No. 21-468

In the Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM BUREAU FEDERATION,

*Petitioner*s,

v.

KAREN ROSS, *et al.*

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

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

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INTERESTS OF *AMICI*[1]

Amici Farm Bureaus, Pork Councils, and other business groups, their members, and their customers will bear the brunt of the costs and burdens imposed by California. Such an ill-conceived attempt to impose uniform national standards regulating the quintessentially local activity of raising livestock is not the role of a single State, no matter how large its consumer market.

Amicus the North Carolina Chamber Legal Institute is a nonpartisan, nonprofit affiliate of the North Carolina Chamber, the leading business advocacy organization in North Carolina. It advocates in various venues for job providers on precedent-setting legal issues with broad implications on business climate, workforce development, and quality of life.

Amicus the North Carolina Pork Council is a nonprofit 501(c)(5) trade association established in 1962. It strives for a socially responsible and profitable North Carolina pork industry through advocacy, research, education, promotion, and consumer information programs and services.

Amicus the North Carolina Farm Bureau Federation, established in 1936, is the State's largest general farm organization, representing and advocating for

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

around 35,000 farm families in every county of North Carolina.

Amicus the North Carolina Retail Merchants Association is the voice of the retail industry in North Carolina with over 2,500 members representing over 25,000 store locations throughout the State. NCRMA's membership includes chain and independent retailers of all trade lines including, as relevant here, groceries, restaurants, shopping centers, and distribution centers.

Amicus the North Carolina Cattlemen's Association is an organization that coordinates the promotion of beef and the beef industry. The NCCA assists cattlemen in legislative, regulatory, and production issues. It represents all cattle producers across the State. North Carolina has 800,000 head of cattle on 18,413 farms and generates cash receipts of $228,926,000 annually.

Amicus the Arizona Farm Bureau Federation is Arizona's largest general agricultural advocacy organization, representing over 25,000 members across the State, including about 2,400 active farmers or ranchers. Arizona's agricultural industry contributes $23.3 billion to Arizona's economy. In many counties livestock production represents 70 percent or more of the county's agriculture, and much of that production is sold across state lines—including to buyers in California.

Amicus the Arizona Pork Council is an educational, advocacy, and research organization dedicated to supporting Arizona's pork industry, which sells the vast majority of its pork into California.

Amicus the Illinois Agricultural Association (a/k/a the Illinois Farm Bureau) is a not-for-profit membership organization directed by farmers. Its mission is to improve the economic wellbeing of agriculture and to enrich the quality of farm family life. It represents 75% of all Illinois farmers, many of whom raise livestock or grow crops that feed livestock in Illinois and elsewhere.

Amicus the Illinois Pork Producers Association has served pork producers in Illinois for more than 50 years. IPPA is an agricultural trade association representing more than 1,600 pork producers throughout Illinois who collectively employ more than 57,000 Illinois citizens, contribute more than $13.8 billion to the Illinois economy through hog production and processing, and have various upstream and downstream business partners, including other farms and enterprises.

Amicus the Kansas Farm Bureau is the largest grass-roots general farm organization in the State of Kansas, representing over 105,000 members, including over 30,000 farmer and rancher member families. Agriculture represents over 43% of the economy of the State (around $70.3 billion), with the pork industry directly accounting for $456.6 million and 3,270 jobs.

Amicus the Michigan Farm Bureau, established in 1919, is the State of Michigan's largest general farm organization with about 200,000 members. Its mission is to represent, protect, and enhance the business, economic, social, and educational interests of its members, who grow crops, raise livestock, and are involved in other agricultural activities.

Amicus the Ohio Farm Bureau Federation is Ohio's largest general farm organization, with a mission of working with Ohio's farmers to advance agriculture and strengthen communities. OFBF is a federation of county farm bureau organizations, representing more than 80,000 member families, who produce a wide range of agricultural commodities, including 2,750,000 hogs, and contribute billions of dollars a year to Ohio's economy.

Amicus the Oklahoma Farm Bureau Legal Foundation is a nonprofit foundation supporting farmers and ranchers by promoting individual liberties, private property rights, and free enterprise. Its sole member is Oklahoma Farm Bureau, Inc., an independent, nongovernmental, voluntary organization of over 83,000 farmer and rancher member families who raise many types of livestock, primarily cattle, swine, and poultry.

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

Amicus the Texas Farm Bureau, established in 1933, is a nonprofit, grassroots, agricultural association representing over 530,000 member farmer and rancher families who believe that certainty in the application of rules and statutes and autonomy to manage and care for their livestock and farms is

central to the strength of the agricultural economy in Texas.

Amicus the Virginia Pork Council is a nonprofit organization dedicated to improving the lives of those engaged in pork production by educating its members and the general public about pork production in the Commonwealth of Virginia.

INTRODUCTION AND SUMMARY OF ARGUMENT

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

1. *Amici* agree with Petitioners that Proposition 12 violates the dormant Commerce Clause under any sensible interpretation of current jurisprudence. It regulates interstate commerce in a burdensome and protectionist manner, imposing elevated costs on out-of-state farmers who sell their goods for export to California. These costs not only raise prices for imported foods in California, but effectively dictate nationwide cost structures and raise prices for consumers in most other States as well. Such nationwide regulation imposed by the polity of a single State will do tremendous economic harm to agricultural producers and consumers in all other States.

Furthermore, if California can impose its local policy views and morality on producers in other States via the bludgeon of interstate trade barriers, other States can and will follow suit, threatening the partisan Balkanization of both interstate markets and national politics as each State or bloc of States seeks to export their views of policy and morality via the threat of trade barriers. Any version of dormant Commerce Clause jurisprudence would rightly reject such efforts.

2. *Amici* recognize that many Justices have expressed concern and disagreement with Court-created and malleable tests sometimes applied in dormant Commerce Clause cases. But such concerns do not justify throwing out the baby with the bathwater. There are significant textual, structural, and historical bases for concluding that the Constitution's structure of horizontal federalism generally, and its delegation of power to regulate interstate commerce to Congress specifically, forbid the type of extraterritorial regulation and conditioning of access to interstate markets embodied in Proposition 12.

Properly and narrowly defined, the power to regulate interstate commerce rests exclusively in the federal government. The absence of that power in the States does not depend on the affirmative and expressly preemptive federal exercise of such power. Earlier jurisprudence recognized federal exclusivity, and it was only the later cases creating judge-made exceptions to that exclusivity that introduced the unmoored judicial policymaking and balancing that so troubles critics of the dormant Commerce Clause. But it is the exceptions to, not the rule of, exclusivity that created the problem. The proper solution is not wholesale abandonment of the textual and structural constraints on States exercising powers delegated to the federal government, but to strictly enforce those constraints within the confines of a properly limited reading of the exclusive federal commerce power.

The structure of horizontal federalism—constitutionally separating and protecting States from each other, not merely from the federal government—corroborates an exclusive approach to the interstate

commerce power. As this Court has recognized, "removing state trade barriers was a principal reason for the adoption of the Constitution." *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2460 (2019). That purpose was served by a collection of interlocking provisions designed to cabin the reach of state authority over local matters within their boundaries and to remove certain state authority to the national level. While many of those interlocking provisions—including the Commerce Clause—have been weakened over time through erroneous judicial interpretations, they were replaced by less effective, more awkward, but nonetheless necessary judge-made doctrines, including the variable dormant Commerce Clause, to compensate for the structural imbalance.

Rather than simply recoil from or reject that imperfect gap-filler, this Court should instead move back toward the original understanding of the text, history, and structure of the Constitution, either by restoring the protections the dormant Commerce Clause replaced or by using such original protections as the textual, structural, and historical anchors under the nominal rubric of a less-preferred doctrine.

ARGUMENT

I. Allowing Extraterritorial State Regulation of Trade Would Have Tremendous Economic and Social Consequences.

As Petitioners note, at 14-16, California's attempt to regulate nationwide pork production will have a tremendous and adverse economic impact.

A. Proposition 12 will harm the economy and consumers nationwide.

Proposition 12 will upend the $26 billion national pork industry. Pet. Br. 9. Apart from chicken, pork has "been the most produced and consumed meat globally in recent years."[2] At any given time, tens of millions of hogs and pigs are held in States around the country.[3]

Amici here are particularly invested in pork production and exports of pork to other States. In North Carolina, which is among the top 3 pork-producing States, pork production directly and indirectly makes up more than 20 percent of cash receipts from farming statewide and brings in billions of dollars to the state economy.[4] Proposition 12 is expected to have a "significant and wide ranging" effect on North Carolina farmers and pork production.[5]

Other States where *Amici* operate similarly produce an enormous amount of pork. Arizona pork production is a nearly $50 million industry.[6] Its 372

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[2] Kelly Zering, *Economic Impacts of the Pigs and Pork Sector In North Carolina and Selected Counties* 6 (2019), https://tinyurl.com/NCPorkReport ("NC Pork Report").

[3] See M. Shahbandeh, *Top U.S. states by number of hogs and pigs 2022,* Statista (May 18, 2022), https://tinyurl.com/PorkStats.

[4] NC Pork Report at 6.

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

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

pork-producing farms include many "small, direct-market pork producers" who—because of their size—are unlikely to afford the massive costs necessary to allow their pork to be sold in California, their neighboring State.[7] Nearly 11,000 Michiganders work to raise their State's 2.5 million hogs, with an additional 700 jobs "directly attributable to exports of Michigan pork."[8] Oklahoma reports similar job numbers: "The production, slaughter and processing segments of Oklahoma's pork industry provide more than 34,000 jobs to [the] state's economy."[9] Texas, "one of the pork industry's new hog growth areas," has a robust and growing pork economy.[10] Its farmers produced nearly 1.1 million hogs in 2021.[11] And in Illinois, more than 2,000 hog farms produced 2.1 billion pounds of pork from around 11 million pigs in 2017 alone.[12] Proposition 12 will have untold effects on Illinois's nearly $14 billion pork industry.[13]

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

[8] Michigan Pork Producers Ass'n, *Farmer Resources,* https://tinyurl.com/69xscp4n.

[9] Oklahoma Pork Council, *The Oklahoma Pork Industry*, https://tinyurl.com/hyetejxw.

[10] Karen McMahon et al., *Texas*, Nat'l Hog Farmer (May 1, 1998), https://tinyurl.com/576jd86d.

[11] U.S. Dep't of Agric., *Quarterly Hog and Pig Report* 1 (Sept. 24, 2021), https://tinyurl.com/mrystvvu.

[12] Illinois Pork Producers Ass'n, *Illinois Pork Industry Facts*, https://tinyurl.com/46hxfyma.

[13] *Ibid.*

Besides the farmers and businesses represented by *Amici* here, pork production in other States generates billions of dollars and hundreds of thousands of jobs.

In Iowa and Minnesota, often the top 2 pork producing States, hundreds of thousands of jobs are linked to the pork industry.[14] Estimates from those States and elsewhere are that it would cost an average of at least $2.5 million to renovate each farm to comply with Proposition 12, would reduce capacity by 17%, will increase operating costs for lager farms by 15%, increase costs even more for smaller farms, and impose $1.9 to $3.2 billion in costs on farmers nationwide.[15]

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[14] See Iowa Pork Producers Ass'n, *Iowa Pork Facts*, https://tinyurl.com/IAPorkFacts.

[15] Mary Stroka, *Iowa Ag Leaders Sound Off on California's Prop 12, EATS Act*, The Iowa Torch (Aug. 14, 2021), https://tinyurl.com/59hbf6mw; Clark Kauffman, *Iowa lawsuit over California's hog-confinement law headed for a hearing*, Iowa Capital Dispatch (July 20, 2021), https://tinyurl.com/3y2y7whe; Scott McFetridge, *Could you live without bacon? Bacon may disappear in California as pig rules take effect*, USA Today (Aug. 1, 2021, 11:07 AM), https://tinyurl.com/unus3ahm; Greta Kaul, *Why California's new pork rules could mean big changes for Minnesota hog farmers*, MinnPost (Aug. 6, 2021), https://tinyurl.com/3mnatjmw; Nat'l Pork Producers Council, *Issues & Insights: California's Proposition 12* (2020), https://tinyurl.com/n69t7rh3; Pan Demetrakakes, *Pork Producers Sound Alarm on California's Proposition 12*, Food Processing (Aug. 2, 2021), https://tinyurl.com/dt5mpxrx; see also Ian Spiegelman, *People Are Panicking About a Potential Pork Crisis in California*, L.A. Mag. (Aug. 3, 2021), https://tinyurl.com/239b8d42; Nami, *NAMI to Supreme Court: Prop 12 not beneficial to consumers and increases sow mortality*, The Fence Post (June 8, 2021),

Just days before the filing of this brief, Smithfield Foods, the "largest employer" in Beaver County, Utah, announced the shutdown of its operations there, expressly citing the "escalating cost of doing business in California."[16] The company is planning to "align its hog production system by reducing its sow herd in its Western region," including in west-central Utah and potentially exiting its farms in Arizona and California.[17]

Furthermore, as Proposition 12 shrinks capacity, raises costs, and reduces sales, demand for the supplies used in pork production also will decline. Kansas pork farms, for example, consume 30 million bushels of grain and 8 million bushels of soybeans annually.[18] Collectively, pork farms throughout the country can consume upwards of a billion bushels of corn and 400 million bushels of soybeans.[19] The grain and soybean industries too will feel the effects of Proposition 12.

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https://tinyurl.com/kx96pccn; Michael Formica, *Hog Farmers' Catastrophic Costs to Implement Prop 12*, Farm Journal's Pork (June 22, 2021), https://tinyurl.com/8hvukz6x; Barry K. Goodwin, *California's Proposition 12 and its Impacts on the Pork Industry* 7 (May 13, 2021).

[16] Ashley Imlay, *Smithfield Foods to close bulk of operation in Beaver County, impacting estimated 250+ workers*, KSL.com (Jun. 10, 2022), https://tinyurl.com/mv9kftw9.

[17] *Ibid.*

[18] Kansas Pork Ass'n, *Kansas Pork Stats*, https://tinyurl.com/5hftb9ca.

[19] Pork Checkoff, *Quick Facts: The Pork Industry at a Glance* 116 (2015), https://tinyurl.com/mwk54745.

The harms felt by the Nation's farmers will also be felt by its consumers. "Processing fewer animals ultimately means less meat for consumers, which pushes up retail prices."[20] The effects of the increase in costs will be felt the hardest by the poorest Americans, who will have to go without or will have less to spend on other goods and services.[21]

Making matters worse, California itself only accounts for a trivial amount of pork production, Pet. App. 80a, and so its regulations have minimal effect on California's agricultural economy relative to its impact elsewhere. And because California producers would be subject to California regulations on animal husbandry in all events, Proposition 12 acts as a protectionist tariff-in-kind, exporting those local costs to other States as an artificial means of making its limited local industry more competitive. Whether Proposition 12 is a misguided effort to export California morality or a cynical attempt to protect local industries from the costs of such local choices, it severely burdens interstate commerce and the national economy.

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[20] Jayson Lusk & Glynn Tonsor, Lusk and Tonsor: America's Indispensable Industry (May 6, 2020), https://tinyurl.com/5r5ubnye.

[21] Memorandum from Lon Hatamiya to Food Equity Alliance, *Analysis of Economic Impact of Proposition 12 on Pork Pricing and Consumption in California* 2-3 (Jun. 21, 2021), https://tinyurl.com/yckz6abh.

B. Allowing States to condition access to interstate markets as a way to impose local political choices on sister States would Balkanize the economy and further polarize the Nation.

Proposition 12 and the legal theories on which it is based are dangerous not only because of the direct impact the law will have on the Nation's agricultural economy, but also because they provide precedent and a roadmap for other trade-enforced extraterritorial regulations.

If California can restrict access to its markets based on its disapproval of conduct beyond its borders, then so can other States.[22] For example, States requiring higher minimum wages could demand comparable pay by companies operating in other States as a condition for allowing imports, either on self-righteous moral grounds or to make their own now-more-expensive goods competitive.[23]

Likewise for other economic issues, allowing States to condition access to their markets on conduct in

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[22] Indeed, even as to Proposition 12 itself, competing policies may exist at the individual state level. Arizona and Ohio, for example, have their own laws regarding the treatment of livestock with different and potentially incompatible rules. See Ariz. Rev. Stat. § 13-2910.07; Ohio Adm. Code 901:12-8-01 *et seq*. Farmers in various States will find it difficult, burdensome, and potentially impossible to comply with their own local laws and the myriad and ever-changing extraterritorial standards imposed by California and other States that follow suit.

[23] Ashley Altus, CFC, *The 10 States with the Highest Minimum Wages in 2022*, OppU (Mar. 18, 2022), https://tinyurl.com/5xzshwbd.

other States could be used to impose heightened minimum health coverage for workers, free childcare, matching retirement contributions, or any other requirement a given State may want to impose on its sister States, particularly to offset the competitive costs of such in-state requirements.

Beyond such economic imperialism or protectionism, conditional trade access also could be used on broader social or political issues. States that disapprove of their neighbors' policies on any variety of social or political issues—guns, abortion, or voting procedures, etc.—can simply condition access to their markets on correction of the perceived flaw. Indeed, private parties routinely behave this way, boycotting companies and even entire States based on disapproval of their laws or policies. While private choices regarding what and from whom to buy are the essence of the free market, state-imposed conditional boycotts remove those choices from consumers and businesses and stifle competition as they seek to leverage all access to major markets to force compliance.

Similar tactics could, of course, be applied at either end of the political spectrum. Red States could ban the sale of goods from any company that advances certain social policies. For example, companies with diversity, equity, and inclusion (DEI) policies deemed too progressive or vaccination policies deemed too strict could find their goods legally blockaded from those States. Blue States could retaliate against companies with more conservative or religious views, or companies headquartered or merely willing to do business in competing Red States. Companies with DEI policies deemed insufficiently progressive or vaccination

policies deemed too lenient could find their goods legally blockaded from those other States. The possibilities are endless.[24]

The reasoning in the decision below could permit States to impose conditional access on foreign commerce as well. Although the power to regulate commerce with foreign nations has properly been treated as exclusive, despite being part of the same clause in Article I, if conditioning access to in-state markets does not constitute impermissible state regulation of commerce, there is no principled distinction based on the source of the goods being a foreign nation rather than a sister State.

Imagine the mischief that would flow from States thus empowered and emboldened: No gasoline sales from oil drilled in Saudi Arabia; no sneakers from China; no goods from Mexico made using low-wage workers; no coffee that isn't fair trade, organic, or otherwise "green"; or maybe no products made in Israel until they agree to a Palestinian State. The possibilities are endless and all turn on the simple failure to recognize that conditioning access to state markets on conduct outside the State constitutes forbidden regulation of interstate or international trade.

Attempts to win political battles by waging economic warfare between the States is precisely the type of destructive economic Balkanization the

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[24] States hostile to the Second Amendment, for example, could seek to export their restrictions on particular disfavored firearms by forbidding manufacturers from selling *any* firearms in the State if they sell the disfavored firearm anywhere else in the country.

Constitution was meant to prevent. And to the extent different States imposed mutually exclusive requirements, other States and companies would be forced to choose which States to abandon. Soon enough, "the very life-blood of the nation" would be deprived of any oxygen because of States' "[i]nterference with the arteries of commerce." M. Farrand, *The Framing of the Constitution of the United States* 7 (1913). The Nation's economy, and perhaps its political cohesion, may not survive if laws like Proposition 12 can withstand constitutional scrutiny.

II. Proposition 12 Violates a Properly Understood Reading of the Commerce Clause and the Horizontal Separation of Powers.

While existing jurisprudence is more than adequate to reject Proposition 12, Pet. Br. 22-35, *Amici* recognize the skepticism of some at the Court towards the dormant Commerce Clause in general, and hence a reluctance to apply it at times. *E.g.*, *Comptroller of Treasury of Md.* v. *Wynne*, 575 U.S. 542, 578-579 (2015) (Thomas, J., dissenting); *Tenn. Wine*, 139 S. Ct. at 2477 (Gorsuch, J., dissenting). But regardless whether the Constitution supports the somewhat variable dormant Commerce Clause as this Court currently applies it, a more textually grounded alternative reaches the same result as the dormant Commerce Clause here.

Under that approach, Proposition 12 is unconstitutional because it conflicts with the Commerce Clause, Article I's delegation of powers, and the Tenth Amendment, as well as the Constitution's structure, which organizes horizontal relations among States on principles of (partial) state autonomy, equality,

territoriality, non-aggression, and mutual recognition. Properly understood, the Constitution forbids California from upending the national economy by trying to dictate extraterritorial local activities through regulation of interstate commerce.

A. Constitutional text and history show that a properly narrow Commerce Clause divests the States of authority to regulate interstate commerce.

1. The power to "regulate Commerce *** among the several States," U.S. Const. art. I, § 8, is one of the "legislative Powers" that the Constitution "grant[s]," and promises will be "vested in[,] a Congress of the United States," U.S. Const. art. I, §1.

By Article I's terms, that grant of authority is exclusive. Taking the "words *** in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged," *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816), any "legislative power" granted "is *** absolutely vested," *id.* at 329. And by vesting powers in Congress, the Constitution divested those same powers from the States. As Justice Story explained in *Hunter's Lessee*, "the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." *Id.* at 325.

The text of the Tenth Amendment confirms this reading, providing that "[t]he powers *not* delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X

(emphasis added). By such wording the Tenth Amendment necessarily recognizes that powers that *are* delegated to the United States are *not* "reserved" to the States or the people, but reside solely in the federal government. While Congress might exercise its power to seek assistance from, or grant permission for, some state activities properly understood to "regulate" interstate or foreign commerce, the default rule is the *absence* of state power to regulate interstate commerce, not endless state encroachment on delegated national authority unless and until Congress affirmatively says otherwise.[25]

2. Consistent with a proper reading of the Constitutional text, this Court's early cases rejected any suggestion that the power to regulate commerce among the States was held concurrently by Congress and the States.

In *Gibbons* v. *Ogden*, Daniel Webster argued that it would be "insidious and dangerous" for the States to have a "*general* concurrent power" with Congress that would allow the States to "do whatever Congress has left undone[.]" 22 U.S. (9 Wheat.) 1, 8 (1824) (emphasis in original). This Court did not need to reach that

[25] It is no answer that Congress can always act to affirmatively disable state regulation of interstate commerce. The exercise of national legislative authority was designed to be difficult. Hurdles such as bicameralism, presentment, and potential veto slow and often stop such exercise. Default rules are thus important, and the constitutional default for the commerce and other Article I powers is that individual States may not take it upon themselves to exercise powers delegated to Congress. The Constitution sought to free commerce from state mischief, not to preserve all opportunity for mischief while the national legislative process struggles to keep up.

question in *Gibbons*, *id.* at 81, but several justices did discuss it in the *Passenger Cases* addressing fees imposed by New York on ships carrying people traveling into the State. *Smith* v. *Turner* ("*Passenger Cases*"), 48 U.S. 283 (1849). Justice McLean extensively reviewed the various powers delegated to Congress, the necessity of their exclusiveness within the narrow confines of such delegations, and concluded:

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

Id. at 400.

Justice Story, for his part, spoke of one State's "cheerful acquiescence" in the exclusivity of the commerce power, a point he said had not been "seriously controverted." Joseph Story, 2 *Commentaries on the Constitution of the United States* 515, §1067 (1833), https://tinyurl.com/ywemmyzh. He explained that the "power to regulate commerce is general and unlimited in its terms" and left "no *residuum*" to the States. *Id.* at 513, §1063. He continued that "when a State proceeds to regulate commerce *** among the several States, it is exercising the very power, which is granted to Congress; and is doing the very thing which Congress is authorized to do." *Id.* at 514, §1064. The

power to tax, by contrast, is different. Congress originally was empowered to adopt "uniform" taxes "throughout the United States" to pay for distinctly national obligations and activities "of the United States." U.S. Const. art. I, §8, cl. 1. States may tax only within their jurisdiction and they do so for different ends. "In imposing taxes for state purposes, a state is not doing what Congress is empowered to do." Joseph Story, 2 *Commentaries on the Constitution of the United States* 513, §1064 (1833).

The Court also described the commerce power as an exclusive delegation in *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891). There, discussing the power to regulate *foreign* commerce, this Court explained that the "prerogative, the responsibility, and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several states." *Id.* at 58. It continued: The "same thing is *exactly as true* with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two." *Ibid.* (emphasis added).[26]

3. The Court's fidelity to the text of the Commerce Clause, however, did not last. Eventually, the Court moved away from its earlier understanding by

[26] As this Court has recognized, "the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce." *Atl. Cleaners & Dyers* v. *United States*, 286 U.S. 427, 434 (1932).

discovering the very "residuum of power" in the States to act in "the absence of conflicting legislation by Congress," *Southern Pac. Co.* v. *Arizona* ex rel. *Sullivan*, 325 U.S. 761, 767 (1945), that Joseph Story rejected in his Commentaries. And it apparently discovered new daylight surrounding the single conjunction joining the power over foreign and interstate commerce, concluding that the "power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce." *Atl. Cleaners & Dyers*, 286 U.S. at 434.

But those cases were poorly reasoned in their broader strokes, and often involved matters that only had an *effect* on commerce or, at best, debatably regulated commerce. Take *Atlantic Cleaners*. To justify its conclusion that the Commerce Clause could be plenary as to foreign commerce but not as to interstate commerce, the Court merely said so on the theory that "there is no rule of statutory construction" that precluded it from treating the "same word" as though it has "different meanings." *Id.* at 433. Nowadays, when "identical words [are] used in different parts of the same [document]," the Court "presume[s them] to have the same meaning." *Robers* v. *United States*, 572 U.S. 639, 643 (2014) (citations omitted). That presumption should nowhere be stronger than with the Commerce Clause, where the power "to regulate commerce" was delegated in a single unitary phrase having three grammatically equal objects.

Nor is it relevant that there was some "evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd.* v. *Los Angeles Cnty.*, 441 U.S. 434, 448 (1979).

Whatever its past practice, this Court now interprets the Constitution by looking to its "words and phrases" as they were "used in their normal and ordinary" sense. *District of Columbia* v. *Heller*, 554 U.S. 570, 576 (2008) (cleaned up). And if the Founders wanted the interstate-commerce power to be different than the foreign-commerce power, they "could easily have said so" in the text they sent to be ratified by the States. *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010). But they did not.

Even taking those cases rejecting the exclusivity of the commerce power on their own terms, any residuum of power left with the States was limited and would apply only to "matters of local concern" that would "in some measure affect interstate commerce" or "to some extent, regulate it." *Southern Pac. Co.*, 325 U.S. at 767. For that reason, just over a decade after the Court decided *Southern Pacific Co.*, it could still say, correctly, that its cases recognized that the "Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any *direct* restrictions or impositions by the States." *Nw. States Portland Cement Co.* v. *State of Minn.*, 358 U.S. 450, 458 (1959) (emphasis added).

The subsequent tendency to find even more exceptions to exclusivity—adding more judicial policymaking into the mix—was perhaps driven by concern that an exclusive reading of an ever-expanding commerce power would foreclose too many state laws regulating ordinary local matters that in some way had an *effect* on interstate commerce. But while

such concerns are understandable, they arise from a different error, not from a proper understanding of exclusivity. Under an original and narrower view of the commerce power (apart from the erroneously expansive gloss of the Necessary and Proper Clause), any problem of excessively disabling state powers would have been limited. *Cf.* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 493 (1941) ("On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority pari passu from the states."). As Justice Thomas has explained, the "Clause's text, structure, and history all indicate that, at the time of the founding, the term ' "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes.' " *Gonzales* v. *Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (quoting *United States* v. *Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring))).

When the commerce power is properly constrained to those activities, any alleged harm from divesting the States of such power is necessarily cabined. "While in its content the commerce clause was designed to include only a limited number of matters, the states could no more legislate with propriety as to subjects falling within its limits than Congress could as to subjects falling outside them." Abel, *The Commerce Clause*, 25 Minn. L. Rev. at 494.

The substantial-effects test that this Court created, guided by an expansive reading of the Necessary

and Proper Clause, is thus the reason for any potential harms stemming from the properly-understood exclusivity of the commerce power. Avoiding the problem of overbroad exclusivity is best accomplished by a properly limited construction of the Necessary and Proper Clause. Congress has the supplemental power only to take such further actions—hiring people to enforce its regulations, for example—as are necessary and proper to implement some primary regulation of "commerce" as the term was used at the Founding. This narrowed understanding would not include the power to take actions that merely had some tangential effects on commerce but were not instrumental to some particular regulation of interstate commerce.

Under that proper (and necessary) narrow reading of the Necessary and Proper Clause, state action that merely affects commerce would not be prevented by the exclusive delegation of the commerce power unless it was acting to regulate commerce itself or to impose extraterritorial regulations of commerce in sister States. Any policy-driven concern regarding excessive preemption that stems from an improperly broad reading of the Necessary and Proper gloss on the commerce power does not justify rejecting the exclusivity of that power. The solution to one exercise of judicial policymaking is not to invent another. Better to fix the original error than to compound it.

The language, structure, and history of the Constitution all support a narrow but exclusive reading of the Commerce Clause. It is the refusal to apply that limited exclusivity, difficult as that may sometimes be, that constitutes judicial policymaking as much or more than the perceived looseness of dormant

Commerce Clause jurisprudence. Returning to an earlier and exclusive reading of the Commerce Clause will go a long way towards reducing the potential for judicial policymaking in either direction.

B. The Constitution's structure of horizontal federalism forbids States from exerting extraterritorial control over their sister States.

Allowing California to do what it did here also violates the Constitution's structure of horizontal federalism. While the concept of vertical federalism—the relationship between the States and the federal government—is familiar to many, the concept of "horizontal" federalism—the relationship between the States themselves—is often overlooked. But there are many elements of the Constitution that reflect a structure of horizontal federalism. It is reflected in basic territorial principles on which the States are founded, have political power, and may resist encroachment by sister States. It also is reflected in provisions limiting state encroachment on the free movement of people and goods between the States, including the properly limited and exclusive delegation to the federal government of the power to regulate interstate commerce.

1. Horizontal federalism begins with a recognition that States, for constitutional purposes, are *equal* and *territorial*. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 250-251 (1992). Those postulates, and territoriality in particular, run through the entire constitutional structure, including residency requirements for Senators and Representatives, limits on merging or severing parts

of States, and even protections against invasion. U.S. Const. art. I, §§ 2 & 3, art. IV, §§ 3 & 4.

Given such territorial foundations and limits, each State's right to regulate its own citizens affords the other States the right to do likewise. A necessary corollary is that States may not regulate or otherwise exercise authority over the citizens of and activities in other States. As this Court once explained, "it would be impossible to permit the statutes of [one State] to operate beyond the jurisdiction of that State *** without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914). This conclusion was once considered so "obvious[]" that it was "rarely *** called in question[.]" *Ibid.*

The limits on extraterritorial regulation by States are reflected in many constitutional provisions limiting how States may exercise power over other States and their citizens. The Import-Export Clause, correctly understood, prohibits States from imposing extraterritorial imposts or duties. See *Brown* v. *Maryland*, 25 U.S. 419, 437-438 (1827); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 621-637 (1997) (Thomas, J., dissenting) (discriminatory taxes on interstate commerce would be covered by a correct reading of the Export-Import Clause rather than the dormant Commerce Clause). The Tonnage Clause serves the same purpose. *Polar Tankers, Inc.* v. *City of Valdez*, 557 U.S. 1, 6-7 (2009). These particularized prohibitions embody the

overarching structural constitutional command that state power be tied to territory.

While the Constitution imposes territorial limits on States, it simultaneously ensures national mobility of persons, goods (including pork), and capital among the States. Through various structural and textual means, it guarantees each citizen free entry and exit to and from different States, and access to a national commercial market. *Int'l Text-Book Co.* v. *Pigg*, 217 U.S. 91, 109 (1910) ("To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."); see also, *e.g.*, U.S. Const. amend. XIV, §1 (citizens of the United States are citizens of any State in which they choose to reside, ensuring free exit and entry between and among the States); U.S. Const. art. I, §10, cl. 2 (States may not, absent congressional consent, "lay any imposts or duties on imports and exports" except for the narrow purpose of funding inspection laws); U.S. Const. art. I, §10, cl. 3 (States may not enter into any Agreement or Compact with one another or with a foreign power without congressional consent). Each of these provisions, and various others, helps reduce barriers to interstate commerce, prevent collusion among States that might undermine effective exit or interstate market access, and generally limits a State's authority to its own territory.

2. One of the most meaningful checks created by horizontal federalism is state competition for freely mobile citizens and businesses that can exit and escape any State that seeks to overreach. Using the

familiar approach of arranging government relations such that "rival institutions can be made to check one another," Michael S. Greve, *The Upside-Down Constitution* 40 (2012), and have the means and motives "to resist encroachments of the others," States compete with each other, but may not collude or encroach, The Federalist No. 51, pp. 321-322 (Clinton Rossiter ed., 1961) (James Madison). While this approach is oft-celebrated at the national level in the separation-of-powers context, it is also reflected in the horizontal limits on state power designed to invite competition and prevent encroachment.

Given the horizontal structures of federalism—territorial constraints on state power, mobility, and access to the national market—"voting with one's feet" becomes a more viable option. Mobile citizens and businesses thus become "consumers" of state government and States must compete for their presence and citizenship. The mobility provided by horizontal "federalism will enable citizens to choose among varying bundles of public services and the taxes that come with them, and it will force the [state] governments to compete for productive citizens and firms." Greve*, The Upside-Down Constitution* at 6. If one State overregulates those within its territory, citizens and businesses may relocate to more appealing States without having to forfeit access to commerce with the market in their former State or in other States. The "principal constitutional advantage" of such citizen mobility "is to discipline governments." *Id.* at 7; see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (structure of federalism "makes government more responsive by putting

the States in competition for a mobile citizenry").[27] Proposition 12 subverts that discipline precisely by exporting California regulations thus making "escape" impossible and offsetting the competitive consequences of its local regulatory choices. See *supra*, at 13, 14-15.

3. Many of these textual and structural elements have been given short shrift over the years, and no longer perform their original role in the Constitution, to the detriment of its structure of horizontal federalism and its barriers to interstate predation. But where past errors created a gap, alternative jurisprudence often arose to fill that gap. These alternatives were sometimes underinclusive, overbroad, or both, relative to the original structure and textual provisions.

As relevant here, the dormant Commerce Clause filled the vacuum created by the removal of textual and structural checks to state interference with interstate commerce and mobility. The theory was less tied to the text and structure, had internal inconsistencies, and smacked of judicial policy making. *E.g. Camps Newfound/Owatonna, Inc.*, 520 U.S. at 618 (Thomas, J., dissenting) ("We have used the Clause to make policy-laden judgments that we are ill equipped and arguably unauthorized to make."). But it was

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

ultimately necessary to shore up the damage done to the overall structure and function of the Constitution's horizontal federalism. And it preserved federalism by placing territorial limits on a State's ability to regulate interstate commerce. In that crucial respect, the rule preserves, however awkwardly, a piece of the constitutional architecture.[28]

Indeed, the Constitution was so necessary because, when the Founders gathered to draft the Constitution, "[i]nterference with the arteries of commerce was cutting off the very lifeblood of the nation." *Tenn. Wine*, 139 S. Ct. at 2460 (citing M. Farrand, *The Framing of the Constitution of the United States* 7 (1913)). Hamilton and Madison recognized that state protectionism could breed interstate conflict, and that a national market would be a preferrable alternative. *Ibid.*

Of course, federalism's "numerous advantages," *Gregory*, 501 U.S. at 458, depend on federalism's horizontal safeguards, including territoriality principles. Little if anything would be left of those advantages if States could erect trade barriers, export the costs of their experiments, and escape accountability for the results, as California has done with Proposition 12.

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[28] Admittedly, "formalistic" distinctions—between interstate commerce and the States' internal affairs; between "direct" and "indirect" imposition on interstate commerce; between a non-citizen's consent to jurisdiction and forbidden, extraterritorial exercise of jurisdiction—often have proven difficult. See, *e.g.*, *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 309-310 (1992) (describing the difficulties in the context of the dormant Commerce Clause), overruled by *South Dakota* v. *Wayfair*, 138 S. Ct. 2080 (2018). But whatever the efforts to overcome such line-drawing difficulties, the resulting rules must remain constitutionally—*i.e.*, territorially—grounded.

See *supra* at 13, 14-15. That conclusion too flows from this Court's cases: "[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pac. Co.*, 325 U.S. at 767 n.2.

C. California's effort to regulate pork production beyond its borders is forbidden by a proper understanding of the Commerce Clause and the structure of horizontal federalism.

One path for reversing the decision below is for this Court to adopt a properly exclusive reading of the limited original understanding of what it means to regulate interstate commerce and return one of the structural checks on state power that the Constitution created. Whether such an approach were adopted as a direct return to past understandings, or embedded within the rubric of the dormant Commerce Clause as a way to define and limit that doctrine and its loosest elements, it would be an improvement over simply abandoning all constitutional limits and leaving the matter to Congress to play whack-a-mole with creative state depredations on interstate commerce. The Constitution does not allow States to condition access to their markets, and the label placed on the jurisprudence is less important than fidelity to the Constitution's text, structure, and history. One can get rid of the bathwater of excessive judicial discretion and policymaking without tossing the baby of divestment of state power to regulate interstate commerce and extraterritorial conduct.

Under the principles articulated above, California's actions do not merely *affect* interstate commerce, they are directly targeted at such commerce and enforced, with roving California inspections, on local activities far beyond California's borders. That California's rules nominally apply to California pork producers as well is all the more egregious because California is home to less than 0.2 percent of the Nation's national breeding herd, Pet. App. 80a, while the brunt of the burden of complying with its regulations falls on farmers in the 49 States that raise the other 99.87% of the sows. Furthermore, "[t]he mere fact that the effects of [California's law] are triggered only by sales of [pork] within the State *** does not validate the law if it regulates the out-of-state transactions" or activities "of [the farmers] who sell in-state." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.,* 476 U.S. 573, 580 (1986). Indeed, exporting those costs nationwide mitigates the adverse competitive consequences of California's regulation on its own farmers, prevents its consumers from escaping the increased costs of pork, and thus increases the offense to horizontal federalism.

The text of the Commerce Clause—properly limited—and the Constitution's structure forbid California from imposing those harms on its sister States and the national economy.

CONCLUSION

California has attempted to impose its preferences regarding local animal husbandry on the Nation as a whole, using restrictions on commerce traveling into California as a cudgel to enforce its demands. That

extraterritorial regulation violates the original public meaning of the Commerce Clause and basic principles of horizontal federalism. This Court should hold that Proposition 12 violates the Constitution, whether as an original matter or via dormant Commerce Clause jurisprudence re-animated by such text, history, and structure.

Respectfully submitted,

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