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 *AMICUS CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in litigation and *amicus curiae briefs* upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. NTUF staff have testified and written extensively on the issues involved in this case and the organization offered its expertise to this Court in recent cases, including on important Commerce Clause questions such as those in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018).

SUMMARY OF THE ARGUMENT

"Federalism" is typically thought of in terms of the relations between the federal government and the states—vertical power or concurrent power sharing between the dual sovereigns. The anticommandeering

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to the preparing or submitting of this brief. All parties consented to the filing of this brief. Sup. Ct. R. 37.3(a).

doctrine, reservation of the police powers to the states, and the limits on the tax and spending powers of Congress all play into the balance of power between D.C. and the states. But a major purpose of the Constitution was also *horizontal* federalism—keeping large states from overpowering small states. We see this in the structure of the United States Senate under the Connecticut Compromise, for example.

It also plays out among the multiple layers of protection for interstate commerce. A major purpose of the creation and ratification of the United States Constitution was to protect interstate commerce from unreasonable burdens placed by state regulations. As the direct representatives of the people, Congress holds the power to regulate and protect interstate commerce.

But the Dormant Commerce Clause doctrine exists to resolve cases and controversies on state regulation of interstate commerce where Congress has not provided guidance. To avoid the Dormant Commerce Clause is to leave unresolved serious cases reaching the core of why the Founders drafted the Constitution.

Pike v. Bruce Church, 397 U.S. 137 (1970), is an under-used case that protects interstate commerce where Congress has not provided statutory language. Indeed, it is so often not applied that some argue that it has become an anachronism. But the Court has a new opportunity to apply *Pike* here, where a state attempts to regulate the activities of producers thousands of miles away from its borders.

Applying *Pike* to California's regulation of pork products will afford this Court the opportunity to carefully apply an as-applied test to a state's regulation of an industry largely outside its borders. Doing so will find that California violates horizontal federalism by demanding its preferences be applied to the activity thousands of miles away.

ARGUMENT

I. THE DORMANT COMMERCE CLAUSE IS IN LINE WITH THE ORIGINAL UNDERSTANDING OF THE PURPOSE OF THE U.S. CONSTITUTION.

The case at bar presents a dispute where a large state imposes its will upon other states via regulation of commerce. But a large state throwing its weight around to the detriment of citizens in other states is not new—indeed, such shenanigans were the very driver of adopting the modern Constitution over the old Articles of Confederation. The Founders set up the Constitution to protect both vertical *and* horizontal federalism.

Protecting interstate commerce in horizontal federalism—keeping the states from overpowering each other—was a major purpose and drive of the Founders in drafting the Constitution, and multiple provisions aim to protect it. But the broadest is Congress's power to regulate interstate commerce and the concurrent power of the Article III courts to resolve cases and controversies such as California's regulation of (mostly) Iowan pork farmers.

A. States Enacting Laws Like California's were a Primary Driver of Adopting the Constitution.

In advocating for adopting the new Constitution, Alexander Hamilton recognized that commerce was paramount: "It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence." THE FEDERALIST No. 22 (Hamilton). The Articles of Confederation had failed, creating "occasions of dissatisfaction between the States" as they regulated and taxed each other's goods. *Id*. If commerce is key to national wealth, then the Articles saw "the lowest point of declension" of trade between the states. THE FEDERALIST No. 15 (Hamilton).

A large state like California exerting its will across state borders is nothing new. In Federalist Number 7, Hamilton argued the need for the new Constitution by noting that large states, like New York, can exert its will upon its neighbors Connecticut and New Jersey for the exclusive benefit of the big state. Hamilton asked, "Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit?" *Id*. Of course not, he argues, for only "temerity alone will answer in the affirmative." *Id*. While the nation has grown to cover the North American continent, there are still "opportunities which some States would have of rendering others tributary to them by commercial regulations." *Id*.

The Articles of Confederation failed because large states can interfere and "unneighborly regulat[e]" the interior workings of other states. THE FEDERALIST No. 22 (Hamilton). It is, of course, possible for a small state to interfere with a large state too. Or any situation where there exists "difference of local position and policy" that can lead to "animosity ad discord," leading in turn to "injurious impediments to the intercourse between the different parts of the" Union. *Id.*

The Founders recognized that the "competitions of commerce would be another fruitful source of contention" among the states as each set up commercial "distinctions, preferences, and exclusions." THE FEDERALIST No. 7 (Hamilton). It would hurt "enterprise" to have "infractions of these regulations, on one side, the efforts to prevent and repel them, on the other" that would lead to economic "reprisals"—or even war. *Id.* The Founders even looked to what happened in Europe (especially the German confederated nations and also among the Netherlands) as what could tear apart the newly formed United States. THE FEDERALIST No. 6 (Hamilton).

The solution was to set up a new constitution to ensure "[a]n unrestrained intercourse between the States." THE FEDERALIST No. 11 (Hamilton). What was needed was not a confederacy, but a federalist union where "[a] unity of commercial, as well as political, interests, can… result from a unity of government." *Id.*

The resulting Constitutional provisions were subject to quite a lot of debate on how to best protect interstate commerce from state interference. *See*, *e.g.*, James Madison, "Journal" (Sept. 15, 1787), in THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES MAY-SEPTEMBER, 1787, 378-81 (Gaillard Hunt ed.) (1908).[2]

Historians and political scientists have long recognized the Constitution's purpose in protecting interstate trade. John Fiske recognized that the "Revolution was a deadly blow aimed at the old system of trade restrictions. It was to a certain extent a step in realization of the noble doctrines of Adam Smith." John Fiske, THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-1789, 135 (1888).[3] Fiske lays out a dire situation where each state is competing with each other for trade between the states and with Europe, especially Great Britain, based on the old mercantilist model of economic development. *Id*. at 145-46. Commerce was on everyone's mind as the Articles of Confederation proved unworkable.[4]

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[2] *Available at*: https://www.gutenberg.org/files/41095/41095-h/41095-h.htm.

[3] *Available at*: https://www.gutenberg.org/files/27430/27430-h/27430-h.htm#Page_134.

[4] Some argue the Constitution's purpose was only to protect commercial interests of the Founders themselves, though that has been heavily criticized as being one of many factors in outlaying the Constitution. *Compare*, *e.g.*, Charles A. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1921) *with* Forrest McDonald, WE THE PEOPLE:

B. Multiple Constitutional Provisions Protect Interstate Commerce.

From the debates on how to protect interstate commerce, what emerged was an express denial of the ability of states to tax imports and exports between the states (save for very limited inspection fees), a limit on the ability of states from taxing tonnage of shipping, a general protection of the privileges and immunities of citizenship, and an express grant for the federal government to regulate commerce. *See* U.S. Const. art. I, § 10, cl. 2 (Import/Export Clause); U.S. Const. art. I, § 10, cl. 3 (Tonnage Clause); U.S. Const. art. IV, § 2 (Privileges and Immunities Clause); U.S. Const. art. I, § 8, cl. 3 (Commerce Clause).

The Founders were concerned about protecting interstate commerce and laid multiple provisions of the new Constitution to protect from state mischief. *See* Madison, Journal, (Sept. 15, 1787). Taking each in turn shows that the Commerce Clause—the broadest grant of power among this list—was crafted specifically to address this issue.

The Import/Export Clause provides, in relevant part, that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." U.S. Const. art. I,

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THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958). Whether self-interested or public-spirited, it is plain that regulating interstate and foreign trade was major factor in shaping the Constitution.

§ 10, cl. 2. In other words, it prevents states from imposing tariffs (aside from very limited inspection fees). This was certainly a problem during the Constitutional Convention, as states were setting up their own tariffs and barriers to interstate trade. *See*, *e.g.*, Fiske at 145 (discussing how Connecticut favored trade with England while its neighbors had higher tariffs). But this Court has held that this clause refers to imports and exports from foreign nations, not other states. *See*, *e.g.*, *Woodruff v. Parham*, 75 U.S. 123, 124 (1868). Nonetheless, the rest of the clause grants plenary power to the national government over tariffs. U.S. Const. art. I, § 10, cl. 2 ("all such Laws shall be subject to the Revision and Controul of the Congress"). Therefore, while this case sounds in interstate trade, the Import/Export Clause illustrates that regulation of trade is a national power, not a state power.

The Tonnage Clause prohibits duties based on tonnage. U.S. Const. art. I, § 10, cl. 3 (Tonnage Clause) ("No State shall, without the Consent of Congress, lay any Duty of Tonnage…"). As this Court recognized 13 years ago, the purpose of the Tonnage Clause was to supplement the Import/Export Clause to prevent States from nullifying the constitutional prohibition against import and export duties by taxing the vessels transporting the merchandise. *See Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 7 (2009) (citing Joseph Story, Commentaries on the Constitution of the United States § 497). The Tonnage Clause is broad, as it applies to any duty on the ship carrying the cargo. *See id.* at 8 (applying *Steamship*

Co. v. Portwardens, 73 U.S. (6 Wall.) 31, 35 (1867) and *Clyde Mallory Lines v. State of Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935)). But its purpose and application is maritime. *See*, *e.g.*, *id.* at 18 (Roberts, C.J., concurring) ("Such protection reflects the high value the Framers placed on the free flow of maritime commerce").

The Privileges and Immunities Clause was an adaptation of Article IV of the Articles of Confederation, which provided that citizens "shall enjoy therein all the privileges of trade and commerce." Articles of Confederation art. IV. While the Articles expressly covered trade, the Constitution's clause was truncated. Charles Pinckney, who is generally believed to have drafted the shorter version, assured the Convention that no change in substance was intended. *See*, *e.g.*, *Austin v. New Hampshire*, 420 U.S. 656, 661 n.6 (1975) (discussing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (M. Farrand ed. 1937)). Thus, this Court has found that the clause "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent." *Id.* at 661.

The purpose of the clause in both the Articles and the Constitution "was to help fuse into one Nation a collection of independent sovereign States." THE FEDERALIST No. 42 (Madison). In arguing for the adoption of the Constitution, Alexander Hamilton made clear that the Privileges and Immunities Clause was designed to be enforced by the judiciary: "[i]n

order to the inviolable maintenance of that equality of privileges and immunities… the national judiciary ought to preside in all cases" involving the clause. THE FEDERALIST No. 80 (Hamilton).

But subsequent case law after the founding era worked to undo much of the Privileges and Immunities Clause's protection for interstate commerce. Courts began to believe that trade and commerce were excised from the clause to avoid questions of slavery. *See*, *e.g.*, *Lemmon v. People*, 20 N.Y. 562, 627-28 (1860) (opinion of Wright, J.) (arguing provisions of article in relation to commercial intercourse omitted to avoid implicitly mandating obligation on part of one state to recognize another state's legitimation of slavery). Additionally, in a pair of cases, this Court held that the Privileges and Immunities Clause does not apply to corporations but did apply to natural persons and non-corporate business entities like general partnerships. *See*, *e.g.* *Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839), and *Paul v. State of Virginia*, 75 U.S. 168, 182 (1868), *overruled as applied to interstate sale of insurance by United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533 (1944).[5]

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[5] For example, *Paul* argued that "[t]he corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created." *Paul* 75 U.S. at 181. Of course, modern doctrine allows for corporations to engage in commerce in multiple states rather than only be chartered in one state, and thus be possibly subject to jurisdiction and taxation in multiple states. *See*, *e.g.*, *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945);

Given this historic narrow interpretation of the Privileges and Immunities Clause, the Commerce Clause has stood as the broadest protector of horizontal federalism. *See*, *e.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. ___, 139 S. Ct. 2449, 2460–61 (2019) ("So if we accept the Court's established interpretation of those provisions, that leaves the Commerce Clause as the primary safeguard against state protectionism."). The Commerce Clause is primarily a grant of Congressional power. U.S. Const. art. I, § 8, cl. 3. But, as discussed below, this Court has long held that the judiciary has a role to play in protecting horizontal federalism and keeping states from taxing or regulating activities beyond their borders.

C. Dormant Commerce Clause Doctrine Reflects Some of the Earliest Jurisprudence of Founding Era, in Place for 193 Years.

Regulation of commerce is a *federal* power, not just a Congressional one (though Congress retains primary responsibility). James Madison himself was active in the debate on the scope of each provision of the Constitution, recognizing that "the regulation of Commerce was in its nature indivisible and ought to be wholly under *one* authority," that is the federal government. Madison, Journal at 381 (Sept. 15, 1787)

South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). And this Court has applied constitutional rights to corporations. *See*, *e.g.*, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (corporations have First Amendment speech rights).

(emphasis supplied). Roger Sherman agreed, that the "power of the U[nited] States to regulate trade being supreme can controul interferences of the State regulations [when] such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction." *Id.* On the question of taxing tonnage, John Langdon "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it" *Id.* Both Congress and the Judiciary therefore play a role in protecting horizontal federalism.

The Federalist Papers provide similar support. In discussing why the judiciary is an independent branch rather than a subset of the legislature, Federalist Number 81 does recognize that "the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution." That is because the role of the judiciary is to determine matters in "a particular case" while the legislature is better aimed at "prescribe[ing] a new rule for future cases." *Id.* Furthermore, "[n]o legislative act, therefore, contrary to the Constitution, can be valid," and it is "bulwark of a limited Constitution against legislative encroachments" to have an independent judiciary enforce the Constitution. THE FEDERALIST No. 78 (Hamilton).

Under Article III, federal courts hear cases and controversies, and this includes when a state impedes interstate commerce. The constitutional hook might

be any of the horizontal federalism clauses, but overall the Constitution is clear that states may not unduly burden business across state lines. *See*, *e.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382 (1821) (describing commerce as one of the powers confided in the federal government) And when cases came up, the Marshall Court answered and applied what became known as the Dormant Commerce Clause.

First, the Marshall Court needed to determine the scope of the Commerce Clause—how far could Congress regulate commerce in the states? The answer came in the famous case *Gibbons v. Ogden*, where dueling legislative enactments in New York and in Congress gave steamboat shipping rights to different persons. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 1-2 (1824). Importantly, if New York's monopoly law controlled, then the state would be able to effectively control trade between itself and New Jersey and Connecticut. *Id*. at 4-5. The *Gibbons* Court held that the regulation of commerce was exclusive to Congress. *Id*. at 177. More importantly, this power of regulating trade between the states was a federal power, and the *Gibbons* Court framed it as such: this power "was that of the United States; that the government by which it was to be regulated, was also that of the United States; and that the subject itself was one undivided subject." *Id*. Because Congress passed an act on the matter, the federal law controlled over the monopoly granted by New York.

Just three years after *Gibbons*, this Court decided Maryland's attempt to require businesses acquire a

license to sell goods in the state. *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827). Maryland's tax had the effect of controlling what goods could be shipped and sold from other states (or even foreign nations). Chief Justice Marshall held that Maryland's law could not stand since it interfered with commerce. *Id.* at 439. His reasoning was that the Constitution gave "the Courts of the Union" the ability to hear the case because the States' powers to tax "cannot interfere with any regulation of commerce." *Id.* at 449.

The concept was further developed in *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829), where a company wished to build a dam in Delaware. There was no congressional act on the question, but nonetheless the question was whether the state law was "repugnant" to the federal power to regulate commerce between states and with foreign powers. *Id.* at 252. While the Marshall Court found that the dormant commerce clause did not bar the building of the dam, it nevertheless recognized the importance of applying the doctrine when a case presented itself at bar and there was no Congressional guidance to apply. *Id.*

Very early on, the Supreme Court recognized that a major purpose of the Constitution is to protect Commerce from unreasonable burdens placed by state regulations. If not the Privileges and Immunities Clause, then the Dormant Commerce Clause exists to resolve cases and controversies on state regulation of interstate commerce where

Congress has not provided guidance. To avoid the Dormant Commerce Clause is to leave unresolved serious cases reaching the core of why the Founders drafted the Constitution. The key is finding a rubric for allowing maximum restraint in federal judicial pronouncements on how to regulate commerce while at the same time making sure the Constitution's protections of interstate commerce are effective. Fortunately, in 1970 this Court articulated such a narrow, as-applied test.

II. *PIKE V. BRUCE CHURCH* PROVIDES A JUDICIALLY-WORKABLE FRAMEWORK FOR ENFORCING THE CONSTITUTION'S COMMERCE PROTECTIONS.

Pike v. Bruce Church, 397 U.S. 137 (1970), is the direct application of the need for federal courts to resolve Article III cases and controversies on interstate commerce where Congress has not expressly legislated. Rather than write a proscriptive rule to resolve all (or most) situations, it's a narrow, as-applied ruling using a balancing test.

Pike states that if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits," then the court will consider whether the local interest could be accomplished by more reasonable means. *Pike*, 397 U.S. at 142. If the state could better accomplish its goals by more reasonable means, then the burden on interstate commerce violates the Commerce Clause.

Pike involved the fundamental mismatch of a state regulation of packing materials for cantaloupes

versus the very real costs of compliance by the growers. *Id*. at 139-40. A bumper crop of high-quality melons caused the company to need to send the cantaloupes from the grove in Arizona to a packaging facility just across the border in California. *Id*. at 139. Arizona law, however, required "packed in containers in a manner and of a kind approved by the" state. *Id*. There were no such facilities available, and so the company would lose $700,000 to comply with the state law. *Id*. at 140. Adjusted for inflation, that is about $5.3 million today.[6]

In deciding the Dormant Commerce Clause issue, this Court articulated the test for burdens on interstate commerce: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id*. at 142. That is, assuming there is a local legitimate purpose, "then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id*. Enhancing the reputation of Arizona cantaloupes was not weighty enough for the state to require the

[6] Or $5,297,808.90, to be exact in comparing March 1970 dollars when *Pike* was announced to April 2022, the latest calculation date available. Bureau of Labor Statistics, CPI Inflation Calculator *available at*: https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=700000&year1=197003&year2=202204.

company to package the melons in-state, at great cost. *Id*. at 146. *Pike* itself was just one of many instances where local processing requirements were struck down under the Commerce Clause. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391–92 (1994) (collecting cases since 1890).

Pike's analytical framework can test any regulation impacting interstate commerce, but it is often not applied and needs resuscitation. Congress cannot—and probably should not—attempt to codify laws touching on every aspect of interstate commerce. But a practical application of a "bang for the buck" standard of judicial review can be helpful in curbing the wanton exercise of power beyond a state's borders.

But the focus should not be the size of a state's market—for such a standard will always favor heavy regulations by big states like California, New York, Texas, and Florida against burdensome compliance costs by out of state businesses. Instead, the analysis should focus on whether the benefit to the state is narrow compared to what the litigant business must bear.

III. CALIFORNIA'S LAW OUTLAYS THE COST OF COMPLIANCE BEYOND ITS BORDERS FOR NEGLIGBLE BENEFIT.

The case at bar presents the perfect opportunity for this Court to again apply *Pike* to an unreasonable and burdensome regulation of interstate commerce and allow challenges to succeed where states impose their will upon citizens of other states.

California's Proposition 12 bans any business from "knowingly" selling whole veal or pork meat that does not meet the state's newly enacted agricultural regulations on cage sizes. Cal. Health & Safety Code § 25990(b). The state's regulatory arm has determined this law applies to all meat sold in the state regardless of where the animal was raised. This includes sending agents of the state of California to travel across the country to inspect farms in other states. Pet. Reply App. 33a, 38a-39a (reproducing the latest regulatory guidance). California's state agents must be allowed full access to the production, operation, and offices of the farms. *Id.* at 33a. The farms must keep extensive records and produce them upon demand. *Id*. at 34a.

Flying inspectors across the country is hardly regulating only within California's borders and infringes on the horizontal federalism protections of the Constitution. Furthermore, the regulations are expensive to the citizens in other states. The Petitioners allege the farming community would spend approximately $300 to $350 million to comply with California's new regulations. Br. of Pet. At 15 (discussing Pet. App. 214a ¶ 342). Adjusted for inflation, this is 56 times the outlay the cantaloupe growers needed to comply in *Pike*. But California producers only make up 0.1% of the supply of what state residents consume. Pet. App. 80a.

These costs are almost exclusively laid upon out-of-state citizens, often in direct opposition to what is allowed in the states the pigs are raised in. *See*, *e.g.*,

Br. of Pet. at 31 (discussing laws in Colorado, Ohio, and elsewhere). All of this is for negligible benefit. Already federal law protects the health and safety of our food, including pork products. *See*, *e.g.*, Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq*. And each state has its own safety and health standards for raising animals. California should not be able to dictate the standards in other states simply as a precondition for interstate trade.

Therefore, Proposition 12 is an example of the regulatory trouble that can happen when one state is allowed to direct the business activity in other states. The Founders drafted the Constitution for the very reason that the Articles of Confederation allowed for such shenanigans, to the detriment of the whole of the United States. *Pike*'s narrow application of the Dormant Commerce Clause allows for federal courts to hear Article III cases and controversies like this while allowing for maximum freedom allowed by Congress.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the decision of the court below be reversed.

Respectfully submitted,

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