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

BRIEF OF INDIANA AND 25 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a California law requiring pervasive nationwide changes to housing for hogs, chickens, and veal as a condition of access to California consumer markets violates the Commerce Clause and the general constitutional restriction against extraterritorial regulation.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arizona, Arkansas, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioners. The Court's precedents squarely recognize constitutional principles prohibiting States from regulating extraterritorially, *i.e.*, from regulating commercial conduct occurring entirely in *other* States. The Ninth Circuit's decision below, however, permits California to regulate extraterritorial commercial conduct so long as it does not use price-control or price-affirmation statutes to do so. Such a doctrine both threatens economic balkanization and upends the fundamental principle that States are coequal sovereigns. The Court should reverse.

California's Proposition 12, enacted by voters in November 2018, regulates how farmers confine breeding pigs, egg-laying hens, and veal calves, not only in California, but nationally. It prohibits the sale in California of any pork, eggs, or veal produced from animals not raised in accordance with California rules, regardless of where those animals were raised. Worse, California has proposed regulations that would permit California officials to conduct on-site inspections in other States and would impose onerous record-keeping requirements on out-of-state farmers.

Amici States file this brief to explain that the Commerce Clause prohibits California's attempt to usurp other States' authority to set their own animal-husbandry policies. Proposition 12 does not protect the health and safety of California consumers, and its overall benefits for animal welfare are debatable at best yet threaten to segment interstate markets for pork and eggs (in particular) and create interstate conflict.

California's rules represent a substantial departure from current practices and standards in most States, yet the Constitution does not permit California to set a single, nationwide animal-confinement policy. Worse, Proposition 12 effectively regulates some government operations in other States, including Indiana. Purdue University, a body corporate and politic and an arm of the State of Indiana, raises swine that it sells into the national supply chain, likely reaching California customers. Purdue's Animal Sciences Research and Education Center (ASREC) does not currently comply with Proposition 12; rather, it houses its sows in gestation stalls. Consequently, it will have to choose between making costly renovations or forgoing California markets altogether. As such, the State of Indiana is directly affected by Proposition 12.

Because Amici States have a sovereign interest in preserving their authority to establish policy for their own farmers and safeguarding their own governmental operations, they file this brief to explain why this Court should reverse and invalidate Proposition 12.

SUMMARY OF THE ARGUMENT

Proposition 12 prohibits the sale within California of pork, egg, and veal products if the seller knows or should know that the animals were confined "in a cruel manner," regardless of the State of origin of the meat. Cal. Health & Saf. Code § 25990(b)(2). Particularly relevant for this case, with respect to pork, "a cruel manner" is defined as confining a sow "six months or older or pregnant" in a manner that prevents the animal "from lying down, standing up, fully extending its limbs, or turning around freely" or within "less than 24 square feet of usable space." *Id.* § 25991(a), (e). Violation of Proposition 12 is a crime punishable by a $1000 fine or 180-day prison sentence. *Id.* § 25993(b). Sellers in violation are also subject to civil damages. *Id.*

The Court has long recognized that the "entire Constitution was 'framed upon the theory that the peoples of the several states . . . are in union and not division,'" and that the Commerce Clause in particular reflects "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36 & n.12 (1989) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). Accordingly, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's au-

thority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336.

California's Proposition 12 is a paradigm of unconstitutional extraterritorial regulation: It requires hog, chicken, and veal-calf farmers in *every* State to follow *California's* animal-confinement rules on pain of exclusion from the California market. *See* Cal. Health & Saf. Code § 25990(b). Since most of California's meat comes from out-of-state, Proposition 12 necessarily regulates not only California grocers, but also the economic actions and transactions of farmers, slaughterers, meat packers, shippers, and wholesalers in other States.

The Ninth Circuit upheld Proposition 12 on the theory that the Constitution permits any extraterritorial regulation that is not a price control or price affirmation statute. Pet. App. 8a. The extraterritoriality doctrine, however, has its roots in a broad historical understanding of the limits of state sovereignty and a desire among the Founders for a unified national market for commerce. It is not merely a Court-contrived doctrine confined to price controls. The Court in *Healy* observed that precedents "concerning the extraterritorial effects of state economic regulation" generally stand for the proposition that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 642–643 (1982) (plurality opinion)). The Court has relied on

the extraterritoriality doctrine to invalidate numerous non-price-control statutes, yielding only where a State acts to protect the health and safety of its citizens.

Yet Proposition 12 offers no net benefit for either California consumers or the affected animals. California makes no effort to connect Proposition 12 to the food safety of pork, and scientific studies provide no conclusive proof that current chicken confinement practices risk unsafe eggs. As for animal welfare, gestation crates prevalent across the country provide substantial benefits for the sows, and restricting the movement of chickens keeps them from attacking each other. California has presented no evidence that its preferred type of housing improves the overall welfare of either.

Allowing the California law to stand would balkanize markets and lead to interstate conflict: precisely the problems under the Articles of Confederation that the framers sought to fix by assigning the interstate commerce power to Congress. Proposition 12 threatens serious economic repercussions for farmers nationwide who depend on access to California markets. Pork commodities markets are likely to split, creating shortages of pork in California and an artificial glut in the rest of the country, with accompanying losses for farmers unable to supply compliant pork—particularly smaller farmers. Because "[s]maller operations . . . have less access to the credit needed to finance renovations and new construction," Proposition 12 will likely "increase . . . the exit of smaller

hog operations." Barry K. Goodwin, *California's Proposition 12 and its Impacts on the Pork Industry* (May 13, 2021), at 1.

Finally, approval of Proposition 12 will green light other attempts by States to promote their own policy preferences through nationally applicable economic regulation. States will be able to impose any restriction on out-of-state businesses so long as it ties that restriction to the sale of goods within its borders. Minimum wage, employee benefits and working conditions, and use of undocumented workers, all would become fair game for extraterritorial reach. The Court should head off the opportunity to act on such divisive impulses and reverse the Ninth Circuit and invalidate Proposition 12.

ARGUMENT

I. Proposition 12 Violates Core Values of Comity, Federalism, and Open Markets Codified by the Long-Standing Rule Against Extraterritorial State Regulation

A. The Constitution precludes States from regulating extraterritorially

Constitutional history stands against extraterritorial regulation by States. The Framers, already acting within the confines of broader theory of government whereby even nation-states did not interfere with others' internal affairs, set out in 1787 to prevent the economic fragmentation yielded by the Articles of Confederation. The result was a Constitution featuring

many restraints on Congress and the States alike—including the Commerce Clause—designed to foster a common marketplace and prevent extraterritorial regulation. The Court's long history of precedents striking down extraterritorial laws confirms this interpretation of the Constitution.

1. One major impetus for transitioning from a confederation to a federal model was the emerging fragmentation of markets in the wake of the Revolutionary War. *See* 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 9–10, 608–11 (5th ed. 2012) ("One of the purposes of the Constitution of 1787 was to create, in effect, a common market of the United States, so the states would all sink or swim together."). "States such as New York which controlled major foreign ports imposed taxes on incoming foreign commerce destined for other states." *Id.* at 609.

More broadly, "[s]tate and section showed themselves jealous, preferring to fight each other over boundaries as yet unsettled and to pass tariff laws against each other." Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787*, at 9 (1986). Indeed, "each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (internal quotation omitted).

The result was commercial subjugation of smaller States. In Connecticut, for example, "dependence upon New York meant that it was not in a position to regulate its own commerce." Forrest McDonald, *We the People: The Economic Origins of the Constitution* 139 (1958). Smaller States, in response, "would tax goods brought in from other states at a rate so high as to foreclose access to their markets." Rotunda at 610. Doing so, unsurprisingly, aggravated the smaller States' economic problems. Again in Connecticut, as a result in part of regressive excise taxes, "the economy suffered a sort of creeping paralysis." McDonald, *supra*, at 139.

For this reason, "there was a call for a convention to amend the powers of the national government under the Articles of Confederation so as to make it effective to deal with multistate problems." Rotunda, *supra,* at 610. Specifically, the convention needed to end "interstate jealousies" created by states' regulation of commerce. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, 105 (1985). But "[w]hen the delegates met to amend the Articles of Confederation, they quickly realized that the country needed an entirely new form of government to deal with national problems." Rotunda, supra, at 610. As a result, they called a second convention: the Constitutional Convention of 1787. *Id.* One objective of that Convention was "to totally revise the powers of the national government" and to "produce[] the new federal government with its enumerated . . . power to regulate commerce 'among the states.'" *Id.*

In the end, the Constitution provided multiple safeguards against economic favoritism and isolation among States. The Interstate Commerce Clause is perhaps the most obvious such safeguard, but other provisions create a robust structural commitment to a unified economic marketplace. Restrictions on congressional action in Article 1 § 9 of the Constitution, including the Export-Tax, Preference, and Duty Clauses, all speak to a broad design in favor of common internal markets. Akhil Reed Amar, *America's Constitution: A Biography* 122–23 (2005) ("[O]ther provisions of sections 9 and 10 aimed at ending incipient economic warfare among the states and related forms of interstate exploitation."). Critically, the same goes for many restrictions against States in Article 1, § 10, including not only the Imports or Exports Clause and the Tonnage Clause, but also the Interstate Compact, Treaty, Coinage, Bills of Credit, Tender in Payment, and Contracts Clauses. *Id.* at 123–24. These clauses "ensured . . . internally the United States would be the largest area of free trade in the world." McDonald, *Novus Ordo Seclorum* at 266.

Alongside many other concerns, economic implications drew substantial attention during the ratification debates. Cataloguing the defects of the Articles of Confederation, Alexander Hamilton wrote in Federalist No. 22 that "interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others." *The Federalist No. 22* (Alexander Hamilton). For historical insight,

Hamilton cited the German empire, which had "rendered almost useless" its "fine streams and navigable rivers" due to "the multiplicity of the duties which the several princes and states exact upon the merchandises." *Id.* Hamilton feared that destiny if each State continued to erect direct barriers to interstate commerce. The unified marketplace offered by the Constitution represented an important step forward because, "it is to be feared that examples of this nature [under the Articles], if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between different parts of the confederacy." *Id.*

Even the anti-federalists, objecting that the Commerce Clause aggrandized national power at the expense of States, acknowledged the inherent limits of state regulatory power. In Anti-Federalist 11, Agrippa challenged many premises underlying the Commerce Clause, yet commented that, under the Articles, "[w]e are now . . . a federal republic," where "[e]ach part has within its own limits the sovereignty over its citizens." *The Antifederalist No. 11* (John Winthrop). And, "Philadelphians would be shocked with a proposition to place . . . the unlimited right to regulate trade in Massachusetts." *Id.*

2. Perhaps equally important, the Constitution was adopted amidst an understanding of sovereignty that foreclosed extraterritorial regulation. With the Peace of Westphalia in 1648, Europeans reconceptu-

alized statehood away from religious acrimony toward territorial sovereignty. In this view, States could exercise supreme authority to the exclusion of others—but only within distinct territorial limitations. *See* Daniel-Erasmus Khan, "Territory and Boundaries," *The Oxford Handbook of the History of International Law* 225, 231 (Bardo Fassbender and Anne Peters eds., 2012); Antonio Cassese, "States: Rise and Decline of the Primary Subjects of the International Community," *The Oxford Handbook of the History of International Law* 51 (Bardo Fassbender and Anne Peters eds., 2012) (noting that the "quintessence of sovereignty reside[s] in the exclusive authority to impose and enforce commands on any individual living in a territory belonging to the sovereign").

Classic notions of international law emphasized a principle of neutrality toward another State's internal affairs. As a matter of intra-European relations, sovereignty created an "impenetrable screen for the state behind which none would have the right of scrutiny, supervision, or intervention." Emmanuelle Tourme Jouannet, "International Law as History and Culture," *A Short Introduction to International Law* 7 (Cambridge University Press 2015) (Christopher Sutcliffe trans.). Humanitarian interventions continued, but "intervention in another state's internal affairs was unanimously condemned as a violation of the law of nations." *Id.* at 8.

The Founding generation similarly understood the normative expectations of sovereign statehood and re-

lied on common law standards to inform interstate relations. Cassese, at 60. Inheriting Blackstone's framework, American colonists incorporated the law of nations "in its full extent" into the common law and courts regularly cited its well-known scholars. J.S. Reeves, *The Influence of the Law of Nations Upon International Law in the United States*, 3 Am. J. Int'l L. 547, 549 (1909) ("Citations of Grotius, Pufendorf, and Vattel [we]re scattered in about equal numbers in the writings [at] the time" of the American Revolution."). Restraints on extraterritoriality informed the movement for colonial independence. As Alexander Hamilton summarized, "Let every colony attend to its own internal police, and all will be well." Aaron N. Coleman, *The American Revolution, State Sovereignty, and the American Constitutional Settlement, 1765-1800* 28 (Lexington Books 2016) (quoting Alexander Hamilton, *The Farmer Refuted* (1775)).

Hamilton and Madison later adopted lessons from the law of nations to frame their defense of the proposed Constitution. *See* Tara Helfman, *The Law of Nations in The Federalist Papers*, 23 J. Legal Hist. 107, 107 (2002). They analogized the Constitution to a treaty where foreign nations would not sacrifice sovereign integrity. In James Madison's view, "[e]ach State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act." *The Federalist No. 39* (James Madison). Hamilton relied heavily on the law of nations for the rule that, no constitution or contractual instrument could alienate a State's sovereign

rights absent a clear and express provision. *The Federalist No. 32* (Alexander Hamilton).

Suffice it to say, the rule against extraterritorial legislation safeguarded those preserved sovereign rights. *See* Anthony J. Bellia and Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 843 (2020) ("Under the law of nations, sovereign states retained all rights, powers, and immunities that they did not affirmatively surrender in a binding legal instrument.").

3. Against this backdrop, the Commerce Clause, certainly in its grant of power to Congress, but even insofar as it implicitly negates powers of States, provides the most obvious and general embodiment of the Framers' commitment to uniformly accessible interstate markets within the boundaries of the United States. *See* 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 9–10, 608–11 (5th ed. 2012) (explaining that one "general concerns for the drafting of the Constitution in general and the commerce clause in particular" was "to put an end, either in itself or through federal legislation, to the trade barriers and tariffs which had led to the economic problems during the preceding period").

While not an unlimited grant of police-power authority to Congress, the Commerce Clause reflects the Framers' "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations

among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). "The entire Constitution was 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 n.12 (1989) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–326 (1979)).

That direction, coupled with the Founding-era philosophy of respect for the prerogatives of other sovereigns, has prompted the Court to invalidate efforts by one State to project its policies into others.

In *Baldwin*, 294 U.S. at 519, the Court invalidated a New York law precluding resale of milk purchased from dairies (no matter where located) at prices higher than those dictated by New York law. The effect was to neutralize price advantages of nearby Vermont dairies, which had no state minimum price of their own. *See id.* at 520. Such barriers against competition with the labor of another State's residents, the Court said, improperly neutralize competitive advantages and "are an unreasonable clog upon the mobility of commerce." *Id.* at 527. Indeed, the New York law would "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521. Critically, while New York

could restrict sale of Vermont milk if it were contaminated, it could no more set a minimum price for Vermont milk than "condition importation upon proof of a satisfactory wage scale." *Id.* at 524.

Similarly, in *Healy* and *Brown-Forman*, the Court interpreted the Commerce Clause to prohibit a State from enforcing extraterritorial regulations, *i.e.* regulations of "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State[.]" *Healy*, 491 U.S. at 336; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986) (holding that a State "may not project its legislation into [other States]" (internal quotation omitted)). The Court assessed the legality of such extraterritorial legislation by assessing its "practical effect[,]" including "considering the consequences of the statute itself . . . [and] how the challenged statute may interact with the legitimate regulatory regimes of other States[.]" *Healy*, 491 U.S. at 336.

Thus, both the history of the Commerce Clause and this Court's precedents confirm that the framers intended to prevent individual States from using economic regulation to accomplish their own policy goals.

B. Extraterritoriality doctrine is not limited to price-affirmation statutes

Despite finding that petitioners plausibly allege Proposition 12 has "dramatic upstream effects," Pet. App. 20a, requires "pervasive changes to the pork production industry nationwide," *id.*, and imposes costs

that "mostly fall on non-California transactions," *id.* at 9a, the Ninth Circuit nevertheless affirmed the dismissal of petitioner's claims because "Proposition 12 is neither a price-control nor price-affirmation statute." *Id.* at 8a. It acknowledged that this Court's extraterritoriality cases have "used broad language" not limited to price-control or price-affirmation statutes, but it did not consider such statements binding: Characterizing them as nothing more than "overbroad extraterritoriality dicta [that] can be ignored," the Ninth Circuit "held that the extraterritoriality principle is not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices." *Id.* at 7a–8a (citations and internal quotation marks omitted). That holding conflicts with the precedents of this Court.

Critically, the Court has not understood price-affirmation statutes to be a special category of regulation uniquely susceptible to the extraterritoriality principle. Rather, the Court in *Healy* observed that the Court's "cases concerning the extraterritorial effects of state economic regulation stand at a minimum" for the general proposition that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336.

Indeed, well before *Baldwin*, the Court, in *Leisy v. Hardin*, 135 U.S. 100 (1890), invalidated on Commerce Clause grounds an Iowa law banning importation of alcoholic beverages. Congress later enacted the

Wilson Act, which "subject[ed] liquors transported in interstate commerce to the laws of the state into which they were shipped," 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 623 (5th ed. 2012). Yet in upholding the Wilson Act, the Court was careful to characterize it as "manifest[ing] no purpose to confer upon the states the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws," suggesting that not even Congress could authorize Iowa to regulate commerce in other States. *Rhodes v. Iowa* 170 U.S. 412, 420, 422 (1898) ("To otherwise construe the act of congress . . . would cause it to give to the statutes of Iowa extraterritorial operation, and would render the act of congress repugnant to the constitution of the United States.").

Then, only a decade after *Baldwin*, the Court applied the rule against extraterritorial regulation to invalidate an Arizona law that made "it unlawful . . . to operate within the state a railroad train of more than fourteen passenger or seventy freight cars." *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 763 (1945). The Court held that the law violated the Commerce Clause because the "practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it." *Id.* at 775.

That same decade, in *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949), the Court struck down the New York Commissioner of Agriculture's denial of a license for a Massachusetts milk company to build a

new plant in the State because "[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc.,* 336 U.S. at 526–28. The Court explained that the framers believed that violation of this principle would "threaten at once the peace and safety of the Union." *Id.* at 533 (internal quotation omitted).

Later, in *Edgar v. MITE Corp.*, 457 U.S. 624, 626–27 (1982), the Court returned to concerns about extraterritoriality when it considered an Illinois statute governing hostile takeovers by out-of-state corporations). The Court struck down the statute under *Pike* balancing, *id.* at 643–46, but four justices would have done the same using the extraterritoriality doctrine because the 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." *Id.* at 642–43. Generally speaking, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" *Id.* at 643. (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)). The plurality explained that the Illinois law "could be applied to regulate a tender offer which would not affect a single shareholder." *Id.* at 642. No Justice expressly *disavowed* extraterritoriality doctrine.

Lest any doubt remain over the breadth of this proposition, the Court later applied it to explain why the Commerce Clause precluded a law having nothing to do with price affirmation or price control. In *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 393 (1994), the Court rejected a town's attempt to justify a waste-disposal ordinance based on environmental concerns with "out-of-town disposal sites," explaining that regulating such sites would "extend the town's police power *beyond its jurisdictional bounds"* (emphasis added).

This conclusion follows directly from the Court's instruction in *Healy* that under the Commerce Clause a state legislature's power to enact laws is like a state court's jurisdiction under the Due Process Clause to hear cases: "In either case, any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Healy*, 491 U.S. at 336 n.13 (internal quotation marks and citation omitted). Jurisdictional limits apply whether the law regulates prices or production: The fundamental rule is that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone*, 511 U.S. at 393.

Accordingly, nothing in the Court's precedents supports the Ninth Circuit's arbitrary distinction between price-affirmation laws on the one hand and all other laws on the other. While some of the Court's decisions in this area have involved state regulation of

out-of-state prices, others—including *Sullivan*, *Edgar*, and *C & A Carbone*—had nothing do with price regulation. And in its price-affirmation cases, the Court invalidated the statute at issue not due to anything specific to price regulations but because the State violated the general prohibition on "regulat[ing] out-of-state transactions" by "'project[ing] its legislation into [other States].'" *Brown-Forman*, 476 U.S. at 582–83 (quoting *Baldwin*, 294 U.S. at 521 (second alteration in original)); *see also Healy*, 491 U.S. at 337.

II. Proposition 12 Imposes Extraterritorial Regulations that Do Not Protect Consumers and Offer Only Debatable Animal-Welfare Benefits

With hardly the faintest pretense of concern for the quality of the commodities themselves, California is poised to regulate the supply chain of pork and with it the circumstances of agricultural production occurring wholly in other States. Proposition 12 in this way "arbitrarily . . . exalt[s] the public policy of one state over that of another" in violation of the Commerce Clause. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667–68 (7th Cir. 2010).

A. Proposition 12 necessarily regulates transactions occurring wholly in other States

California's attempt to project its own policy into other States must implicitly regulate commercial transactions occurring entirely in other States. California consumes 13% of the nation's pork. In other

words, nearly the entire impact of Proposition 12 will be visited on out-of-state producers that, though they have no vote in California, must remodel their farms (or reduce their herds) to comply with the law. According to agricultural economist Jayson Lusk, this is exactly what happened in California in response to its earlier law regulated animal cage sizes within the State. *See* Conner Mullally & Jayson L. Lusk, *The Impact of Farm Animal Housing Restrictions on Egg Prices, Consumer Welfare, and Production in California*, Amer. J. Agr. Econ. (September 13, 2017), *available at* https:/academic.oup.com/ajae/advance-article/doi/10.1093/ajae/aax049/4157679.

Lusk explains that the response to California's law requiring certain cage sizes for chickens within the State was reduction in flock sizes. *Id.* at 7. "If a producer expects higher production costs in the future, and higher costs will not be completely offset by rising output prices, then he or she will reduce production by cutting flock size relative to levels that would be observed in the absence of the policy change." *Id.* at 4. As a result, "[e]gg production was also strongly affected, falling by an average of 26% each month relative to its pre-break mean." *Id.* at 7. In other words, California's animal confinement laws undoubtedly affect economic behavior and transactions at the production stage.

Particularly for pork, California imports 99.87% of the pork it consumes, meaning that pork production mostly occurs wholly in other States. The agricultural supply chain leading to California requires multiple

out-of-state transactions. Such transactions include farm procurement and production, sale to distributors, and slaughter and packing (followed by sale to California retailers, transportation, and ultimate sale to consumers).

Elaine Kub, an internationally renowned expert in the economics of commodity markets, prepared a analysis of the economic effects of Proposition 12 in the summer of 2021. According to Kub, California retailers will demand Prop-12 compliant pork from wholesalers who must get that pork from meat-packing plants. Elaine Kub, *Analysis of the Pork and Hog Markets' Likely Changes if California's Prop 12 Is Implemented in January 2022*, at 14–15, *available at* https://www.elainekub.com/single-post/hog-market-needed-clearer-faster-prop-12-signals. In turn, the meat-packing plants demand rendered hogs from slaughterhouses who need 280-pound live hogs from finishing operations. *Id.* Finishing operations receive those hogs only after farrowing and nursing, which often take place in different facilities. *Id.* But newborn piglets come from gestational farms, which have ultimate control over whether to use traditional gestational crates or Prop-12-compliant facilities. *Id.*

In short, the supply chain of agricultural foodstuffs includes many links, each of which requires a commercial transaction. But for such food commodities to reach California consumers, only two links in the chain—the wholesale and retail sales—will include a California party. Yet Proposition 12 will in effect regulate *every* link in the chain. Consequently,

Proposition 12 will regulate commercial transactions occurring wholly in other States.

Not only that, but California has proposed regulations that would send California inspectors into other States to confirm compliance with California law. Indeed, out-of-state pork producers who intend for their commodity hogs to be eligible for retail sale in California must subscribe to a complex registration-and-certification regulatory scheme. California's proposed regulations provide that "any out-of-state pork producer that is keeping, maintaining, confining, and/or housing a breeding pig for purposes of producing whole pork meat, from the breeding pig or its immediate offspring, for human food use in California, shall hold a valid certification." Proposed Regulations § 1322.1(b), *available at* https://www.cdfa.ca.gov/ahfss/pdfs/regulations/AnimalConfinementText1st Notice_05252021.pdf. To receive certification, an out-of-state pork producer must register with the California Department of Agriculture. *Id.* § 1322.2. As a condition of registration and certification, the pork producer must "[a]llow on-site inspections by the certifying agent, and/or authorized representatives of the Department, with access to the production and/or distribution operation." *Id.* § 1326.1.

It is bad enough that California would bar the sale of imported pork not raised in accordance with its specifications. But its plan to deploy inspectors to ensure coast-to-coast, farm-to-table compliance leaves no doubt that, when California looks eastward, it sees an entire Nation ripe for regulatory takeover.

B. Proposition 12 is not predicated on concerns for consumer safety and will not improve the welfare of sows

The Court has given States greater leeway to regulate interstate transactions in the name of protecting resident consumer health, safety and welfare. *See* 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 641 n.5 (5th ed. 2012) (observing that "[t]he Court has largely exempted state safety regulations" from extraterritoriality analysis and collecting cases).

Consumer welfare, however, does not justify Proposition 12. California predicates its law principally on "prevent[ing] animal cruelty by phasing out extreme methods of farm animal confinement." Pet. App. 37a. Only secondarily does it gesture toward concern for "the health and safety of California consumers," which it claims to promote with Proposition 12 by reducing "the risk of foodborne illness and associated negative fiscal impacts." Pet. App. 37a. But Proposition 12 imposes no mechanism for pathogen-testing imported meat, and California has presented no evidence that Proposition 12 increases consumer health and safety.

Even California's concern for *animal* welfare (in other States) is suspect considering scientific evidence that supposedly "extreme" animal confinement practices in other States are safer for the animals than

what California demands. California has no legitimate justification for attempting to dictate animal confinement standards to the rest of the country.

1. California has presented no evidence that Proposition 12 increases the health and safety of pork sold within the State. Nor has it even attempted to defend Proposition 12 on health and safety grounds in the courts below. Indeed, the California Department of Food and Agriculture admits that "[a]nimal confinement space allowances prescribed in [Proposition 12] . . . are not based in specific peer-reviewed published scientific literature or accepted as standards within the scientific community to reduce human food-borne illness, promote worker safety, the environment, or other human or safety concerns." Pet. App. 75a–76a. The lack of health and safety benefit should be unsurprising, considering that Proposition 12 regulates the space allotted to sows who will never enter the food chain, but not the offspring of those sows who will constitute the pork products that enter the market. *Id.* at 226a.

With respect to eggs, while the record in this case includes no evidence, one literature review found "no general consensus demonstrating the superiority of one housing situation over another regarding food safety and egg quality." P.S. Holt et. al, *The Impact of Different Housing Systems on Egg Safety and Quality*, 90 Poultry Science 251, 259 (2011). The review cited one study that "observed that, in general, aerobic bacterial counts on eggshells are lower from caged (conventional and furnished) than from noncaged (aviary

and floor) flocks, and this difference is very marked when eggs laid outside of the nest boxes in the non-cage flocks are included." *Id.* at 253. However, it concluded that the difference was not significant enough to "indicate a markedly differing risk of external or internal contamination between systems, provided that floor-laid eggs are removed from the retail chain." *Id.*

In short, consumer safety is not a legitimate rationale supporting Proposition 12's attempt to regulate animal confinement in other States.

2. That leaves only concern for the welfare of animals in other States as a justification of California's law. The animal-welfare science on housing for sows during pregnancy is far from settled, however, raising the question whether a legitimate understanding of the police power allows extraterritorial effectuation of state preferences for controversial animal-husbandry practices. Harkening back to New York's exploitation of its economic dominance during the Confederation period, Proposition 12 leverages California's market hegemony to usurp nationwide authority to evaluate animal-welfare science and make informed animal-safety assessments.

Less than 4% of sow housing in the United States meets the standards required by Proposition 12. Christine McCraken, *US Pork Supply Chain Locked in Limbo as Producers Await Legal Ruling* (Mar. 2022), *available at* https://research.rabobank.com/far/en/sectors/animal-protein/us-pork-supply-chain-

locked-in-limbo-as-producers-await-legal-ruling.html. Most sows are housed in gestation stalls, *i.e.*, "pen[s] designed to encompass . . . the space occupied by a sow when standing or lying on her sternum." USDA, *Sow Welfare Fact Sheet* (Fall 2010), at 1. Meanwhile, "[a]bout 30% of breeding sows are already housed in group pens which generally have about 20 square feet each—not enough to meet [Proposition 12]'s 24-foot requirement." Richard Sexton & Daniel Sumner, *California's Animal Welfare Law Caused Hysteria on Both Sides—Here Are the Real Impacts*, The Hill (Aug. 20, 2021), *available at* https://thehill.com/opinion/energy-environment/568762-californias-animal-welfare-law-caused-hysteria-on-both-sides-here/.

California asserts that Proposition 12 bans animal housing practices that are "inhumane and unsafe," citing only its voter information guide for support. Br. in Opp. to Cert. 4. But nothing in the record demonstrates that the group housing required by Proposition 12 improves animal welfare. And while the United States Department of Agriculture reports that gestation stalls can reduce cardiac function, bone strength, and immune function (and can increase the incidence of lameness and skin lesions), *USDA* at 2, farmers have economic incentives to monitor such conditions so that sows produce healthy offspring. In any event, even USDA acknowledges that group housing also can create aggression between sows. *Id.*

Unsurprisingly, plenty of evidence demonstrates that gestation stalls, which the California law prohibits, provide distinct advantages over group housing for sows.

First, "[s]tall housing allows each sow to be given an individually tailored diet and secure access to water." AVMA, *Welfare Implications of Gestation Sow Housing* (Nov. 11, 2015), at 1. Individualized feeding prevents competition among sows for food, which is common in group housing and may lead to dominant sows becoming overweight while middle-ranking and subordinate sows become underweight. *Id.* at 2. Second, "individual housing makes it easy to identify, inspect and intervene on behalf of specific sows, such as for veterinary treatment." *Id.* at 1. Third, "stall-housed sows are unlikely to receive injuries associated with physical aggression." *Id.* Once again, physical aggression often occurs in group housing, especially for subordinate sows, because of competition for resources or crowding. *Id.* at 2.

Purdue University runs a 1,500-acre farm for educational and research purposes called the Animal Sciences Research and Education Center (ASREC). The ASREC farm includes a Swine Unit, which sells hogs on the open market for meat production. Scholars at ASREC predict the following results if Purdue's ASREC Swine Unit switches to Prop-12-complaint hog production facilities. First, Prop-12 compliance will lead to sows dying due to higher rates of sow fighting. Second, sow fighting may lower conception rates. Third, group housing will cause sow fighting

will lead to higher rates of miscarriage among sows. Fourth, transitioning to group housing will lead to higher mortality among newborn piglets.

Proposition 12's capacity to promote the welfare of sows is questionable at best. California should not have authority to bind farmers in other States—who, after all, cannot vote against Proposition 12—to a model of animal husbandry that thwarts current protections for the sake of unproven benefits.

III. Allowing Proposition 12 To Stand Will Disrupt Small Farms, Affect Retail Prices, Invite Market Balkanization, and Foster Interstate Economic Conflict

Upholding Proposition 12 will have both legal and economic consequences across the country. Farms nationwide will need to invest in costly new housing for covered livestock, resulting in an increase in retail prices. Furthermore, such a decision will lead to market segmentation and encourage other States to enact their own laws imposing economic policy on American consumers.

1. Proposition 12 threatens serious economic consequences, as it is costly to convert animal-husbandry operations to comply with the new rules.

According to Christine McCracken, senior analyst of animal protein at Rabobank, ordinarily an "average barn might cost $1,600 to USD 2,500 per sow, or $3 million to $4.5m million in total." Erica Shaffer, *Rabobank: California's Prop 12 a Call to Lead on Animal*

Welfare, Meat+Poultry (2021), https://www.meatpoultry.com/articles/24659-rabobank-californias-prop-12-a-call-to-lead-on-animal-welfare. Under California's animal-confinement rules, however, some compliant barns are "averaging as much as $3,400 per sow," with the decision to convert operations becoming increasingly difficult in light of recently "elevated building costs." *Id.*

Because "[s]maller farms will be more constrained by access to capital and thinner margins," they may have difficulty implementing the changes required by Proposition 12. Barry K. Goodwin, *California's Proposition 12 and its Impacts on the Pork Industry* (May 13, 2021), at 7. "The financial condition of a business operation is heavily influenced by the availability and cost of borrowed capital," but "[h]og operations tend to be much more highly leveraged than is the case for other types of farms." *Id.* at 7–8.

Small farms in particular have "a lower return to investments and therefore will likely realize less favorable terms of credit," and "will be the least able to undertake the changes that would make facilities conformable to Proposition 12." *Id.* at 8–9. As a result, Proposition 12 "will hasten the concentration of the hog industry, with smaller farms exiting the sector, leaving a US hog industry that has fewer but larger farms." *Id.* at 10.

2. The economic impact of the California law on the rest of the nation cannot be overstated. Again,

California consumes 13% of the nation's pork. To continue selling pork products in California, "U.S. grocery retailers, meat wholesalers, and pork processors will need to split the pork supply chain into two separate classes of product: 1) pork products that are compliant with California's Proposition 12 and destined only for that market, and 2) traditional pork products that make no claims about compliance." *Id.* at 3. But because the pork market will not be able to adjust instantaneously to the new rules, pork prices within California "will likely skyrocket in conditions of artificial scarcity." *Id.*

Outside California, on the other hand, "the remaining 49 states of the U.S. will experience an artificial glut of oversupplied traditional pork." *Id.* As a result, the price for conventionally raised hogs will collapse. *Id.* at 4. "If the sudden loss of California's pork sales channels destroys the meatpacking industry's demand for conventionally-raised lean hogs, then hogs that were once market-ready may become worthless and need to be euthanized if there is simply no buyer to take them." *Id.* at 5.

National market segmentation at the hands of a single State's law is a red flag of impermissible extraterritoriality. The Commerce Clause, not to mention the larger "sink or swim together" ethos of the Constitution, responded to abuses by larger, wealthier States the interfered with commerce and economic health in other States. Proposition 12 undermines the "maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce

and . . . the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36 (1989). It is a regression away from national market unity and toward a future of endless division.

3. The broad impact of Proposition 12 may be transformation of America's current integrated national market into a patchwork of regulatory regions on a variety of fronts.

Among many other horizontal federalism problems, in this situation the "risk of inconsistent regulation by different States[,]" *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987), is substantial. California may have its own view of what constitutes proper treatment of livestock sold as food to its consumers, but other States may have other ideas, and differing standards will ultimately conflict with one another. California's animal-confinement rules depart markedly from the conventional rules of most States, which permit farmers to raise calves and hogs in accordance with commercial standards and agricultural best practices, rather than dictate mandatory animal-confinement requirements. *See generally* Elizabeth R. Rumley, *States' Farm Animal Confinement Statutes*, Nat'l Agric. Law Ctr., https://nationalaglawcenter.org/state-compilations/farm-animal-welfare/.

Perhaps even more concerning, State efforts to exert unilateral control over large sectors of national economic activity are increasingly common. In the field of energy regulation, for example, California and

Oregon regulate greenhouse gases generated along the electricity supply chain leading to those States. Cal. Code Regs. tit. 17, § 95481; Or. Admin. R. 340-253-0040. *See generally* James W. Coleman, *Importing Energy, Exporting Regulation*, 83 Fordham L. Rev. 1357 (2014). Colorado, meanwhile, regulates the renewable energy portfolios of power companies selling electricity for use in the State. Colo. Rev. Stat. § 40-2-124.

Eventually, this trend may prompt exactly the sorts of trade wars the Commerce Clause was designed to prevent. Even with farm production, animal confinement laws may be just the beginning. Texas, for example, might pass a law prohibiting the sale of fruit picked by undocumented workers (even in other States) and institute a certification and inspection program just like what California threatens here.

Consider another labor policy: It is not hard to imagine a large State obstructing access to its markets for goods produced by labor paid less than $15 per hour—the hypothetical "satisfactory wage scale" dismissed as absurd in *Baldwin*—only to face retaliation from other States via exclusion of goods produced by labor lacking right-to-work protections. Or a large State might pass a law forbidding the retail sale of goods from producers that do not pay for employees' birth control or abortions.

These hypotheticals have a critical commonality with Proposition 12: All showcase circumstances where a State closes its markets to products based on

preferences for conditions of production rather than concern for the health and safety of the regulating State's citizens. In short, a victory here for extraterritorial regulation portends a new era where States shutter their markets to goods whose conditions of production offend the moral sensibilities of the regulating State.

***

The Constitution permits California to serve as a laboratory of state policy experimentation with its animal-confinement laws—but only within its own borders. Precisely to ensure *other* States may experiment with animal-confinement policies of their own, the Constitution prohibits California from applying its animal-confinement laws to farmers in other States. By allowing California to do so, the decision below creates an untenable situation: It permits California to impose policy choices on defenseless other States. Because the Constitution forecloses such extraterritorial regulation, the Court should reverse.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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