NO. 21-468

In the Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL &
AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE THE CENTER FOR A HUMANE ECONOMY, ANIMAL WELLNESS ACTION, AMERICANS FOR FAMILY FARMERS, SPCA INTERNATIONAL, AND THE CHRISTIAN ANIMAL RIGHTS ASSOCIATION IN SUPPORT OF RESPONDENTS

SCOTT EDWARDS
KATHRYN SCHULTZ
THE CENTER FOR
A HUMANE ECONOMY
P.O. BOX 30845
BETHESDA, MD 20824
ANIMAL WELLNESS ACTION
611 PENNSYLVANIA AVE. S.E. #136
WASHINGTON, DC 20003

JESSICA L. BLOME
COUNSEL OF RECORD
GREENFIRE LAW, P.C.
P.O. BOX 8055
BERKELEY, CA 94710
(510) 900-9502
JBLOME@GREENFIRELAW.COM

AUGUST 12, 2022 *COUNSEL FOR AMICI CURIAE*

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INTEREST OF AMICI CURIAE[1]

Amici are non-profit organizations united in their interest in seeing Proposition 12 upheld by the Court as a lawful exercise in a state's power to regulate consumptives that end up on its citizens' plates. When a state has legitimate and serious concerns about the humane treatment of the animals that form part of our food chain, about food safety, and about public health, it is appropriate for a state to regulate in the way California has done.

Amicus the Center for a Humane Economy (the Center) is a 501(c)(3) nonprofit headquartered in Maryland. It is the first nonprofit of its kind, focusing specifically on influencing the conduct of corporations to forge a more humane economy. Its efforts include corporate engagement, advocacy campaigns, consumer education, and research and analysis of business practices. In a society where consumers, investors, and stakeholders consistently report a preference for the humane treatment of animals, the Center works to make these desires for social responsibility a reality.

Amicus Animal Wellness Action (AWA), a 501(c)(4) nonprofit headquartered in Washington, D.C., works to promote animal welfare by advocating for the passage and enforcement of laws that protect animals from cruelty. AWA advocated for Proposition 12 and both it and the Center have encouraged companies to source

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[1] All parties have consented to this filing. No counsel for a party authored this brief either in whole or in part. No person other than *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

products from humanely raised animals, rather than from producers who rely on extreme confinement as a routine husbandry method.

Amicus Americans for Family Farmers (AFF) is a 501(c)(3) nonprofit dedicated to preserving family farms and rural communities. AFF promotes policies that support strong and vibrant rural communities, sustainable food systems, opportunities for family farmers, the availability of safe and healthy food for all, and responsible farming practices. AFF President Donna Krudwig began advocating against the use of gestation crates in animal agriculture in 2002 and was involved in gathering signatures during the initiative petition process for Proposition 2 in 2008 and for Proposition 12 in 2018.

Amicus SPCA International (SPCAI) was founded in the United States in 2006 to advance the safety and well-being of animals around the world. SPCAI runs major domestic and international initiatives, including a Shelter Support Fund in over sixty countries, rescuing soldiers' animals in Baghdad, Afghanistan, Lebanon, Georgia, and elsewhere, and providing critical veterinary supplies to organizations on almost every continent. SPCAI also works to educate concerned citizens about a variety of animal welfare issues and promotes the improved treatment of animals through government policy around the globe – whether those animals be companion animals like dogs and cats, or farmed animals like the sows of Proposition 12.

Amicus the Christian Animal Rights Association (CARA), a non-profit 501(c)(3) organization, is a non-denominational Christian and Bible-based ministry dedicated to advocating for, protecting, and defending the rights of all sentient animals. CARA supports and

encourages Christian animal rights activists around the world and educates fellow Christians on the importance of caring for animals and animal issues.

SUMMARY OF ARGUMENT

Petitioners have an outsized vision of the dormant Commerce Clause. Instead of an appropriately tailored limit on states' protectionist impulses, petitioners imagine a behemoth that major corporations can set upon state laws that they deem adverse to their own business interests.

The Constitution, however, contains no such Goliath. Originalist and textualist interpretations argue that today's dormant Commerce Clause should not even exist as a legal doctrine: it has no textual support, was not intended by the Founders, and clashes with our federalist system. And even if the dormant Commerce Clause is rationally borne of the Commerce Clause, the superpowered version that petitioners depict is not only a departure from earlier jurisprudence, it is also an affront to state autonomy, liberty, and authority.

What petitioners are asking this Court to do is to strike down a law democratically enacted by the most populous state with the largest economy in the Union to financially benefit a handful of giant food conglomerates – two of the largest of which are foreign-owned, *see infra* pp. 31-32. That, under any analysis, cannot be what the framers of the Constitution envisioned.

When selecting the appropriate means of analysis for Proposition 12, the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test emerges as the proper

doctrinal choice, not the "extraterritoriality" analysis or the *Baldwin/Brown-Forman/Healy* strain of case law. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) (plurality opinion).

This is because Proposition 12 does not directly regulate out-of-state activity, nor does it have the practical effect of doing so. Proposition 12 also does not control prices, either directly or by "inevitable effect"; indeed, expert analysis has revealed that pork prices outside of California will hardly be affected.

Rather, the *Pike* test is ideally suited to a law that was passed for reasons including the consumption of humanely treated animals, food safety, and public health. An honest assessment balancing the law's legitimate purposes against what economic experts repeatedly demonstrate is a minimal impact on inter-state commerce leads to the conclusion that Proposition 12 should be upheld. Otherwise, the judiciary not only scorns the clear will of Californian voters, it also imperils a wide range of other state laws expressing citizens' and state legislatures' political wills.

ARGUMENT

I. THE EXPANSIVE AND SWEEPING DORMANT COMMERCE CLAUSE DOCTRINE THE PETITIONERS ENVISION HAS NO BASIS IN THE CONSTITUTION, AND SO PROPOSITION 12 SURVIVES JUDICIAL SCRUTINY.

Petitioners' argument, at its core, insists that the Constitution prohibits a state from regulating products purchased *within* the boundaries of that state when those state-enacted prerogatives have even a marginal impact on interstate commerce. Under petitioners' unbridled view, there are few state laws that could survive such scrutiny. But thankfully the Constitution does not do so and was never intended to do so.

A. Originalist and Textualist Interpretations of the Constitution Hold That the Dormant Commerce Clause Is a Judicial Figment of the Imagination.

> "*The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative commerce clause. It contains only a Commerce Clause*."

Former Justice Antonin Scalia in *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).

The champion of originalist and textualist Constitutional interpretation, former Justice Scalia, was famously skeptical of the dormant, or "negative," Commerce Clause. His primary criticisms can be

summarized in three parts, which provide an overview of textualist and originalist criticisms of the doctrine.

First, there is no foundation for the concept in the language of the Constitution itself. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674-75 (2003) (Scalia, J., concurring) ("[A]s I have explained elsewhere, the negative Commerce Clause . . . [has] no foundation in the text of the Constitution"); *Wynne*, 575 U.S. at 572 (Scalia, J., dissenting) (calling the dormant Commerce Clause "a judicial fraud"). The Commerce Clause empowers Congress to "regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. To an originalist and textualist, the language of this affirmative grant of power does not and cannot convey a seemingly unlimited restriction on the regulatory authority of states.

Second, today's dormant Commerce Clause has evolved far past its earlier manifestations and no longer represents what was originally invoked. *Id.* (Scalia, J., dissenting) ("The negative Commerce Clause applied today has little in common with the negative Commerce Clause of the 19th century, except perhaps for incoherence"). Justice Thomas, an even stronger critic of the doctrine, has called the doctrine "virtually unworkable," *id.* at 578 (Thomas, J., dissenting), and, echoing former Justice Scalia's originalism, has envisioned the "surprise [of] those who penned and ratified the Constitution" upon glimpsing "how far [the Court's] negative Commerce Clause jurisprudence has departed from the actual Commerce Clause." *Id.* at 579 (Thomas, J., dissenting).

Third, former Justice Scalia constantly warned of the dangers of gratuitous judicial intrusion into

matters rightfully within the States' domains. *Id.* at 572 (Scalia, J., dissenting) (characterizing the dormant Commerce Clause as "a judge-invented rule under which judges may set aside state laws that they think impose too much of a burden upon interstate commerce"); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (again describing the doctrine as an "unjustified judicial intervention not to be expanded beyond its existing domain"). In a similar criticism of the overreach of judicial authority into state affairs when it comes to dormant Commerce Clause jurisprudence, in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2484 (2019) (Gorsuch, J., and Thomas, J., dissenting), Justice Gorsuch remarked that "the regulation of alcohol wasn't left to the imagination of a committee of nine sitting in Washington, D.C., but to the judgment of the people themselves and their local elected representatives."

B. Petitioners' Vision of a Sweeping Dormant Commerce Clause Imperils the American Institution of State Autonomy and Sovereignty Enshrined by the 10th Amendment.

Petitioners and their *amici* frame Proposition 12 as part of an existential socio-cultural struggle. On the contrary, Proposition 12 instead represents the constitutional and lawful exercise of a state's police power over consumptives sold within state borders in a manner that reflects the State's time-honored position as a laboratory of democracy in our federalist system.

Such a state-based laboratory is precisely what the founders envisioned when they crafted the Tenth Amendment. As former Justice Brandeis famously warned in *New State Ice Co. v. Liebman,* 285 U.S.

262, 311 (1932) (Brandeis, J., dissenting), "[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation." He further praised federalism by describing how, in this system, "a single courageous state may, if its citizens choose, serve as a laboratory . . . This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, *we must be ever on our guard, lest we erect our prejudices into legal principles*" (emphasis added).

Petitioners argue that we ought to be concerned about Balkanization, Pet'rs' Br. 22, 24, 30. But this strain of argument fails, for Balkanization can be resolved by acts of Congress – and indeed this is precisely what the Constitution envisions in its Commerce Clause when the Legislature is empowered to "regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, *see* U.S. Const., Art. I, § 8, cl. 3, and 'ill suited [*sic*] to the judicial function.'" (Citation omitted)). However, in this case, Congress has elected to do nothing on farm animal welfare, and with that choice, it has invited the states to address that omission in the law.

What cannot be solved by acts of Congress, however, and what threatens the precious balance of state and federal government far more than Proposition 12, is the erosion of federalism by a turbocharged dormant Commerce Clause.

II. THE APPROPRIATE JURISPRUDENTIAL TEST FOR PROPOSITION 12 IS THE *PIKE* BALANCING TEST, UNDER WHICH PROPOSITION 12 SURVIVES.

Should the Court conduct a full dormant Commerce Clause analysis of Proposition 12 despite the absence of textual support for the Clause, it should employ the balancing test from the seminal *Pike v. Bruce Church, Inc.*, 397 U.S. 137, rather than the "extraterritoriality" doctrine, borne from the *Baldwin*/*Brown-Forman*/*Healy* line of cases. *Baldwin*, 294 U.S. 511; *Brown-Forman*, 476 U.S. 573; *Healy*, 491 U.S. 324 (plurality opinion).

A. The Proper Test Under Which to Analyze This Factual Scenario Is *Pike*, Not *Brown-Forman*/*Healy*/*Baldwin* or the "Extraterritoriality" Doctrine.

This case offers the quintessential set of facts for the *Pike* balancing test. *Pike* is the standard test for state laws that concern public health (*e.g.*, *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154-55 (9th Cir. 2012) (upholding state law prohibiting opticians from selling prescription eyewear at optometrist and ophthalmologist locations); public health in relation to animal agriculture (*e.g.*, *Mintz v. Baldwin*, 289 U.S. 346, 349-50 (1933) (upholding state's partial ban on cattle importation to protect against contagious disease)); and even ethical or philosophical preferences – such as conservation (*e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-62 (1981) (upholding statute to reduce plastic)) and religious sentiment (*e.g.*, *Hennington v. State of Georgia*, 163 U.S. 299, 303-05 (1896) (upholding Georgia law banning freight train running on the Christian Sabbath)).

In contrast, the extraterritoriality doctrine, as exemplified by the *Baldwin*/*Brown-Forman*/*Healy* line of cases, has been wielded to invalidate state laws that either:

1) control or regulate out-of-state prices, or tie in-state to out-of-state prices, whether explicitly or by "'inevitable effect,'" *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. at 669 (quoting *Pharm. Research and Mfrs. v. Concannon*, 249 F.3d 66, 81-82 (1st Cir. 2001)), or,

2) regulate commerce occurring wholly outside state borders, or, have the "practical effect" of doing so. *Healy*, 491 U.S. at 332.

This Court's most recent decision addressing the extraterritoriality doctrine only considered the first manifestation and ignored the second. Indeed, in *Pharmaceutical Research & Manufacturers of America v. Walsh*, this Court stated that the *Baldwin*/*Brown-Forman*/*Healy* rule only concerns state legislation that: 1) "regulate[s] the price of any out-of-state transaction, either by its express terms or by its inevitable effect"; or 2) "t[ies] the price of [] in-state products to out-of-state prices." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. at 669 (quoting *Pharm. Research and Mfrs. v. Concannon*, 249 F.3d at 81-82). Justice Gorsuch made the same observation in *Energy and Environment Legal Institute v. Epel* ("*EELI*") when rejecting a dormant Commerce Clause challenge to a Colorado renewable energy law. *EELI*, 793 F.3d 1169, 1173 (10th Cir. 2015).

Proposition 12, however, has no such "inevitable effect" on extra-California prices, for two reasons.

First, careful and unbiased analysis by agricultural economic experts makes mincemeat of petitioners' and *amici's* unsupported and conclusory arguments that Proposition 12 will raise pork prices nationwide. Agric. and Res. Econ. Professors' Br. 5-6 (calling petitioners' claims "flawed as a reflection of basic economic incentives [and] factually implausible," and stating that implementation of Proposition 12 will raise prices for Californian consumers but have "marginal" collateral effect on out-of-state pork prices).

Second, a statute having the "inevitable effect" of direct regulation of out-of-state prices and transactions is qualitatively distinct from a statute that, while directly regulating in-state transactions, has a collateral and incidental effect on prices out of state. Many state laws have collateral effects on economic activity elsewhere outside the state. *Compare Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 674 (4th Cir. 2018) (holding a Maryland statute directly regulating the prices of out-of-state transactions invalid), *cert. denied*, 139 S. Ct. 1168 (2019) *with Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (upholding Maine statute providing regulations on drug pricing where state regulated only with reference to in-state transactions, even if there were collateral effects out of state).

1. The Broad Manifestation of the Extraterritoriality Doctrine that Prohibits Statutes Having the "Practical Effect" of Regulating Out-of-State Commerce Is Unworkable.

The "practical effect" dicta is unwieldy and unworkable in the modern age, where extraterritorial effects are inevitable with a broad swath of legitimate state

expressions of their police powers.[2] *See, e.g.*, Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 998-99 (2013) (criticizing the *Healy* dicta for a "lack of a limiting principle that would prevent it from curtailing legitimate state regulatory power"); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 & n. 90 (2000) (describing the infamous *Healy* and *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), extraterritoriality dicta as "overbroad"); Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 MAINE L. REV. 467, 514 (2003) (criticizing the lower courts for failing to constrain the *Healy* dicta and thereby invalidating state laws with only nominal out-of-state effects – effects that are "inevitable" in the modern age).

Former Justice Scalia also characterized the expansive extraterritoriality doctrine suggested by the "practical effect" dicta in *Healy*'s majority opinion as "dubious." *Healy*, 491 U.S. at 345 (Scalia, J., dissenting). "The difficulty with this [more expansive analysis]," he wrote, "is that innumerable valid state laws affect pricing decisions in other States . . . I do not think our Commerce Clause jurisprudence should degenerate into disputes over degree of economic effect." *Id.*

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[2] Most legal academics in this arena believe this expansive version of the extraterritoriality doctrine to either be already obsolete law, or flawed law deserving of being overruled. Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 959 n. 42 (2017) (reviewing the myriad academics taking this position).

But that is precisely what dormant Commerce Clause jurisprudence will become should this Court rely on *Healy*'s dicta – dicta that has been implicitly and explicitly condemned by innumerable academics and scholars. It will set the stage for a vast overreach of federal judicial power into the affairs of the individual States. As Justice Gorsuch commented in *EELI*, "After all, if any state regulation that 'control[s] . . . conduct' out of state is per se unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels?" *EELI*, 793 F.3d at 1175.

State legislation that could fall under such an expansive and unlimited reading of the extraterritoriality doctrine include:

- State laws imposing taxes on out-of-state online purchases, upheld in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (recognizing the "unsound" and "incorrect" decision of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and overruling *Quill*);
- State laws restricting the sale of alcoholic beverages, such as Utah's S.B. 132, which sets a limit at 4.0% by weight and allows only state-run stores to sell alcohol above that, or Utah's newest "clampdown" on beverages that have commonly used flavor additives containing "trace amounts" of ethyl alcohol. Associated Press, *Popular Hard Seltzers to Be Scarcer in Utah Under New Law*, U.S. NEWS (Mar. 3, 2022), https://www.usnews.com/news/business/articles/2022-03-

03/popular-hard-seltzers-to-be-scarcer-in-utah-under-new-law.

- State bans on the direct sale of cars from manufacturers to consumers[3];
- Labelling laws and consumer protection laws, *see, e.g.*, *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 649-50 (6th Cir. 2010) (holding that Ohio's dairy labelling law prohibiting labelling milk products sold in Ohio as "No Hormones," "Hormone Free, "No Artificial Hormones," etc., did not violate the dormant Commerce Clause despite dairy industry's arguments that the law in effect imposed labelling requirements nationally and the law was not supported by science);
- Milk expiration laws, such as that of Montana, which requires that any milk sold in the state be pasteurized within the previous 288 hours – which in effect prevents out-of-state milk producers from being able to sell in state, and which is substantially more stringent than all other states' laws. Yet it was upheld in court when challenged for an undue burden on commercial speech. *Core-Mark Int'l, Inc. v. Montana Bd. of Livestock*, No. 15-35705, 2018 WL 5724046, *at 5 (D. Mont. Nov. 1, 2018).

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[3] *See* Gerald R. Bodisch, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers* 1-2 U.S. Dep't of Just. (May 2009), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/28/246374.pdf.

2. In Any Case, Proposition 12 Does Not Have the Effect of Regulating Out-of-State Commerce.

Moreover, Proposition 12 does not have the practical effect of regulating out-of-state commerce. To have such an effect means more than merely exerting a collateral impact on consumers or products in other states. For example, a host of state environmental regulations affect consumers elsewhere, but they cannot be said to *regulate* out-of-state commerce. MERRIAM-WEBSTER defines "regulate" as "to govern or direct according to rule." *Regulate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/regulate (last visited Aug. 9, 2022). California's rule only applies to sales taking place in the state, and nowhere else. Businesses may choose to sell or not to sell Proposition 12-compliant pork in California.

Instead, when courts have found that state legislation has effectively created extraterritorial regulation, the legislation in question has imposed a nearly literal impediment to interstate commerce due to physical constraints, unfeasibility, or impossibility because of mutually exclusive state regulatory regimes. As the Court explained in *Healy*, "The critical inquiry is whether the practical effect of the regulation is to *control conduct* beyond the boundaries of the State." *Healy*, 491 U.S. at 336 (emphasis added). It added that in this inquiry the Court should "consider[] how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

For example, while it is properly considered to be a primordial iteration of a *Pike*-esque balancing test

rather than as part of the *Baldwin*/*Brown-Forman*/*Healy* line, the case *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945), is instructive in that the Court used the term "practical effect" when striking down an Arizona law regulating the length of train cars. In 1945, between 93% to 95% of Arizona train traffic was from other states. *Id.* at 771. Arizona's law would have required the dismantling and rebuilding of all train cars when crossing into and out of Arizona. In this way, the law would quite literally have impeded the free flow of interstate commerce. *Id.* at 773. The lower court had also found that not only was there almost no evidence supporting the safety rationale for the regulation, but that there was evidence that the rule decreased safety on the railroad. *Id.* at 779.

Amici argue that should Proposition 12 stand, any state will be empowered to regulate the industry of another state. Nat'l Ass'n Mfrs. et al. Br. 19 ("If California can assert legal control over out-of-state meat production, then Indiana can do the same when it comes to Kentucky's e-cigarette manufacturers, and North Dakota can regulate New York's art transactions.").

But the assertion that the survival of Proposition 12 will enable states to regulate one another is predicated on a plainly flawed analogy. California is not attempting to regulate the pork industry – California is regulating *pork products that are sold within California*. Likewise, Indiana can certainly constitutionally regulate e-cigarettes being sold within Indiana – even if it happened to impact e-cigarette manufacturers residing in Kentucky – so long as it was for a legitimate purpose (*e.g.*, public health and safety), and so long as it was not *directly* regulating

the minute details out-of-state operations. *See Legato Vapors, LLC v. Cook*, 847 F.3d 825, 827 (7th Cir. 2017) (striking down Indiana law that directly imposed strict requirements on the specific "design and operation of out-of-state production facilities, including requirements for sinks, cleaning products, and even the details of contracts with outside security firms and the qualifications of those firms' personnel," but also clarifying that that "the Constitution leaves Indiana ample authority to regulate in-state commerce in . . . e-cigarettes . . . For example, the Act's prohibitions on sales to minors, its requirements for child-proof packaging, ingredient labeling, and purity . . . pose no inherent constitutional problems").

Unlike Indiana in *Legato*, California does *not* require certain specific facilities, manufacturing processes, cleaning plans, security, contract decisions, etcetera. California merely requires that, for a sow's offspring's meat to be sold in California, the sow must be afforded a minimally humane space in which to spend virtually her entire life. Proposition 12 also does not require a certain method of housing through which to achieve this minimum space. How a producer does so is entirely up to the individual pork producer: they have their choice of methods, equipment, facilities, design, cleaning processes, contractual arrangements, and more.

In sum, to apply petitioners' over-expansive vision of the *Baldwin*/*Brown-Forman*/*Healy* line of cases to Proposition 12 would be to fundamentally change that strain of jurisprudence. No longer would the extra-territoriality principle represent, as Justice Gorsuch has described, the "most dormant" of dormant Commerce Clause doctrines. *EELI*, 793 F.3d at 1172.

A. Contrary to Petitioners' Claims, Proposition 12 Has Multiple Legitimate Purposes in Addition to Humane Concerns.

From its inception, the plain language of Proposition 12 offered multiple rationales for its enactment. Section 2 of the text of the proposed law makes explicit that the aim of the act "is to prevent animal cruelty by phasing out extreme methods of farm animal confinement, *which also threaten the health and safety of California consumers, and increase the risk of foodborne illness* and associated negative fiscal impacts on the State of California." Prop. 12, § 2; codified at Cal. Health & Safety Code § 25990 *et seq*. (Emphasis added.)

Because California ballot initiatives like Proposition 12 are placed on the state ballot through direct voter initiative rather than the legislative process, there is no legislative history. But just as legislative history informs us of legislators' intent, the Californian Official Voter Information Guide – drafted by the State Attorney General, the Legislature, and the Legislative Analyst's Office – offers insight into voters' minds when they cast their ballots for Proposition 12. According to Californian case law, for the purposes of statutory construction, voter intent has the same role as legislative intent, when it comes to initiatives. *Pro. Engineers in California Gov't v. Kempton*, 155 P.3d 226, 239 (Cal. 2007). And courts look not only to the plain language of the initiative, but also ballot materials such as ballot summaries and arguments like those present here. *People v. Superior Ct. (Pearson)*, 227 P.3d 858, 862 (Cal. 2010).

The brief Quick-Reference Guide to Proposition 12 dedicates equal space to the two primary rationales

for Proposition 12: the consumption of products from animals treated humanely, and food safety for consumers. Cal. Sec'y of State, *Voter Information Guide* 70 (2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf.

The portion of the Voter Information Guide that supplies more extensive arguments for and against each proposition[4] included a third rationale. In this section, each of the three purposes was again described with equally large paragraphs of text. First, the aim of the law is to "prevent cruelty to animals." *Id.* at 70. Second, to "protect our families from food poisoning." *Id.* Third, to "help family farmers" and create job growth. *Id.*

1. Food Safety and Public Health Concerns are the Quintessential Legitimate State Interests Under *Pike* and Its Progeny.

While petitioners show disdain for the health and safety interests of California and Californians, those very concerns have long been quintessential 'legitimate state interests' in dormant Commerce Clause jurisprudence. Indeed, there is such a strong tradition of these police powers exemplifying valid state interests under Commerce Clause and *Pike* analyses that they are treated with a presumption of legitimacy and subject to a test akin to rational basis (*i.e.*, a minimum level of scrutiny). *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) ("[Laws that are] safety measures carry a strong presumption of validity when challenged

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[4] This portion is composed of submissions from the stakeholders for and against Proposition 12, rather than from the State.

in court. . . . Policy decisions are for the state legislature, absent federal entry into the field.")

Petitioners and their *amici* pejoratively frame Proposition 12 as a "moral crusade," Pac. Legal Found. Br. 4, 15, and as mere "philosophical preferences," Pet. Br. 5. But such hyperbolic language ignores a central truism of law-making: most laws are at their core an expression of substantive political, moral, societal, cultural, or philosophical preferences. Even the most evidence-driven statutes, like vehicle or food safety laws, are still an implicit articulation of a philosophical preference: namely, the value of life, and the acceptable degrees of risk to life. In this way, statutes are often borne from moral, ethical, and philosophical preferences – and the choice of these preferences is properly within the purview of a state's citizens, rather than international or domestic corporations or this Court. *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 442 n.89 (1982) ("the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges").

States began formulating animal anti-cruelty laws hundreds of years ago, and these laws are now part of the fabric of state governance. They address countless concerns, including malicious cruelty, dogfighting and cockfighting, puppy mills, wildlife trafficking, farm animal welfare, and more. However, there are no federal animal welfare standards for the care of animals on the farm, leaving the matter entirely to the states to address the type of animal products they want to have in stores and eaten by their citizens.

B. California's Interest in Public Health and Consumer Safety Is Rationally Tied to Proposition 12.

California's public health and consumer safety rationales for Proposition 12 are legitimate and well-founded. For example, close confinement of livestock, like that common on modern industrial farms and exemplified by gestation crates, necessitates the use of prophylactic antibiotics. Melinda Wenner Moyer, *How Drug-Resistant Bacteria Travel from the Farm to Your Table*, SCIENTIFIC AMERICAN (Dec. 1, 2016). The widespread use of antibiotics in farmed animals is a significant driver of antibiotic resistance in the United States. *Id.* These livestock operations become hyper-active breeding grounds for antibiotic-resistant pathogens which, in turn, can infect people through 1) the consumption of the infected livestock tissues, and 2) through waste from infected livestock entering the water supply, which is then used to water crops that are shipped to and eaten by consumers across the nation. Ctrs. for Disease Control and Prevention, *Antibiotic Resistance Threats in the United States* 28 (2019), https://www.cdc.gov/drugresistance/pdf/threats-report/2019-ar-threats-report-508.pdf.

Antibiotic resistance is considered an "urgent . . . public health threat," with the CDC estimating that antibiotic-resistant pathogens infect more than 2.8 million Americans, and kill more than 35,000 Americans, each year. *About Antimicrobial Resistance*, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/drugresistance/about.html (last visited July 12, 2022).

While the FDA released voluntary "guidelines" a decade ago discouraging the use of antibiotics for growth promotion, they are still regularly overused in

industrial animal agriculture for "disease prevention and control" – *i.e.*, prophylactic use. Moyer, *supra* p. 22. And while antibiotic use in American poultry and cattle has declined in recent years, attempts to discourage the widespread use of antibiotics in the pork industry have not been effective: use in swine has been trending upwards. Chris Dall, *FDA Reports Another Rise in Antibiotic Sales for Livestock*, University of Minnesota Center for Infectious Disease Research and Policy (Dec. 16, 2020), https://www.cidrap.umn.edu/news-perspective/2020/12/fda-reports-another-rise-antibiotic-sales-livestock. Indeed, the farmer who was awarded the 2015 "America's Pig Farmer of the Year" by the NPPC commented, "I think you'll find [mass use of antibiotics] relatively normal in the industry." *Id.*

Furthermore, there is scientific evidence published by USDA researchers that concludes that the pathogens found from animals at sow and nursery farms statistically had much more antibiotic resistance than did those found at finisher farms (where pigs are brought to grow to slaughter weight). John P. Brooks et al., *Microbial Ecology, Bacterial Pathogens, and Antibiotic Resistant Genes in Swine Manure Wastewater as Influenced by Three Swine Management Systems*, 57 WATER RESEARCH 96 (2014). This was related to the fact that sow and nursery farms had the highest antibiotic use – likely due to the extremely close confinement, unsanitary conditions, and concomitant poor health of the animals. John P. Brooks & M.R. McLaughlin, *Antibiotic Resistant Bacterial Profiles of Anaerobic Swine Lagoon Effluent*, 38 JOURNAL OF ENVIRONMENTAL QUALITY 2431 (2009). The young pigs gestating in and nursing from sows crawling with various strains

antibiotic-resistant pathogens likely become infected with those same pathogens. Thus, it stands to reason that attempts to enhance the living conditions of sows, and improving their health overall, will lead to less antibiotic resistance in not only the sows but also in their offspring – offspring that end up on a Californian's dinner plate.

In May of 2021, the California Department of Food and Agriculture (CDFA) published the first formal draft regulations to implement Proposition 12. Pet. App. 47a *et seq*. The CDFA conducted a standardized regulatory impact analysis (SRIA) of the proposed regulations. While in the Initial Statement of Reasons accompanying the SRIA, the CDFA stated that "the law was not primarily written with the concern or benefit of human food-borne illness, worker safety . . . etc.," Pet. App. 76a, the CDFA soon revised its proposed regulations, stating, "[t]he Department recognizes that text of the Proposition 12 ballot initiative, as approved by voters . . . stated that the initiative's purpose was 'to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California.'" Pet. Reply App. 74a.

C. Petitioners and Their *Amici* Fundamentally Misrepresent the Economic Impacts of Proposition 12.

As discussed above, a neutral *amicus* brief filed in this action describes the petitioners' economic arguments as "fundamentally flawed" and "factually

implausible." Agric. and Res. Econ. Professors' Br. 1, 5, 24.

Part of the reason for this is that the industry has already been switching to gestation crate-free housing. Californian voters acted in a manner consistent with the affirmative corporate pledges of the biggest food retailers in the nation. Many companies have promised their consumers that they will forbid sourcing pork or eggs from operations that confine the sows or hens in extreme ways. *See infra* pp. 27-28.

In 2013, Smithfield, the largest pork supplier to the United States' domestic market, announced that nearly forty percent of sows in the company's United States-based farms were group-housed. Katie Doherty, *Smithfield: on Track for Crate-Free Sows by '17*, ARKANSAS DEMOCRAT GAZETTE (Jan. 2013).

By 2014, the number of Smithfield sows out of crates had risen above fifty percent, and Smithfield was asking its contract farmers to do the same. *Smithfield Foods Recommends Its Contract Growers Convert to Group Housing for Pregnant Sows*, Globe Newswire (Jan. 7, 2014), https://www.globenewswire.com/news-release/2014/01/07/600779/10063123/en/Smithfield-Foods-Recommends-Its-Contract-Growers-Convert-to-Group-Housing-for-Pregnant-Sows.html.

Both Smithfield and Hormel Foods aim to end the use of gestation crates. *See* Doherty, *supra* pp. 25-26. Tyson Foods stated that as of December 2018, over half of all sows on farms supplying to Tyson were group-housed, "and [they] expect this number to grow." *Sow Housing*, Tyson Foods, https://www.tysonfoods.com/news/viewpoints/sow-housing (last visited Aug. 9, 2022).

The pork industry has been supplying gestation-crate free pork to the market for years, due to corporate and consumer buyers' demand for it. Indeed, it is "relatively straightforward," according to the farmers and processors themselves: in a recent veterinarian report released by the CDFA, "farmers and processors . . . told [the veterinarian] that tracing pigs throughout the pig production cycle is relatively straightforward because farmers and processors have already been tracing product from sow farm to end-product for years in order to market and sell premium pork products (such as 'crate-free' pork)." Dr. Elizabeth Cox, *Lessons About Proposition 12 from Recent Pork Producer Visits*, Cal. Dep't of Food and Agric. Animal Care Program 2 (July 2022), https://www.cdfa.ca.gov/AHFSS/pdfs/prop-12_pork_producer_visits.pdf.

This echoes the assurances that the President and CEO of Tyson Foods, Donnie King, emphatically gave to investors and stakeholders in 2021: "Tyson is currently aligning incentivizing suppliers where appropriate. We can do multiple programs simultaneously, including Prop 12 . . . we can certainly provide the raw material to service our customers in that way." Tyson Foods, *Tyson Foods Third Quarter 2021 Earnings August 9, 2021 at 9:00 a.m. Eastern* 15 (Aug. 9, 2021), https://s22.q4cdn.com/104708849/files/doc_financials/2021/q3/08-11-21_Tyson-Foods-080921.pdf.

These "premium pork products" mentioned above by farmers and processors are in high demand because, long before Proposition 12 came to any ballot, many of the biggest corporate buyers of pork publicly stated their intent to only use pork from sows housed outside gestation crates. This includes:

- McDonald's[5]
- Walmart[6]
- Hormel Foods[7]
- Burger King[8]
- Safeway[9]
- Wendy's[10]
- Kroger[11]
- Stop & Shop[12]
- Target[13]

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5 Stephanie Strom, *McDonald's Set to Phase Out Suppliers' Use of Sow Crates*, NEW YORK TIMES (Feb. 13, 2012).

6 *Animal Welfare*, Walmart (April 21, 2022), https://corporate.walmart.com/esgreport/esg-issues/animal-welfare.

7 *Hormel Foods Company Information About California Proposition 12*, Hormel Foods, https://www.hormelfoods.com/newsroom/news/hormel-foods-company-information-about-california-proposition-12/ (last visited Aug. 4, 2022).

8 Tim Carman, *Pork Industry Gives Sows Room to Move*, THE WASHINGTON POST (May 29, 2012).

9 *Id.*

10 *Id.*

11 *Animal Welfare Policy*, Kroger Co. (Aug. 2021), https://www.thekrogerco.com/wp-content/uploads/2018/07/The-Kroger-Co_AnimalWelfarePolicy_2018-July.pdf.

12 *Farm Animal Welfare Policy*, Stop & Shop, https://stopandshop.com/pages/farm-animal-welfare-policy/ (last visited Aug. 4, 2022).

13 *Food Animal Welfare Commitments*, Target, https://corporate.target.com/sustainability-ESG/environment/animal-welfare/food-animal-welfare (last visited Aug. 4, 2022).

- ConAgra[14]
- Denny's[15]

The fatal inconsistency in petitioners' position is laid bare by the following: when grocery chain and big box corporations demand that only gestation crate-free pork may be sold in their stores, the industry willingly and voluntarily responds by making the necessary shifts in production to maintain supply, yet when a duly elected state legislature acting on the votes of its citizens enacts the same standards, petitioners come before this Court claiming that providing the state with compliant pork will cause the collapse of the national pork supply chain. If pork producers can supply crate-free pork to tens of thousands of McDonald's outlets – to say nothing of the dozens of other companies across the nation with tens of thousands of their own outlets – then it can supply California's market. Here, the industry's argument quickly falls like a hypocritical house of cards.

Petitioners have also failed to offer any unbiased expert-backed analyses to support their economic catastrophizing. Conclusory references to one's own virtually unsupported[16] allegations in one's own com-

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[14] *Conagra Brands: Frequently Asked Questions*, ConAgra, https://www.conagrabrands.com/frequently-asked-questions (last visited Aug. 4, 2022).

[15] Carman, *supra* note 8.

[16] The only economic expert cited by petitioners spent three years in academia and has since been employed by petitioners in some capacity. Pet. App. 341a. He bases his conclusions on "observation" and a few sources, rather than the extensive analysis demonstrated in Agric. and Res. Econ. Professors' Br., and errs in the 13% estimate

plaint do not provide sufficient support for their prophesies. And tellingly, one expert that *amici* cite, Hanbin Lee, at State Pork Producer Ass'ns et al. Br. 21, is done so in the carefully wrought vacuum that was needed as Hanbin Lee is one of the expert academics whose research concludes that Proposition 12 will have only a *marginal* effect on the pork market outside California. *E.g.*, Hanbin Lee, Richard J. Sexton, & Daniel A. Sumner, *Economics of Mandates on Farm Practices: Lessons from Regulation of Pork Sold in California*, UC Davis Agric. Workshop (Oct. 6, 2020), https://arefiles.ucdavis.edu/uploads/filer_public/7f/7c/7f7ca688-97724b3aaa871d9880a0b1ab/pork_ag_econ_workshop_hanbin_lee.pdf (demonstrating that most pork producers will not enter the Proposition 12-compliant market; a significant quantity of domestic pork is in products not covered by Proposition 12; and the impact of Proposition 12 on consumers outside of California is negligible). Petitioners' *amici* purposely avoid Lee's ultimate findings by citing to a cherry-picked sentence, disregarding his conclusions. State Pork Producer Ass'ns et al. Br. 21.

Furthermore, this Court has emphasized that the dormant Commerce Clause protects interstate commerce, *not* interstate commercial firms. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (holding that, despite the Maryland statute's burden falling entirely on interstate firms, with no local producers or refiners, that the statute does not violate the dormant Commerce Clause).

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of California's share of demand due to failure to account for exported product, *see* Agric. and Res. Econ. Professors' Br. 9 & n.9.

At worst, Proposition 12 may incidentally burden some – but certainly not all – interstate commercial entities; specifically, those that house their breeding sows in extremely small and inhumane gestation crates. A number of large companies, however, are already in compliance with Proposition 12, and can easily begin supplying California with product.

For example, the pork sold by Niman Ranch, a firm that gets pork product from over 750 family farms across the nation, is already compliant with Proposition 12. *Frequently Asked Questions*, Niman Ranch, https://www.nimanranch.com/faq/ (last visited Aug. 9, 2022).

So is the pork sold by large producer duBreton and its subsidiary North Country Smokehouse, as well as countless other farms and producers across the nation ("a massive shift"). *Making Prop 12 Compliant Pork Accessible*, PR NEWS WIRE (Sept. 20, 2021), https://www.prnewswire.com/news-releases/making-prop-12-compliant-pork-accessible-301380630.html.

While petitioners attempt to paint a picture of struggling Midwest family farmers burdened by the alleged increased costs of raising Proposition 12-compliant pigs, in reality, giant conglomerates own and control most pork production in the United States.[17] What's more, some of the biggest conglomerates in domestic pork production are foreign-owned.

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[17] In 2012, only 5% of the hog and pig operations by number held 68% of the inventory; in other words, a very small number of large corporate industrial farms controlled over two-thirds of swine production. And that trend of corporate consolidation has been growing for decades. USDA Nat'l Agric. Stat. Serv., *U.S. Hog Industry* 3 (Mar. 2016) https://www.nass.usda.gov/Publications/Highlights/2016/HogIndustryHighlights_No2016-1.pdf.

Smithfield Foods – the owner of *one in four* hogs in the United States – is a wholly owned subsidiary of WH Group, a Chinese billionaire's company. Jennifer Wang, *The Chinese Billionaire Whose Company Owns Troubled Pork Processor Smithfield Foods*, FORBES (Apr. 16, 2020).

Another top producer in the United States is JBS USA, which despite its name is a wholly owned subsidiary of a Brazilian company. *About Our Company*, JBS USA, https://sustainability.jbssa.com/chapters/who-we-are/about-our-company/ (last visited July 28, 2022) ("JBS USA Pork is the second-largest fresh pork producer in the U.S. . . .").

This Court should not invalidate Proposition 12 to benefit foreign-owned corporations that are at the helm of the pork industry: such a decision cannot possibly be in line with the true purpose of the dormant Commerce Clause doctrine.

Lastly, not only is Proposition 12's true economic impact far less than petitioners portray it to be, its qualitative effect on interstate commerce is also distinguishable from that of laws struck down under the dormant Commerce Clause.

For example, often when the Court finds that one state's law is a substantial impediment to interstate commerce, the case involves laws that are completely anathema to cross-nation commercial activity. *See, e.g.*, discussion of *So. Pac. Co. v. Arizona*, 325 U.S. 761 *supra* p. 17; *Bibb*, 359 U.S. 520, 529 (holding that Illinois law requiring trucks to have unique mudguard unconstitutional because it would paralyze the travel of goods across country); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 446-57 (1978) (holding that

a Wisconsin law banning trucks over fifty-five feet long on state highways unconstitutional due to the state's failure to produce any evidence supporting its safety rationale and experts' adverse opinions as well as extreme impact on nationwide interstate freight transport); *but cf. Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 649-50 (holding that Ohio's dairy labelling law prohibiting labelling milk products sold in Ohio as "No Hormones," "Hormone Free, "No Artificial Hormones," etc., did not violate the dormant Commerce Clause despite dairy industry's argument that it, in effect, imposed Ohio labelling regulations across the country and created barriers in the free flow of interstate commerce).

In this way, laws on the in-state sale or labelling of products impact interstate commerce in a qualitatively and quantitatively different manner than laws that require the use of different vehicles or equipment upon crossing state borders. Proposition 12 is analogous to the Ohio dairy labelling law of *Boggs*: it may be annoying for a corporation to comply, because products sold in California may need to be separated from those sold elsewhere, but the corporation can choose to sell in California or not. (And, as discussed above, plenty of suppliers already segregate different types of pork.) The freights of *Southern Pacific Co. v. Arizona* that are bound by the national railway system, however, cannot choose to grow wings to avoid crossing into a particular state to meet its demands. Nor can the trucks of *Raymond Motor Transportation* grow and shrink according to which state they enter along the Interstate Highway System during their lengthy journeys. But pork producers can segregate premium, organic, humane, pasture-raised, or Proposition 12-

compliant pork from other pork, as labels in grocery stores amply demonstrate, and producers can also choose where they peddle their products.

In sum, should this Court create a new standard by which dormant Commerce Clause cases are judged and, moreover, assign more weight to expert-negated claims than to direct analyses from experts themselves, then this Court will expand the dormant Commerce Clause's power far beyond its current prudential borders. Should that happen, this Court must then anticipate a slew of dormant Commerce clause challenges to a host of current state laws that have well-documented adverse out-of-state economic impacts, such as anti-immigration laws, public health laws, consumer and public safety laws, reproductive health laws, labelling laws, and many, many more.

CONCLUSION

The judgment of the Ninth Circuit should be upheld.

Respectfully submitted,

JESSICA L. BLOME
COUNSEL OF RECORD
GREENFIRE LAW, P.C.
P.O. BOX 8055
BERKELEY, CA 94710
(510) 900-9502
JBLOME@GREENFIRELAW.COM

SCOTT EDWARDS
KATHRYN SCHULTZ
THE CENTER FOR A HUMANE ECONOMY
P.O. BOX 30845
BETHESDA, MD 20824
ANIMAL WELLNESS ACTION
611 PENNSYLVANIA AVE. S.E. #136
WASHINGTON, DC 20003

COUNSEL FOR AMICI CURIAE

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