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 PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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August 2022

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a consumer-advocacy organization with members in all 50 states, advocates on behalf of its members before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers in the retail marketplace. Public Citizen has long supported the authority of states to enact consumer-protection measures and has opposed efforts by industry to invoke federal law to escape responsibility for complying with state consumer-protection laws.

Public Citizen submits this brief to address the first question presented: whether California's regulation of the in-state sale of pork products has an extraterritorial effect that violates the dormant Commerce Clause. Public Citizen is concerned that petitioners' argument on this question, if accepted by the Court, would sow confusion and uncertainty about the validity of state consumer-protection laws, incentivizing challenges to such laws and deterring states from enacting valuable protections for consumers in their states.

SUMMARY OF ARGUMENT

I. The Commerce Clause grants Congress authority to regulate interstate commerce. This Court has held that the Commerce Clause also has a "dormant" aspect that bars states from adopting laws that impede interstate commerce. Under a standard dormant Commerce Clause analysis, a state law that

[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

discriminates against interstate commerce is typically invalid *per se*. In contrast, a nondiscriminatory state law is subject to the more flexible balancing standard set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), under which the state law will be upheld unless the burden it imposes on commerce clearly exceeds the law's local benefits.

In a small number of cases, the Court has applied a variation of dormant Commerce Clause analysis to bar a state from regulating extraterritorially, that is, directly regulating commerce occurring wholly outside of its borders. Unlike standard dormant Commerce Clause analysis, extraterritoriality principles arise from the nation's federal structure, which imposes an inherent limit on the territorial reach of state authority. Accordingly, the principle does not accommodate the strength of the state's interest. Rather, direct regulation of out-of-state commerce is prohibited, notwithstanding any in-state effects. This Court has confined the extraterritoriality principle to circumstances in which a state has regulated out-of-state commerce directly, either by prohibiting or dictating the terms of out-of-state transactions or by penalizing in-state merchants based on the terms of their out-of-state transactions in order to gain an impermissible competitive advantage over other states.

II. The extraterritoriality principle does not bar states from enacting nondiscriminatory consumer-protection statutes with which all businesses, in-state and out-of-state, must comply to participate in the state's marketplace. Such statutes are instead potentially subject to the *Pike* balancing test, which gives states leeway to impose burdens on commerce to further the state's interests in consumer protection.

Under these principles, Proposition 12 is a consumer-protection law that directly regulates only in-state commerce. It affects out-of-state pork suppliers in the same way that any nondiscriminatory consumer-protection standard would: by requiring pork products to conform to a uniform standard—here, one that the state believes protects the health of its citizens. Under this Court's precedent, such an effect is not a direct regulation of commerce in violation of the extraterritoriality principle.

III. This Court should reject petitioners' proposal to expand the extraterritoriality principle to cover nondiscriminatory state consumer-protection standards that have "material" effects outside the state. In articulating the inherent limits of state authority in our federal system, the Court has consistently defined those limits without regard to the characteristics of the particular state, industry, or regulation at issue. By contrast, the effects-driven test that petitioners propose would lead to different outcomes in different states, because variations in states' economies, the structure of affected industries, and the regulatory requirements at issue would inevitably lead to variations in out-of-state "effects." If petitioners' proposal were adopted, neither states nor courts would have any *ex ante* guidance as to whether a law should be scrutinized under *Pike* or petitioners' refashioned extraterritoriality test. That uncertainty would encourage more legal challenges to state consumer-protection laws, creating an *in terrorem* effect that could deter states from adopting measures to protect consumers in their states.

Petitioners' application of their expanded extraterritoriality test to Proposition 12 shows that the test does not stand up to scrutiny. *First*, petitioners argue that California's regulation of in-state pork sales is extraterritorial because California imports almost all pork consumed in the state. That expansive view of extraterritoriality conflicts with this Court's precedents. Moreover, it would have the perverse result of treating states differently based on arbitrary factors such as their status as importers or exporters of products into interstate commerce, their ratio of imports to in-state sales, and the size of their economies.

Second, petitioners focus on alleged effects of the state law on the industry. Although they argue that industry members nationwide will comply with Proposition 12, the law's effect on out-of-state producers is the same as that of any consumer-protection standard: They must make a business judgment about whether the benefits of sales in the state's market exceed the costs of compliance. Petitioners also allege that Proposition 12 will increase prices for out-of-state pork consumers. Even if that assertion were correct, a rule that treated state laws as extraterritorial if they affected out-of-state retail prices would have far-reaching effects that would undermine state sovereignty and place more commercial activity under Congress's exclusive control.

Third, an allegation that a state law does not advance the state's interest in health and safety does not make the law extraterritorial. Unlike standard dormant Commerce Clause balancing tests, which take account of the state's interest, the extraterritoriality test does not treat the state's interest in the regulation as a relevant consideration. Thus, California could not directly regulate pork production on Indiana farms no matter how much evidence it mustered on the health benefits of its production standards. Conversely, although the absence of such benefits may be relevant to whether the regulation is proper under the *Pike* balancing approach, that absence does not render in-state regulation extraterritorial.

Fourth, petitioners contend (without offering support) that Proposition 12 will subject farmers to inconsistent state regulations. This contention too has no place in extraterritoriality analysis. Further, their claim of inconsistency provides no basis for striking down Proposition 12 rather than the laws of other states. Petitioners' theory also has no logical stopping point because many state consumer-protection laws short of a complete ban could affect out-of-state commerce and create the same type of claimed "conflicts" with the laws of other states. Petitioners' vision of extraterritoriality would open up a Pandora's box of uncertainty for states that seek to enact measures to protect consumers and would force federal courts to grapple with consequences for years to come.

ARGUMENT

I. The Commerce Clause restrains state authority in limited and carefully defined circumstances.

A. The dormant Commerce Clause aims primarily at laws that discriminate against or excessively burden interstate commerce.

In the federal system established by the Constitution, states have "broad authority to enact legislation for the public good—what [this Court has] often called a 'police power.'" *Bond v. United States*, 572 U.S. 844, 854 (2014); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (describing the "police power" as the "general power of governing"). The police power "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." *Bacon v. Walker*, 204 U.S. 311, 317 (1907); *see Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). It is "an exercise of the [state's] sovereign right." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

By contrast, the Constitution grants Congress only enumerated powers, including the power "[t]o regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. When Congress exercises that power "by enacting legislation, the legislation controls" in the face of contrary state police-power regulations. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018). Absent such legislation, the general rule is that federal law does not supersede "the historic police powers of the States," given the "respect" owed them "as independent sovereigns in our federal system." *Wyeth v. Levine*, 555 U.S. 555, 565–66 & n.3 (2009) (cleaned up).

The general rule gives way, however, where "the Commerce Clause by its own force restricts state protectionism." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). In that circumstance, the so-called dormant Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Id.* at 2459. As the name implies, the dormant Commerce Clause operates in the absence of "congressional action," leaving it "'to the courts to formulate the rules' to preserve 'the free flow of interstate commerce,'" *Wayfair*, 138 S. Ct. at 2089–90 (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945)), and freeing Congress from the need to "pass a law striking down every protectionist measure that a State … chose to enact," *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2461 n.4.

This Court has fashioned two general rules for scrutinizing state laws that are alleged to impede interstate commerce. First, state laws that discriminate against interstate commerce—that is, "impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State," *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994)—"face a virtually *per se* rule of invalidity." *Wayfair*, 138 S. Ct. at 2091 (internal quotation marks omitted). Under the dormant Commerce Clause, a state can advance its interests only through nondiscriminatory means, unless "the State [can] demonstrate both that the [discriminatory] statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotation marks omitted).

Second, if a state law does not discriminate against interstate commerce—that is, if it "regulates evenhandedly to effectuate a legitimate local interest"—it will be upheld despite its "incidental" effect on interstate commerce "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142; *see Wayfair*, 138 S. Ct. at 2091. In comparison to the virtually *per se* bar on discriminatory state laws, the *Pike* balancing test represents a "much more flexible approach." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *see also Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 339 (2008) ("State laws frequently survive this *Pike* scrutiny[.]").

These principles, however, do not grant a general license to review the wisdom of state police-power regulations, including those that affect commercial transactions. States have long used their police powers to enact consumer-protection laws that address "whether the manufacture of particular articles of traffic, *or the sale of such articles*, will injuriously affect the public," *Leisy v. Hardin*, 135 U.S. 100, 123 (1890) (emphasis added). In general, absent discrimination against or excessive burden on interstate commerce, whether "the policy thus pursued by the State is wise or unwise" is not a question for "national authorities." *Patterson v. Kentucky*, 97 U.S. 501, 504 (1879). Rather, the state alone is "the judge of the necessity or expediency of the means adopted." *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 40 (1908). When regulating intrastate commerce, states are entitled to the same respect that Congress receives when it regulates interstate commerce. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941) (explaining that questions that "relate to the wisdom, need, and effectiveness of a particular project … are therefore questions for the Congress not the courts."); *Ferguson v. Skrupa*, 372 U.S. 726, 730 n.7 (1963) ("When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature." (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932))).

B. A state also lacks authority to regulate commerce wholly outside its borders.

In a small number of this Court's cases, the Court has applied a distinct strand, or "variation[]," *Wayfair*, 138 S. Ct. at 2091, of dormant Commerce Clause analysis to bar a state from regulating "extraterritorially." That principle prevents application of state laws "to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality op.)).

Although this Court has invoked the concept of extraterritoriality in dormant Commerce Clause cases, *see id.*, the principle derives from the nation's federal structure and the inherent limits it imposes on each state's authority to regulate outside of its borders. Such limits inhere in the structure of a Constitution for a union comprising sovereign states possessing police powers within their territory, and operate to restrain states from regulating wholly out-of-state conduct, whether or not it is commercial (and irrespective of the contours of the dormant Commerce Clause doctrine). *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992); Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and the Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (1987); Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. Pa. L. Rev. 973 (2002); *see, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 91 (1985) ("[F]or an act done within the territorial limits of the State of Washington under authority and license from that State one cannot be prosecuted and punished by the State of Oregon." (quoting *Nielsen v. Oregon*, 212 U.S. 315, 321 (1909))).

Consistent with these federalism principles, the Court has regarded extraterritorial regulation of commerce as beyond "the inherent limits of the enacting State's authority." *Healy*, 491 U.S. at 336. As the

Court has explained, "[t]he limits on a State's power to enact substantive legislation [regulating commerce] are similar to the limits on the jurisdiction of state courts." *Id.* at 336 n.13 (quoting *Edgar*, 457 U.S. at 643 (plurality op.)). Because "the sovereignty of each State implies a limitation on the sovereignty of all its sister States," *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (cleaned up), "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment" against a nonresident defendant, *id.* at 1781 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)). In similar fashion, the dormant Commerce Clause, acting as an instrument of interstate federalism, may prevent a state from regulating out-of-state commerce, "whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642–43 (plurality op.)).

Unlike standard dormant Commerce Clause analysis, the extraterritoriality principle, where it applies, operates as an absolute bar on state authority to regulate out-of-state conduct: A state law that is extraterritorial cannot be saved by balancing its extraterritorial effect against the state's interests in preventing in-state harms. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579–80 (1986) (agreeing with argument that the state's "legitimate" interest in lowering prices for consumers is "irrelevant" to the constitutionality of a "direct regulation[] of interstate commerce that the Commerce Clause wholly forbids"). Rather, genuinely extraterritorial laws exceed the state's powers in all circumstances. If a state is harmed by commerce occurring wholly outside of its borders, its recourse is to ask Congress to exercise its commerce power to regulate the activity. *See*, *e.g.*, *BMW of N. Am. v. Gore*, 517 U.S. 559, 571 (1996) (stating that "while we do not doubt that Congress has ample authority to enact such a [disclosure] policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States" (footnote reference omitted)).

For example, in *Edgar*, the Court addressed an Illinois law that regulated tender offers as applied to a Delaware corporation headquartered in Connecticut seeking to acquire an Illinois corporation. 457 U.S. at 626–27. A plurality of this Court determined that the law violated the dormant Commerce Clause because it "directly regulate[d] transactions which take place across state lines, even if wholly outside the State of Illinois," by "prevent[ing] MITE from making its offer and concluding interstate transactions … with those living in other States and having no connection with Illinois." *Id.* at 641–42.

Even when one of the parties to an out-of-state transaction is an in-state business, this Court has held that state laws impermissibly regulate extraterritorially if they penalize the business based on the terms of their transactions in markets outside the state in order to shield the state from competition from its sister states. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), for example, the Court invalidated a New York law that banned in-state milk dealers from selling milk within the state if it was "bought outside," unless the dealer paid the out-of-state producer a price "that would be lawful upon a like transaction within the state." *Id.* at 519. The Court held that, by setting the price that in-state merchants had to pay to out-of-state farmers, New York had "directly burdened the prosecution of interstate business" by imposing "a barrier to traffic" in milk "as effective as" a customs duty. *Id.* at 521–22 (internal quotation marks omitted). Because the purpose and effect of the law was to "suppress or mitigate the consequences of competition between the states," the Court held that it was "beyond the power of a state" under the Commerce Clause. *Id.* at 522.

In *Brown-Forman* and *Healy*, the Court applied *Baldwin* to state "price affirmation" laws that required sellers to affirm that the price of beer sold in a state was no higher than the price sold in the regional or national market. *Brown-Forman*, 476 U.S. at 576 (national market); *Healy*, 491 U.S. at 326 (regional market). The Court held that the price-affirmation laws "directly control[led] commerce occurring wholly outside the boundaries of [the] State," *Healy*, 491 U.S. at 336, because they prevented an in-state seller from "chang[ing] its prices elsewhere in the United States" and, thus, "regulat[ed] the price to be paid for liquor in those States," *id.* at 334 (internal quotation marks omitted). As the Court explained, such laws involve the "kind of potential regional and even national regulation of the pricing mechanism for goods [that] is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes." *Id.* at 340.

II. The extraterritoriality principle does not bar a state from enacting nondiscriminatory consumer-protection laws for products sold in the state.

A. State consumer-protection laws often set uniform standards with which all businesses—in-state and out-of-state—must comply if they want to participate in the state's marketplace. *See*, *e.g.*, Cal. Health & Saf. Code § 24502 (prohibiting the manufacture and sale of unsafe infant cribs); Colo. Rev. Stat. § 25-5-303 (prohibiting sale or distribution of "any bedding or bedding materials which are not clean" or "may be deemed injurious to the public's health"); Ind. Code Ann. § 16-42-11-6 (prohibiting sale of "eggs that do not meet the standards of quality and weight set forth by the state egg board").

Because of their nondiscriminatory nature, such laws (if alleged to burden interstate commerce) would be scrutinized under *Pike* and upheld unless the burden on interstate commerce was clearly excessive compared to the local benefits. This approach reflects the understanding, long recognized by this Court, that nondiscriminatory consumer-protection laws are valid exercises of the state's police power that do not violate the dormant Commerce Clause absent a showing of an excessive burden. *See Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 352 (1939) (upholding application of price regulation of milk sold in the wholesale market, enacted for "the welfare of the producers and consumers of milk in Pennsylvania," as applied to milk destined for interstate commerce); *Pa. Gas Co. v. Pub. Serv. Comm'n of N.Y.*, 252 U.S. 23, 30–31 (1920) (upholding retail rate regulation of gas transported in interstate commerce); *see also Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963) ("[T]he Court recognized that the States have always possessed a legitimate interest in the protection of their people against fraud and deception in the sale of food products at retail markets within their borders" (cleaned up, citing cases)).

Nondiscriminatory state consumer-protection laws can affect transactions outside the state's jurisdiction because out-of-state businesses (like in-state businesses) must choose between complying with the law and forgoing the benefits of the state's market. That choice, however, does not implicate the structural protections of interstate federalism that the extraterritoriality principle is designed to enforce: Federalism principles, for instance, are not offended when a state exercises authority over a nonresident that causes in-state harm through "some act by which it purposefully avails itself of the privilege of conducting activities within the forum State." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (cleaned up). As *Ford* contemplates, states may apply their product-liability laws to out-of-state defendants over which they have jurisdiction, even if the consequence is to alter the defendant's conduct in another state or even "overseas." *Id.* at 1027.

Thus, a state consumer-protection law that regulates the nature and quality of products or services that a business chooses to make available to consumers within the state's borders does not trigger extraterritoriality concerns. *Baldwin* illustrates this principle. There, the Court contrasted New York's direct regulation of the price that in-state milk dealers had to pay to out-of-state producers, which was impermissible, with regulations that the state could impose on market participants to protect public health. 294 U.S. at 525. As the Court indicated, New York could require "farmers in Vermont and elsewhere" to produce "appropriate certificates," could "exclud[e]" out-of-state milk from its market if the producer failed to take "necessary safeguards" to protect public health, *id.* at 524, and could impose "fitting standards of sanitation [on importers] before the products of the farm or factory may be sold in its markets," *id.* at 528. Such public-health measures would violate the dormant Commerce Clause if they discriminated against interstate commerce or imposed burdens on commerce that clearly exceeded local benefits, but they would not violate the extraterritoriality principle. State laws "may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Sherlock v. Alling*, 93 U.S. 99, 103 (1876).

In short, nondiscriminatory state consumer-protection laws do not directly regulate out-of-state commerce simply because they have effects on businesses located in other states. Indeed, subject to territorial limits on their authority, states generally have "concurrent regulatory power" with Congress and one another to enact laws affecting interstate commerce, except as to "subjects that by their nature 'imperatively deman[d] a single uniform rule, operating equally on the commerce of the United States.'" *Wayfair*, 138 S. Ct. at 2090 (quoting *Cooley v. Bd. of Wardens of Port of Phila. ex rel. Soc. for Relief of Distressed Pilots*, 53 U.S. 299, 319 (1852)). Although a state's exercise of that concurrent power necessarily produces out-of-state effects, it would be nonsensical to suggest that the state has thereby *directly regulated* out-of-state commerce. Such a rule would severely constrain states' authority to address "local necessities," *id.* (quoting *Cooley*, 53 U.S. at 319), and resurrect the constitutional theory, long ago rejected by this Court, that Congress has "exclusive power to regulate commerce" that affects more than one state, *id.* (discussing *Gibbons v. Ogden*, 22 U.S. 1, 236 (1824) (op. of Johnson, J.)).

For these reasons, nondiscriminatory state consumer-protection laws that apply only to in-state commerce are subject to standard dormant Commerce Clause analysis, specifically *Pike* balancing; they are not invalid *per se* under the extraterritoriality principle. *Cf. Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 669 (2003) (holding that Maine's prescription-drug rebate program for state residents did not operate extraterritorially because the program did not "regulate the price of any out-of-state transaction" or tie "the price of in-state products to out-of-state prices." (internal quotation marks omitted)).

B. Under the foregoing principles, Proposition 12 does not violate the extraterritoriality principle. Proposition 12 regulates only in-state transactions—that is, "the sale within the state" of noncompliant pork products. *See* Cal. Health & Saf. Code §§ 25990(b)(2) (Pet. App. 38a); *see also id.* § 25991(o) (Pet. App. 42a) (defining "sale" based on where the buyer takes possession of the product). The state law does not impose criminal or civil penalties on farmers, packers, or merchants for their out-of-state conduct, and it does not otherwise penalize in-state merchants based on the terms of their out-of-state transactions in order to gain a "competitive economic advantage," *Healy*, 491 U.S. at 332, over other states.

Although Proposition 12 prevents merchants from selling noncompliant pork products within the state, that prohibition directly targets the product that is brought within the state's jurisdiction for retail sale in state—a product that the state believes raises health risks for its citizens. By its terms, Proposition 12 addresses the threat that "extreme methods of farm animal confinement" pose to "the health and safety of California consumers" and the associated "risk of foodborne illness." Pet. App. 37a.[2] Addressing such health and safety concerns is a "traditional exercise" of a state's police power, *Hill v. Colorado*, 530 U.S. 703, 715 (2000), as petitioners acknowledge. *See* Pets. Br. 36.

Accordingly, Proposition 12 is an exercise of state sovereignty that, like any number of nondiscriminatory state consumer-protection laws that regulate the price, quality, nature, packaging, or disclosures of products sold to consumers within a state, does not directly regulate out-of-state commerce. Because the law also does not discriminate against interstate commerce, analysis of a dormant Commerce Clause challenge turns on *Pike* balancing.

III. Petitioners' proposed expansion of the extraterritoriality principle would harm states' ability to protect consumers.

In *Healy, Brown-Forman*, *Edgar*, and *Baldwin*, the Court applied the extraterritoriality principle in a manner that recognized that the states are entitled to "equal dignity and sovereignty under the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct.

[2] In addition to challenging California's authority to enforce Proposition 12 as a consumer-protection measure, petitioners argue that the law's purpose of advancing animal welfare impermissibly regulates out-of-state farming practices. Pets. Br. 40–41. Although the extraterritoriality principle may bar a state from regulating conduct occurring wholly outside of its borders based on moral or ethical concerns, the out-of-state effects of *in-state* conduct or transactions that the state has moral reasons for regulating do not necessarily make the in-state regulation extraterritorial. Here, because California may bar the in-state sale of pork products that do not meet Proposition 12's production standards for health and safety reasons, the Court need not address this question.

1485, 1497 (2019). In each case, the Court's finding of extraterritoriality was based on a facial examination of the challenged statutory provisions, not on a trial-court record concerning the statute's *effects* on commerce. Further, the Court's determination of extraterritoriality was not tied to the economic characteristics of the particular state, industry, or regulation at issue.

Nonetheless, petitioners here ask this Court to adopt a different approach. Under petitioners' refashioned extraterritoriality principle, a court would treat a nondiscriminatory state law as extraterritorial if the court concluded that the law had "material extraterritorial effects." Pets. Br. 23, 27. If such effects were found, the law would be "almost *per se* invalid." Pet. 35 (quoting *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015)).

Petitioners' proposed approach would pose several problems for states' ability to enact nondiscriminatory laws to protect consumers. Because the "materiality" of a state law's effect on commerce will be affected by characteristics of the state's economy, the industry, and the regulatory requirements at issue, petitioners' approach would lead to disparate outcomes in different states with similar laws. And the approach would require an evidentiary hearing on a law's effect on commerce before a court could make the preliminary determination whether the law would be subject to *Pike* balancing or petitioners' refashioned extraterritoriality standard (under which the law would almost certainly fail). Thus, states would have no meaningful *ex ante* guidance about whether a particular law would survive dormant Commerce Clause review, and courts would have no mechanism for achieving consistent outcomes in dormant Commerce Clause challenges to state consumer-protection statutes. The absence of such assurance would open the door to legal challenges to state consumer-protection laws whenever an affected industry could plausibly allege a "material extraterritorial effect." Pets. Br. 23, 27. And by opening the door to such attacks, petitioners' approach risks generating an *in terrorem* effect that would deter states from adopting consumer-protection laws.

Perhaps recognizing these difficulties, petitioners attempt to portray Proposition 12 as somehow different in nature from typical consumer-protection statutes, based on allegations about the supposedly unique attributes of California's market, the pork industry, and Proposition 12's requirements. Petitioners' arguments, however, reveal just how amorphous their standard would be. The distinctions that they attempt to draw do not withstand scrutiny and instead highlight that their approach would lead to arbitrary and inconsistent outcomes and force courts to treat the fifty equal states in dissimilar fashion.

Allegations concerning market characteristics. Petitioners argue that the "extraterritoriality principle" should be "trigger[ed]" here because "[m]ore than 99% of pork consumed in California is produced outside of that State." Pet. 21. Such a trigger would mean that a state's power to regulate in-state sales for the protection of consumers would turn on the ratio of in-state to out-of-state production. For example, under petitioner's approach, Proposition 12 presumably would *not* violate the extraterritoriality principle if some smaller proportion of the pork consumed in California were produced out of state. Petitioners do not specify the threshold (70 percent? 50 percent? 30 percent?).

Nor do petitioners explain how they selected "pork" as the relevant market definition for assessing the threshold. Proposition 12 regulates the sale of veal and egg products, as well as pork. *See* Cal. Health & Saf. Code § 25990(b) (Pet. App. 38a). Moreover, with respect to pork, the law addresses only "[w]hole pork meat," *id.*, defined as "any uncooked cut of pork," and excludes "combination food products," such as "soups, sandwiches, pizzas, [and] hotdogs," from its scope. *Id.* § 25991(u) (Pet. App. 43a). Petitioners do not explain how a court should decide which products to consider when calculating the ratio of in-state to out-of-state sources for purposes of implementing their extraterritoriality "trigger."

Because the ratio of in-state to out-of-state sources of any product will necessarily differ from state to state, petitioners' test would allow some states to enact health and safety laws for the protection of consumers, while other states would be forbidden from enacting exactly the same laws for products sold in their states. States with a high percentage of imports would be stymied, while low-import states could adopt consumer-protection laws, subject to *Pike* balancing. Meanwhile, the regulatory authority of states on the cusp of whatever import threshold was deemed the "trigger" could vary year by year, with variations in the percentage of their imports.

Petitioners' approach, moreover, cannot be reconciled with this Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). *Parker* concerned a California program "for marketing the 1940 crop of raisins produced in 'Raisin Proration Zone No. 1.'" *Id.* at 344. That zone produced "almost all the raisins consumed in the United States, and nearly one-half of the world crop." *Id.* at 345. The program required growers to pool their raisins in accordance with a "prorate marketing plan" designed to "maintain prices in the distribution" of raisins to packers. *Id.* at 346–48. As the Court explained, "since 95 per cent of the crop is marketed in interstate commerce, the program may be taken to have a substantial effect on the commerce, in placing restrictions on the sale and marketing of a product to buyers [*i.e.*, packers] who eventually sell and ship it in interstate commerce." *Id.* at 359. Nonetheless, the Court upheld the program against a dormant Commerce Clause challenge. The Court explained that the program addressed a matter that "may appropriately be regulated in the interest of the safety, health, and well-being of local communities," *id.* at 362, and that the law "applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce," *id.* at 361. Under petitioners' theory, however, *Parker* should have come out differently because the high percentage of raisins shipped from California to the interstate market would have "triggered" the extraterritoriality principle.

Although petitioners do not cite *Parker*, they suggest that, in extraterritoriality analysis, upstream effects on industry might be viewed differently from downstream effects on consumers. *See* Pet. Br. i (alleging "pervasive changes" to the industry), 34 (alleging that "farmers in other States" would "significantly change their operations"). They offer no basis, however, for applying different effects-oriented extraterritoriality principles based on the direction in which commerce flows. *Cf. C & A Carbone*, 511 U.S. at 393 ("States and localities may not attach restrictions to *exports or imports* in order to control commerce in other States" (citing *Baldwin*, 294 U.S. 511; emphasis added)). The bar on extraterritorial regulation is designed to protect the equal sovereignty of each of the fifty states (and the federal government's role in interstate commerce) by confining each state to "the inherent limits of [its] authority." *Healy*, 491 U.S. at 336. Its purpose does not include favoring some legitimate state interests (such as protecting producers' interests) over other legitimate state interests (such as consumer protection). An effects test that operated in only one direction would tilt the interstate playing field towards the interests of producers and against those of consumers, to the detriment of states that seek to use their sovereign power to protect their resident consumers from harm.

Exempting exporting states from petitioners' effects-oriented extraterritoriality test would not, in any event, eliminate the problem of disparate treatment: A pork-producing state like Indiana, *see* Pet. App. 180a, by virtue of being an exporting state, would retain the authority to protect its own citizens by adopting standards for pork products sold in Indiana retail outlets. California, as an importer of pork, could not do the same. On the flip side, under petitioners' theory, California could enact consumer-protection laws concerning avocados or harms associated with use of technology products and services, but the many states that import such products and services from California corporations could not. Such outcomes would make no sense.

In addition to arguing that the percentage of imports triggers the extraterritorial principle, petitioners note that "Californians consume about 13% of the Nation's pork." Pets. Br. 28. Petitioners do not clearly explain the relevance of the relative size of California's pork market to their extraterritoriality analysis.

If the size of a state's market were relevant, however, that would result in additional disparate treatment among the states. A less-populous state like Vermont could enact a consumer-protection law for various products that Texas could not, simply because the impact of the Vermont law on the national economy would be less significant. Disparate treatment among the states is an inherent, and problematic, attribute of an effects-focused extraterritoriality test.

Allegations concerning industry effects. Petitioners assert that "farmers everywhere will be *required* to conform their entire operations with Proposition 12 for all their sows" because of the "complex, segmented commercial pork production process that has evolved in this country," and the "impracticality" of tracing pork products "back to a particular sow." Pets. Br. 28. Proposition 12, however, does not *require* out-of-state farmers to do anything. As petitioners acknowledge, the only consequence to farmers who choose not to adopt the Proposition 12 standards is that their products may not be sold in the state's retail market. Pet. App. 205a (complaint). That is the same choice that *every* nondiscriminatory consumer-protection law imposes on *every* out-of-state producer that desires to sell products in a state's market. *Cf. Ford*, 141 S. Ct. at 1027 (explaining that a company can "alleviate the risk" of product-liability litigation by "severing its connection with the State" (quoting *World-Wide Volkswagen*, 444 U.S. at 297)). Proposition 12 does nothing to deprive out-of-state farmers of the ability to sell their products to the 87 percent of the pork market located in other states or to the robust foreign market. *See* Pet. App. 148a. If farmers choose to comply with Proposition 12 to serve the California market as well, the exercise of that business judgment does not transform Proposition 12 into a "requirement" that violates the dormant Commerce Clause.

Recognizing that Proposition 12 imposes no legal compulsion on out-of-state farmers, petitioners allege that *packers and dealers* will choose to require farmers to comply with its standards "[a]s an alternative to tracing and segregation." Pet. App. 206a; *see also* Pets. Br. 28–29. Even if true, that result would mean only that the pork industry "has evolved in this country," Pets. Br. 28, in a way that gives packers and dealers, rather than farmers, bargaining power when deciding which markets to serve. Such industry-specific dynamics have no rational connection to the question whether a state consumer-protection law has exceeded "the inherent limits of [the state's] authority." *Healy*, 491 U.S. at 336.

Petitioners also contend that the hypothesized decision by members of the industry to comply with Proposition 12 will raise pork prices for consumers in other states. Pets. Br. 29. A rule that treated state laws as extraterritorial, and thus invalid, when they affect out-of-state retail prices would have far-reaching effects. Indeed, applied to pork farming, such a rule would likely have a disproportionate impact on the ability of exporting states like Iowa, North Carolina, and other midwestern states, Pet. App. 148a, to enforce in-state regulation, because any purely in-state regulation they impose (for example, labor or environmental standards) may increase production costs and, therefore, raise prices for out-of-state consumers. For instance, if Iowa (the lead pork-producing state, according to petitioners, *see* Pet. App. 148a) enacted wage and safety regulations for in-state farm workers that increased the cost of pork imported into Florida by 9.2 percent, the cost of compliance would be the same as petitioners allege here. *See* Pets. Br. 15 (alleging that "compliance will increase farmers' production costs by … 9.2%").

Under the Court's existing case law, such regulation of intrastate activity would generally pose no dormant Commerce Clause concern. *Cf. Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 180 (1950) (upholding "power of a state to fix prices at the wellhead on natural gas produced within its borders and sold interstate"); *Parker*, 317 U.S. at 349 (upholding program that raised wholesale price of raisins from $45 per ton to "$55 per ton or higher"). Yet under petitioners' view, because the regulation would have "material extraterritorial effects," Pets. Br. 23, it would be "almost *per se* invalid," *id.* at 35 (internal quotation marks omitted). What's more, under that view, wages and working conditions for pig farmers within Iowa's borders could be regulated only by Congress. Such outcomes would represent an unprecedented expansion of the extraterritoriality principle, inconsistent with existing precedent.

Allegations concerning the state law's effectiveness. Petitioners argue that a state law is extraterritorial if a court "take[s] a hard look" at "how well the law serves" the state's interest in health and safety, Pets. Br. 39, and concludes that "[n]o evidence connects that objective to the requirement" it imposes, *id.* at 42; *see also* U.S. Amicus Br. 32–33. That argument elides the distinction between the standard dormant Commerce Clause balancing test (which takes account of the state's interest) and the extraterritoriality test (which does not). For instance, *if* a state law is extraterritorial—that is, if it directly regulates out-of-state commerce—it is invalid regardless of how well the law protects human health and safety. *Cf.*

Brown-Forman, 476 U.S. at 579–80. Thus, California cannot directly regulate pork production on Indiana farms even if it proves that Indiana farms engage in conduct that has harmful "effects within the State" of California. *See Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642–43 (plurality op.)). Indeed, petitioners acknowledge that a finding of extraterritoriality would compel a state to rely on its "sister States" to "regulate their own businesses" or ask Congress "to step in" to address "genuine, fact-based concerns about the health and safety of its residents." Pets. Br. 35. That concession understates the consequence of their effects-based approach, which, as explained above, may *prevent* sister States from regulating their own businesses if such regulation would make transactions in other states more costly.

Conversely, if a state law regulates only in-state commerce, a judicial finding that the law does not reasonably achieve its ends does not transform the law into a regulation of out-of-state commerce. Such a finding may cause the law to fail the *Pike* test, because a law that completely lacked efficacy would be more likely to clearly exceed any burdens it might impose on interstate commerce. Because the extraterritoriality principle does not employ a balancing approach, however, the strength of the state's interest is not a relevant consideration in extraterritoriality analysis.

Contrary to petitioners' suggestion, Pets. Br. 37–38, *Baldwin* does not direct courts to assess the "reasonableness" of a state consumer-protection law when assessing whether the law is extraterritorial. There, the Court concluded *as a matter of law* that New York could not directly regulate wholesale milk prices in other states as a means to promote "a higher standard of quality [of milk] and thereby promote [public] health." 294 U.S. at 524. *Baldwin* does not suggest that the outcome would have been different had New York submitted conclusive proof connecting wholesale milk prices to improved public health. To the contrary, the Court made clear that New York's extraterritorial regulation was prohibited "apart from such defects of proof." *Id*. Likewise in *Brown-Forman*, the Court held New York's price-affirmation law to be extraterritorial under *Baldwin*, even though the state's "legitimate" interest in "assur[ing] the lowest possible prices for its residents" was undisputed. 476 U.S. at 579–80.

Petitioners' reliance on *Southern Pacific* is also misplaced. *See* Pets. Br. 37, 39. There, the Court affirmed the district court's conclusion that Arizona's train-length law "had no reasonable relation to safety, and made train operation more dangerous." 325 U.S. at 775. The Court's analysis, however, occurred in the context of what later became known as *Pike* balancing. *See id*. at 775–76 (explaining that the "decisive question" is whether the state law's safety benefits "outweigh the national interest"); *see also Wayfair*, 138 S. Ct. at 2091 (citing *Southern Pacific* as an example of *Pike* balancing); *Pike*, 397 U.S. at 142 ("Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U.S. 761."). *Southern Pacific* does not authorize a court to classify direct regulation of in-state sales of a product as "extraterritorial" based on second-guessing a state's judgment that the regulation advances the state's interest in consumer health.

Allegations concerning differences among states' laws. Petitioners raise the specter that the substantive requirements of Proposition 12 will "subject[] pork farmers to inconsistent regulations." Pets. Br. 30. Yet petitioners do not identify any state law that a pork producer would violate by complying with Proposition 12. *See* Pets. Br. 5, 31 (citing state laws with more permissive standards than Proposition 12, but none with conflicting standards). In any event, even if a conflicting state law existed, petitioners offer no justification for resolving the conflict by treating *California's* law as extraterritorial. Under petitioners' view, a law in a state other than California that prevented in-state farmers from producing compliant products for the California market would have "material extraterritorial effects," to use petitioners' term, and, therefore, would be impermissible. An effects-driven extraterritoriality principle therefore cannot determine which of such hypothetical conflicting state laws should fall.

Citing *Southern Pacific* and the federal Pork Promotion, Research, and Consumer Information Act, 7 U.S.C. § 4801(a)(3), (4), petitioners suggest that Proposition 12 regulates a subject that "demand[s] a single uniform rule." Pets. Br. 32 (internal quotation marks omitted). In *Southern Pacific*, the Court noted the need for national uniformity with respect to the length of trains operating interstate, describing that subject as the type of regulation that "Congress alone can prescribe." *Id.* at 782; *see also id.* at 775 (explaining the "practical necessity" of having train-length regulation "be prescribed by a single body having a nation-wide authority"). As explained above, however, the holding in *Southern Pacific* did not rest on the need for exclusive federal authority, but on a form of *Pike* balancing. *See supra* p.27. Notably, petitioners neither argue that the federal Pork Promotion statute they cite (which the United States does not cite) signals a need for national uniformity in the operation of farming practices, nor that the statute suggests that all states must permit in-state sales of the same pork products—which is the issue here. Moreover, petitioners' argument would imply that *all* state regulation of pork production is invalid, creating a regulatory vacuum in the absence of a national standard Congress has not created.

Finally, petitioners' effects-driven extraterritoriality principle would create "conflicts" between state laws based solely on how upstream (or downstream) market participants adjust their businesses in response to them. For example, imagine if, rather than barring the sale of noncompliant pork to consumers, Proposition 12 required noncompliant pork products to carry a label stating that they had not been produced in accordance with the law's standards. Such a labeling requirement would not normally be described as "subject[ing] pork *farmers* to inconsistent regulations." Pets. Br. 30 (emphasis added). Yet if enough California consumers responded to the label by purchasing Proposition 12-compliant pork, the effect on out-of-state farmers, packers, and dealers would be similar to the effects that petitioners allege here: The industry would forgo practices that might be lawful in the states where producers operate to meet the standards demanded by California consumers. Indeed, the same industry response could arise even if California imposed no requirements on in-state pork sales, but instead developed and funded its own consumer education program to raise awareness about the health risks of various pork-production techniques. An effects-driven extraterritoriality principle under which such voluntary actions by industry are treated as evidence of "conflicting" regulatory requirements would require invalidating all of these forms of state actions as beyond "the inherent limits of the enacting State's authority," *Healy*, 491 U.S. at 336, because they all have the same effect on out-of-state producers. Petitioners do not grapple with these consequences of their theory, but states and courts would be required to do so if an effects-driven approach to the extraterritoriality principle were adopted by this Court.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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August 2022