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 PROFESSORS BARRY FRIEDMAN AND DANIEL T. DEACON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

* Counsel of Record

August 15, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Barry Friedman is the Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at New York University Law School and is one of the country's leading authorities on constitutional law and the federal courts. Daniel T. Deacon is a Lecturer at the University of Michigan Law School and has published extensively on topics that include constitutional and administrative law. Professors Friedman and Deacon are the authors of *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877 (2011), a leading article examining the origins of the Commerce Clause and defending the validity of the dormant Commerce Clause doctrine. Accordingly, they have an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers adopted the Commerce Clause in response to the threat posed by state economic protectionism, which was jeopardizing the political union. They did not adopt the Clause to exempt businesses from nondiscriminatory local regulations, or to place any industry's methods of operation on a constitutional pedestal. Reflecting that understanding, this Court's decisions addressing state laws that affect interstate commerce have long focused on averting protectionism and discrimination—a task that gives the

---

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

judiciary an important but narrow role to play where Congress has not legislated. Petitioners' effort to expand that role and to secure constitutional protection for their preferred system of production is at odds with history and precedent, and it should be rejected.

Proposition 12 limits the sale of certain animal products in California, without regard to their origin. It does not put California in competition with any state, because it does not discriminate against other states' commerce or favor local economic interests at their expense. Nor does the law impede the transportation of goods across state lines. It is completely agnostic with respect to the geography of production—and applies only within California.

Although Proposition 12 "regulates evenhandedly," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), and leaves businesses "on an even playing field," *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018) (quotation marks omitted), Petitioners ask this Court to overturn the will of California's voters and strike it down. They claim that the Commerce Clause entitles them to "an unobstructed nationwide pork market," free of state laws that might increase their "production costs." Pet. Br. 20, 15. Proposition 12, they say, will require changes to the "segmented commercial pork production process" they have chosen to develop, *id.* at 28, and for that reason is unconstitutional.

The Commerce Clause was not adopted, however, to immunize large enterprises from local requirements that might change how they do business. Rather, it was adopted to "curb[] state protectionism." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). That purpose has guided this Court's "dormant" Commerce Clause decisions from

the start. Protectionist measures are inherently "hostile in conception," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), because they are aimed at "burdening out-of-state competitors" to benefit local interests, *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). Such discrimination inevitably pits states against one another, creating rivalries and cycles of retaliation that "interfere with the project of our Federal Union." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 595 (1997). Averting this threat to political harmony, by combatting protectionism and discrimination, is the role of the dormant Commerce Clause. Shielding businesses from mere "cost increases," Pet. Br. 4, is not.

"State tariffs," after all, "were among the principal problems that led to the adoption of the Constitution." *Comptroller of Treas. of Md. v. Wynne*, 575 U.S. 542, 570 (2015). Under the Articles of Confederation, each state set its own commercial policies, and "selfish motives frequently dictated what was done." Max Farrand, *The Framing of the Constitution of the United States* 7 (1913). As states competed for foreign commerce and the associated tax revenue, economic rivalries flourished, prompting many states to impose restrictions that directly targeted their neighbors' commerce. Increasingly, states began using their trade policies "as weapons against each other," Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 448 (1941), fostering "animosity and discord," *The Federalist No. 22*, at 144 (Clinton Rossiter ed., 1961) (Hamilton).

The need to end these rivalries was a key factor motivating the convening of the Constitutional Convention and the adoption of the Constitution itself. At the Convention, virtually everyone agreed that federal

superintendence was necessary to quash state protectionism and its associated harms. Discussions regarding interstate commerce focused almost exclusively on that imperative. And as those discussions reveal, the problem the Framers perceived was not that state regulation of commerce was too costly, but that protectionism created "unceasing animosities" that threatened to "terminate in serious interruptions of the public tranquility." *Federalist No. 42*, *supra*, at 268 (Madison). "The competitions of commerce," in short, risked inducing the states "to make war upon each other." *Federalist No. 7*, *supra*, at 62, 60 (Hamilton). Where such danger was absent, there is no evidence that any of the Framers—including those who regarded the federal government's new commercial powers as exclusive—understood the Commerce Clause to empower courts to strike down state laws simply because they raised costs for out-of-state businesses.

In keeping with the original understanding of the Clause, this Court's dormant Commerce Clause precedents consistently have focused on curbing economic protectionism and discrimination. The Court's early decisions exclusively struck down laws that targeted out-of-state goods or vessels because of their foreign origin, or gave preference to local industry. Meanwhile, laws affecting commerce even-handedly were upheld. Invoking the Clause's history, this Court emphasized the pivotal role of protectionism in distinguishing valid from invalid laws, prohibiting "any discrimination in enacting commercial or revenue regulations." *Ward v. Maryland*, 79 U.S. 418, 431 (1870).

In the late nineteenth and early twentieth centuries, however, dormant Commerce Clause doctrine split into two branches. One branch continued targeting protectionism, limiting itself to laws "discriminating against the products and citizens of other states."

Minnesota v. Barber, 136 U.S. 313, 325 (1890). But the other branch, addressed to nondiscriminatory laws, struggled to find a defensible rationale for its holdings. Its ever-shifting standards provided "very little coherent, trustworthy guidance," *Wynne*, 575 U.S. at 552 (quotation marks omitted), leading to inconsistent and seemingly results-oriented decisions.

Acknowledging those criticisms, this Court purported to reformulate (again) its approach to reviewing nondiscriminatory commercial legislation in the mid-twentieth century. Henceforth, the Court declared, it would resolve the "competing demands of state and national interests" by assessing their "relative weights" and deciding which should yield. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769-70 (1945). But that is not what actually happened. Instead, the presence or absence of protectionism has played the decisive role in determining which laws are invalidated. This is especially obvious in the cases on which Petitioners chiefly rely, involving laws with extraterritorial effects: those decisions struck down discriminatory trade barriers that sought to protect local economic interests from out-of-state competition.

For nearly a century now, the only set of cases in which this Court has overturned nondiscriminatory limits on commerce involved a uniquely problematic type of restriction: barriers to the interstate movement of trucks, trains, and other vehicles transporting goods and products. Like protectionist measures, restrictions on the ability "to move commodities through the State," *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 667 (1981), pose a distinct threat to economic union, because if every state "place[s] a great burden of delay and inconvenience on [vehicles] crossing its territory," *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S.

520, 529-30 (1959), multi-state trips could become untenable, *S. Pac. Co.*, 325 U.S. at 774. In light of that inescapable geographic reality, this Court has been willing to scrutinize the objectives and effects of such restrictions. But because these laws are not inherently hostile or destructive to political harmony, the Court evaluates them under a more forgiving standard than it extends to discriminatory measures.

Proposition 12 is neither protectionist nor discriminatory, and it does not impede the transportation of goods through the states. Because the law creates no economic rivalries, it poses no risk of causing the "jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). And because it does not hinder the transportation of goods across state lines, it poses no risk of choking "the arteries of commerce." *Tenn. Wine*, 139 S. Ct. at 2460 (quoting Farrand, *supra*, at 7). Contrary to Petitioners' view, there is nothing sacrosanct about the supposed "natural functioning" of the pork industry, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) (quotation marks omitted), and the Commerce Clause does not shield that industry from even-handed local regulation.

ARGUMENT

I. The Commerce Clause Was the Framers' Response to State Protectionism, Which Threatens the Political Union.

A. The aftermath of the Revolutionary War witnessed "a drift toward anarchy and commercial warfare between states," *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949), as each adopted commercial policies "from a sense of its own interests," seeking "to draw to itself a larger share of foreign and

domestic commerce," 1 Joseph Story, *Commentaries on the Constitution of the United States* 239-40 (1833). As "grievances were multiplied in every direction," these "animosities and local prejudices" threatened "the peace and safety of the Union." *Id.* at 240.

After the war, Americans confronted a deep economic depression and severe trade imbalance. Curtis P. Nettels, *The Emergence of a National Economy, 1775–1815*, at 45-49 (1962). "At the same time, Britain restricted American merchants' ability to trade with Britain and with its colonies." Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1887 (2011). "France and Spain soon followed suit," Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* 21 (2016), and "American trade suffered severe losses," Nettels, *supra*, at 55. Because Congress lacked the power to regulate commerce, the states were "unable to adopt a uniform response." Friedman & Deacon, *supra*, at 1887. Instead, "[s]tates tried to respond on their own," levying taxes and fees on foreign goods and vessels. Klarman, *supra*, at 22. But these efforts "lacked any coordination," Brannon P. Denning, *Confederation-Era Discrimination against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 46 (2005), and were easily evaded by an "end run through a neighboring state," Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 Wm. & Mary Bill Rts. J. 1, 23 (2004).

Worse, the states' individual policies were "pursued with surreptitious views against each other." Letter from Edmund Carrington to Edmund Randolph (Apr. 2, 1787), *in* 4 *Calendar of Virginia State Papers* 264 (William P. Palmer ed., 1884). When states with

superior ports (the so-called "commercial states") tried to raise tax rates on foreign imports, their neighbors "responded by establishing free ports," Klarman, *supra*, at 23, "undercutting the tax rates to channel commerce in [their own] direction," Johnson, *supra*, at 14. As Madison lamented, measures aimed at foreign governments, "instead of succeeding have in every instance recoiled more or less on the states which ventured on the trial." Letter to Thomas Jefferson (Jan. 22, 1786), https://founders.archives.gov/documents/Madison/01-08-02-0249.

The only fruit of these efforts was to turn the states against one another. As tensions rose, states began engaging in "overt discrimination," enacting "imposts and tariffs specifically targeting goods coming from a particular state." Denning, *supra*, at 48. Thus, "Connecticut taxed foreign goods from Massachusetts," and New York "put special duties on foreign goods imported" from its neighbors. Nettels, *supra*, at 72. Rhode Island merchants "believed they were virtually barred from trade with Massachusetts and New York because of prohibitively high state duties." Cathy D. Matson & Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* 73 (1990). Madison complained that such fees amounted to "a tribute." Letter to Thomas Jefferson (Dec. 10, 1783), https://founders.archives.gov/documents/Jefferson/01-06-02-0301.

In short, "interstate rivalries" and "the hostile competition for relative advantage" had "made Americans foreigners to one another." Matson & Onuf, *supra*, at 76, 50-51; *see id.* at 76 n.62 (New York merchants complained of being "'called on to wage a *variegated war*' of state against state . . . and states against other nations"). So dire was the situation that many

statesmen foresaw "the imminent collapse of the union." *Id.* at 51. As Fisher Ames put it, the states' commercial disputes were "fermenting into civil war." *The Republican No. VI*, Conn. Courant (Mar. 19, 1787).

B. With a superficial gesture toward this history, Petitioners invoke "the Balkanization that the Framers called a constitutional convention to avoid," Pet. Br. 30, in support of their claim that businesses wanting to sell goods in California should be exempt from California laws they find inconvenient. But the history of the Commerce Clause provides no support for this laissez-faire agenda. The threat the Framers sought to avert was economic *competition* among the states, which undermined the commercial and political union. The problem was not mere "cost increases," Pet. Br. 4, but the conflict that ensued when states "put[] Citizens of other States on the footing of foreigners," Letter from James Madison to James Monroe (Jan. 22, 1786), https://founders.archives.gov/documents/Madison/01-08-02-0250.

The most notorious example was an imbroglio between New York and its neighbors that exemplified the dangers of tit-for-tat retaliation. To combat British trade restrictions, New York placed heavy imposts on British goods arriving at its ports. Connecticut and New Jersey "were outraged," Johnson, *supra*, at 12, and reacted by establishing duty-free ports, undercutting New York by diverting trade toward themselves. In response, New York taxed foreign goods imported from its neighbors and imposed port fees and tonnage charges on their vessels. New Jersey then began taxing the New York–owned lighthouse at Sandy Hook, and Connecticut resolved to halt trade with New York and ban its ships for a year. *See* Friedman & Deacon, *supra*, at 1889. Nathaniel Gorham said it was only "the restraining hand of Congress (weak as it is) that

prevents New Jersey and Connecticut from entering the lists very seriously with New York and bloodshed would very quickly be the consequence." Letter to James Warren (Mar. 6, 1786), *quoted in* Klarman, *supra*, at 24.

It was this "warfare & retaliation among the States," Letter from James Madison to Thomas Jefferson (Aug. 12, 1786), https://founders.archives.gov/documents/Madison/01-09-02-0026, and not neutral laws concerning "production methods," Pet. Br. 14, that the Framers denounced as the "interfering and unneighborly regulations of some States, contrary to the true spirit of the Union," *Federalist No. 22*, *supra*, at 144 (Hamilton); *see id.* at 145 (making clear that Hamilton was referring to the "duties" levied by states "upon the merchandises passing through their territories"). State protectionism, because of the "retaliating" measures it provoked, was inherently "destructive of the general harmony." James Madison, *Vices of the Political System of the United States* ¶ 4 (Apr. 1787), https://founders.archives.gov/documents/Madison/01-09-02-0187.

The point of curtailing the states, moreover, was not to eliminate commercial regulation but to make it more effective. The "want of concert" in "commercial affairs," *id.* ¶ 5, prevented a unified response to European trade maneuvers, arguably the "first and most sensibly felt" flaw of the Articles, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 253 (Jonathan Elliot ed., 1836) (Charles Pinckney). Without federal control over *interstate* commerce, therefore, "the great and essential power of regulating foreign commerce would have been incomplete and ineffectual." *Federalist No. 42*, *supra*, at 267 (Madison).

Importantly, the Constitution was drafted "before Adam Smith, laissez faire, and free trade came to dominate economic thinking," and the prevailing mercantilist tradition contemplated an active government role in regulating trade. Johnson, *supra*, at 28; *see Federalist No. 11*, *supra*, at 85 (Hamilton) ("By prohibitory regulations, extending . . . throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets."). Madison denounced the idea "that trade ought in all cases to be left to regulate itself," Letter to Thomas Jefferson (Aug. 20, 1784), https://founders.archives.gov/documents/Madison/01-08-02-0058, and Hamilton called that notion a "wild speculative paradox[] . . . contrary to the uniform practice and sense of the most enlightened nations," *The Continentalist No. V* (Apr. 18, 1782), https://founders.archives.gov/documents/Hamilton/01-03-02-0015.

When Hamilton enthused about an "unrestrained intercourse between the States," *Federalist No. 11*, *supra*, at 89, there is no reason to think that the "restraints" he envisioned lifting were anything other than the protectionist barriers causing so much controversy. Indeed, Hamilton indicated as much, explaining that the "fetter[s]" to which he was referring had been "amply detailed . . . in the course of these papers." *Id.* at 90; *see Federalist No. 7*, *supra*, at 63 (Hamilton) (criticizing some states for "rendering others tributary to them" through "duties" that "must be paid by the inhabitants of [neighboring] States").

In sum, what the Framers recognized as inherently repugnant to commercial unity was not legislation raising costs for business enterprises—it was economic warfare among the states. *See id.* ("Would Connecticut and New Jersey long submit to be taxed by

New York for her exclusive benefit?"). Such protectionist measures set the states "against each other," fostering "deep-rooted jealousies & enmities" that "tended to throw them apart." Letter from James Monroe to James Madison (July 26, 1785), *in* 1 *The Writings of James Monroe, 1778–1794*, at 98 (Stanislaus M. Hamilton ed., 1898).

Illustrating the difference, free trade policies were themselves some of the most intense sources of friction at the time. "Particularly irksome," as noted, was "the practice of some states of establishing duty-free ports, where foreign vessels were free to trade without paying onerous duties." Friedman & Deacon, *supra*, at 1888; *see* Hugh Williamson, *Remarks on the New Plan of Government* (1788), *in* Paul Leicester Ford, *Essays on the Constitution of the United States* 403 (1892) ("Does one of the states attempt to raise a little money by imports or other commercial regulations? A neighbouring state immediately alters her laws, and defeats the revenue by throwing the trade into a different channel.").

The mere fact that businesses must comply with the laws of multiple states does not risk the type of balkanization that alarmed the Framers. The danger they perceived was not a simple lack of homogeneity—it was the wholesale breakdown of interstate relations that arose when states used protectionist tactics "to secure exclusive benefits to their own citizens." *Federalist No. 7*, *supra*, at 63 (Hamilton).

C. By the mid-1780s, many statesmen "believed interstate discrimination to be an extremely serious problem meriting a profound response." Friedman & Deacon, *supra*, at 1890. Accordingly, Virginia organized an interstate conference to discuss the union's commercial defects. Farrand, *supra*, at 8. This confer-

ence "culminated in a call for the Philadelphia Convention that framed the Constitution." *Tenn. Wine*, 139 S. Ct. at 2460.

In Philadelphia, the Commerce Clause was adopted "unanimously, and without debate." Denning, *supra*, at 82; *see* 2 *The Records of the Federal Convention of 1787*, at 308 (Max Farrand ed., 1911). There was "nearly universal agreement that the federal government should be given the power of regulating commerce." Abel, *supra*, at 443-44. "No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished." *H.P. Hood*, 336 U.S. at 534.

Discussion of interstate commerce at the Constitutional Convention focused on the need to eliminate "discriminatory state laws," which "posed a continuing threat to the Union." Friedman & Deacon, *supra*, at 1908. Madison touted the "removal of the existing & injurious retaliations among the States." 2 *Farrand's Records* 451-52. Gouverneur Morris warned that without federal power over commerce, "the exporting States will [continue to] tax the produce of their uncommercial neighbors." 2 *id.* 360. Roger Sherman described "the power to regulate trade between the states" as guarding against the "oppression of the uncommercial States." 2 *id.* 308. Oliver Ellsworth promised that the "power of regulating trade between the States will protect them ag[ain]st each other." 2 *id.* 359-60.

Without exception, therefore, the federal power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, was described as a means of eliminating state laws that were discriminatory and "partial," Abel, *supra*, at 471. "No one approved of these laws." Friedman & Deacon, *supra*, at 1908.

In the state ratifying conventions, too, "the need for the commerce power was nearly universally acknowledged." *Id.* at 1893. The consensus was that the Commerce Clause would put an end to the "prejudicial fiscal burdens imposed by the several states on each other's commerce." Abel, *supra*, at 472-73. In Virginia, for instance, Edmund Randolph highlighted the states' "reprisals on each other" and warned of "the jealousy, rivalship, and hatred" that would continue without constitutional reform. 3 *Elliot's Debates* 82. As in Philadelphia, the focus was on protectionism and its potential to unravel the union.

II. This Court's Dormant Commerce Clause Precedents Consistently Have Focused on Combatting Protectionism and Discrimination.

The Commerce Clause explicitly refers only to Congress's authority, and the power of courts to strike down state laws in the absence of congressional action has long been controversial. Yet for nearly two centuries, this Court has struck down state laws that were discriminatory and protectionist—a consistent line of cases resting squarely on the history and purpose of the Clause.

Indeed, from the earliest decisions addressing the "dormant" Commerce Clause to the present, one thread has remained constant: the centrality of preventing state protectionism. "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce . . . while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." *H.P. Hood*, 336 U.S. at 535. Because of their uniquely destructive effects on commercial unity and political harmony, protectionist measures form the core of the narrow class of

legislation that is appropriate for judicial invalidation under the dormant Commerce Clause.

By contrast, this Court has struggled to find any coherent basis beyond protectionism for striking down nondiscriminatory state laws. The history of that effort is checkered, and this Court repeatedly has abandoned prior standards that proved unworkable or unduly restrictive of state prerogatives. Today, despite employing the language of "balancing," the only nondiscriminatory commercial restrictions this Court strikes down are those that interfere with the transportation of goods across state lines.

A. An early question confronting the Court was whether the Commerce Clause vests exclusive authority in the federal Congress and, if so, what role the courts should play in restraining state attempts to exercise that exclusive power. Although these topics were not discussed at length when the Constitution was adopted, some Framers suggested that the Clause would "exclude" state regulation of commerce by its own force, without congressional legislation, *see* 2 *Farrand's Records* 625 (James Madison), while others said federal and state authority would be "concurrent," *id.* (Roger Sherman). In an influential passage, which this Court later would endorse, Hamilton maintained that federal power was exclusive by implication only where "a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *Federalist No. 32*, *supra*, at 198-99. Hamilton emphasized the narrowness of this category: state laws did not offend the Constitution whenever "the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration," but only where federal power "must necessarily" be exclusive. *Id.*; *see* 3 *Elliot's Debates* 419 (John Marshall) (expressing similar views).

As for the courts' role in policing state regulations, many Framers harbored serious doubt that Congress alone had the capacity to patrol every harmful law passed by the states, *see* Friedman & Deacon, *supra*, at 1896-1903 (discussing the debate over the rejected congressional "negative"), indicating that the courts would need to play a role in restraining particularly pernicious state measures.

Although this Court's earliest cases did not resolve the exclusivity question, *e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824), what they *did* establish is that states may exercise their police powers in ways that significantly affect interstate commerce. Chief Justice Marshall cited "[i]nspection laws, quarantine laws, [and] health laws of every description" as examples of "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." *Id.* at 203. Such laws may permissibly have a "considerable influence on commerce." *Id.* Indeed, the very decision that gave name to the dormant Commerce Clause, *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829), held that measures calculated to enhance the value of local property or "the health of the inhabitants" are "undoubtedly within those which are reserved to the states." *Id.* at 251. As this Court later elaborated, the Commerce Clause "was not a surrender" of the states' police power, which covers efforts to secure "domestic order, morals, health, and safety," including through "the adoption of precautionary measures against social evils." *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 470-71 (1877) (quotation marks omitted).

Ultimately, this Court also recognized that Congress's power to regulate interstate commerce left ample room for the states to regulate it as well. Invoking Hamilton's *Federalist No. 32*, the Court denied that

the commerce power "is absolutely and totally repugnant to the existence of similar power in the states." *Cooley v. Bd. of Wardens of Port of Philadelphia*, 53 U.S. 299, 318 (1851). Instead, only subjects that are inherently "national, or admit only of one uniform system," are off-limits. *Id.* at 319. By recognizing that "the power to regulate commerce may be exercised by the States," *Gilman v. City of Philadelphia*, 70 U.S. 713, 727 (1865), *Cooley* further expanded the reach of state action, even though its "national-local" distinction partly tracked the "commerce-police" distinction.

This Court also established early on that the judiciary has a role to play in enforcing the Commerce Clause's goal of averting state protectionism. The principle of nondiscrimination was implicit in this Court's early decisions, and over time became increasingly explicit. Every law struck down targeted out-of-state goods or traffic by virtue of their foreign origin, or gave preference to local industry. *E.g.*, *Gibbons*, 22 U.S. at 221; *Smith v. Turner*, 48 U.S. 283, 392-93 (1849); *Brown v. Maryland*, 25 U.S. 419, 448 (1827); *Steamship Co. v. Portwardens*, 73 U.S. 31, 33 (1867). Meanwhile, laws affecting commerce even-handedly were upheld. *E.g.*, *Black-Bird*, 27 U.S. at 252; *Thurlow v. Massachusetts*, 46 U.S. 504, 595 (1847); *Cooley*, 53 U.S. at 320; *Gilman*, 70 U.S. at 732; *see* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 355 (8th ed. 2010) (contrasting the law upheld in *Black-Bird*, which "resulted in a *nondiscriminatory* prohibition of all shipping," with the law invalidated in *Gibbons*, "which favored local shippers").

Increasingly, this Court highlighted the pivotal role of protectionism in distinguishing valid from invalid laws. While taxes applying only to out-of-state goods would violate the Commerce Clause, taxes making "no attempt to discriminate injuriously against the

products of other States" were valid. *Woodruff v. Parham*, 75 U.S. 123, 139-40 (1868). To uphold laws "discriminating adversely" against other states would cause "a total abolition of all commercial intercourse between the States." *Hinson v. Lott*, 75 U.S. 148, 152 (1868). Such laws therefore triggered a need for national uniformity under the *Cooley* rule, *id.*, and states could not "make any discrimination in enacting commercial or revenue regulations," *Ward*, 79 U.S. at 431.

B. In the late nineteenth century, the Court's "previously unitary" dormant Commerce Clause doctrine "split into separate branches," Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. Rev. 1847, 1864 (2007), addressing "two distinct principles," *Tenn. Wine*, 139 S. Ct. at 2464 (quotation marks omitted).

The more enduring branch continued targeting "protectionist legislation," Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, 1102 (2000), focusing on "enactments discriminating against the products and citizens of other states," *Barber*, 136 U.S. at 325. These cases recognized that the aim of the Commerce Clause was "to protect the products of other States and countries from discrimination by reason of their foreign origin." *Guy v. City of Baltimore*, 100 U.S. 434, 443 (1879). Such protectionism would lead to "all the evils of discriminating State legislation . . . which existed previous to the adoption of the Constitution." *Welton v. Missouri*, 91 U.S. 275, 281 (1875).

By 1879, it was "settled" that a state cannot "build up its domestic commerce" through "burdens upon the industry and business of other States." *Guy*, 100 U.S. at 439, 443. "Thereafter, the Court routinely invalidated discriminatory measures without any assess-

ment of whether the affected subject matter was national or local in nature." Williams, *supra*, at 1866; *e.g.*, *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 121 (1908) (discriminatory taxes); *Tiernan v. Rinker*, 102 U.S. 123, 127 (1880) (discriminatory licensing requirements); *Voight v. Wright*, 141 U.S. 62, 66-67 (1891) (discriminatory inspection laws); *Husen*, 95 U.S. at 473 (discriminatory import restrictions).

The rule was straightforward and modest in scope: measures "operating to the disadvantage of the products of other states," *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891) (quoting *Walling v. Michigan*, 116 U.S. 446, 455 (1886)), or attempting "to discriminate unfavorably" against them, were "forbidden," *Cook v. Pennsylvania*, 97 U.S. 566, 573 (1878). States could not "prevent competition" by burdening out-of-state products "by reason of their foreign character." *Webber v. Virginia*, 103 U.S. 344, 349 (1880).

This Court also became "adept at rooting out such discrimination in otherwise facially neutral laws." Williams, *supra*, at 1865. Thus, where a law prohibited the sale of meat from animals that had not been inspected within twenty-four hours before slaughter, the Court recognized that it inevitably excluded "all [meat] from animals slaughtered in other states," thereby restricting the trade "to those engaged in such business in that state." *Barber*, 136 U.S. at 322.

The Court continued to stress, however, that the "police power of the state" could be used in a nondiscriminatory fashion to safeguard "health, peace, and morals." *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 494 (1888). "In the exercise of its police powers," a state could prohibit the sale "of any articles" that were "prejudicial to the health . . . of its people." *Guy*, 100 U.S. at 443.

In sum, despite occasional disagreement among Justices regarding the power to invalidate state laws under the "dormant" commerce power, this Court consistently has done so to avoid economic protectionism since the mid-nineteenth century. The history of the Commerce Clause makes vividly clear the threat to the union should such laws remain unaddressed—necessitating judicial intervention even (or especially) when Congress is unwilling or unable to step in.

C. The other branch of the doctrine that developed in this period involved a fruitless quest to identify a justifiable basis for striking down nondiscriminatory laws. This "more problematic" branch, Williams, *supra*, at 1869, produced only a confused and inconsistent body of decisions.

The *Cooley* test, which sought to distinguish between national and local subjects, proved unsatisfactory, as "everything depended on how the relevant 'subject' was defined," and the Court was prone "to define it inconsistently and without explanation." David P. Currie, *The Constitution in the Supreme Court, 1789–1888*, at 339 (1985); *compare In re State Freight Tax*, 82 U.S. 232, 276-77 (1873) (tax on railroad's freight is national), *with In re State Tax on Ry. Gross Receipts*, 82 U.S. 284, 294 (1873) (tax on railroad's gross receipts is local).

Gradually *Cooley* was replaced by an attempt to distinguish between laws that burdened interstate commerce "directly" or only "indirectly," but this "arid distinction" also provided "very little coherent, trustworthy guidance," *Wynne*, 575 U.S. at 552 (quotation marks omitted), as it "offered so little of a criterion for determining on which side a case would fall," Noel T. Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 6 (1940). The Court "employed this vocabu-

lary rather indiscriminately," causing "no end of confusion." Cushman, *supra*, at 1114; *see Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 199 (1925) (conceding that decisions "have not been in full accord").

The malleability of these tests had consequences. As the twentieth century approached, "the Court began a conscious and increasingly aggressive campaign to break down local barriers to interstate trade through a 'free-trade' construction of the dormant Commerce Clause." Cushman, *supra*, at 1101. Acting "with unprecedented vigor," the Court "went far beyond its predecessors in using the commerce clause to limit state power." Currie, *supra*, at 403, 362.

To the extent these decisions went beyond curbing discrimination, however, "the Court struggled to identify principled guidelines," and its holdings "often rested on thin, seemingly subjective, and eminently manipulable distinctions." Williams, *supra*, at 1872; *see* Louis M. Greeley, *What Is the Test of a Regulation of Foreign or Interstate Commerce?*, 1 Harv. L. Rev. 159, 159 (1887) ("the reasoning upon which the decisions are based is meager and unsatisfactory"). Thus, the Court could reach "almost any result which it might decide to be for the best interest of the country." Edward S. Corwin, *Constitutional Revolution, Ltd.* 34 (1941). The resulting doctrine was essentially that "the Constitution forbids those departures from laissez-faire that the Court disapproves, and permits those departures that the Court thinks reasonable and proper." Robert G. McCloskey, *The American Supreme Court* 149-50 (1960).

These decisions relied in part on the untenable notion that "the silence of congress" on a matter of interstate commerce "is equivalent to a declaration . . . that it should be absolutely free." *Brennan v. Titusville*, 153 U.S. 289, 302 (1894); *Brown v. Houston*, 114 U.S.

622, 631 (1885) ("inaction" by Congress "indicates its will"). *But see* U.S. Const. art. I, § 7 (requirements for congressional action); *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). That notion allowed the Court to conceive of its aggressive decisions as a form of federal preemption, not a usurpation of the legislative role. *See* Dowling, *supra*, at 6.

Notably, however, protectionism concerns often were close at hand, even in decisions that endorsed broader judicial oversight of state laws. *E.g.*, *Robbins v. Taxing Dist. of Shelby Cnty.*, 120 U.S. 489, 497-98 (1887) (stating that discrimination is not a requirement for invalidity under the dormant Commerce Clause, but noting, "It would not be difficult, however, to show that the [law] in the present case is discriminative against the merchants and manufacturers of other states."); *Bowman*, 125 U.S. at 496, 494 (stating that interstate commerce "cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce," but observing that such taxes could allow "each state, according to its own caprice . . . to discriminate for or against" other states' products).

D. Recognizing the difficulty with its non-protectionism line of dormant Commerce Clause cases, in the New Deal era this Court once again changed the standards it would (ostensibly) use to evaluate nondiscriminatory state laws. Acknowledging the flaws of prior tests, the Court declared that henceforth it would perform its role as "the final arbiter of the competing demands of state and national interests" through an "appraisal and accommodation" of those competing demands. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). The Court would judge the "relative weights" of the state and national interests and decide which should yield. *Id.* at 770.

But in reality, this Court never assumed that magisterial role: it has not actually tried to balance state and national interests. Instead, by the time of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court had clarified that state enactments are presumptively valid, *see id.* at 142, and under that deferential standard nearly all measures have survived, *see Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008). Thus, the "modern law" of the dormant Commerce Clause continues to be "driven by concern about economic protectionism." *Id.* at 337 (quotation marks omitted). That has been true even in those cases that are sometimes held up as exemplifying a looser "balancing" approach.

In *Pike* itself, where a state required certain fruit to be packaged at in-state facilities, the law's goal was "to protect and enhance the reputation of growers within the State," and its method of achieving that goal contravened a longstanding prohibition on "requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." 397 U.S. at 143, 145. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the law "erect[ed] an economic barrier protecting a major local industry against competition," thus "plainly discriminat[ing] against interstate commerce." *Id.* at 349. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the law "shield[ed] the local apple industry from the competition of Washington apple growers and dealers," offering "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id.* at 351-52.

To the extent that "balancing" occurred in these cases, it was not to weigh the value of nondiscrimina-

tory laws against national interests. Rather, in deference to state prerogatives, it held out the possibility of upholding even *discriminatory* state laws if the local interests promoted were sufficiently robust. *See Pike*, 397 U.S. at 146 (despite its discriminatory nature, the law "could perhaps be tolerated if a more compelling state interest were involved"); *Dean Milk*, 340 U.S. at 354 (asking "whether the discrimination inherent in the [law] can be justified in view of the character of the local interests"); *Hunt*, 432 U.S. at 353 (when a law is discriminatory, "the burden falls on the State to justify it"). Far from weighing policy values to overturn neutral state laws, this approach extends a more forgiving standard to discriminatory laws, which are upheld if "the State has no other means to advance a legitimate local purpose." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007).

The decisive role of protectionism in modern precedent is especially obvious in the cases on which Petitioners rely involving laws with extraterritorial effects. "[I]n each of these cases," this Court "simply found that the law at issue created a discriminatory trade barrier." Nowak & Rotunda, *supra*, at 345.

The price regulation in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), "promote[d] the economic welfare of [New York] farmers" by "guard[ing] them against competition with the cheaper prices of Vermont." *Id.* at 522; *see City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (*Baldwin* was about "simple economic protectionism"). Petitioners make much of *Baldwin*'s remark about a "wage scale," but requiring minimum wages for out-of-state workers would obviously shield in-state labor from cheaper competition—precisely the type of protectionism that invites retaliation and rivalries.

The price regulation in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), was a form of "[e]conomic protectionism" that benefitted "local consumers" by "insist[ing] that producers or consumers in other States surrender [their] competitive advantages." *Id.* at 580.

The price regulation in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), was "essentially indistinguishable," and, "on its face," imposed "patent discrimination" against interstate brewers. *Id.* at 339-41; *see* David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 Tul. L. Rev. 1, 38 (1992) (the laws in *Healy* and *Brown-Forman* were meant "to discourage [local] residents from travelling to neighboring states to purchase liquor").

The "discriminatory regulation" in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), provided "an advantage over rival businesses from out of State." *Id.* at 394. Preventing environmental harm in other states could not justify "local legislation that discriminates in favor of local interests." *Id.* at 393.

Thus, modern precedent still is concerned almost "exclusively" with economic protectionism, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1092 (1986), even in cases purporting to draw on "balancing" or "extraterritoriality" principles.

The only set of cases in which this Court has overturned nondiscriminatory restrictions on commerce involves a special topic: interstate transit. *See Bibb*, 359 U.S. at 530 ("the interstate movement of trucks"); *S. Pac. Co.*, 325 U.S. at 779 ("the interstate movement of trains"). These cases, which could be regarded as

one of the doctrine's "exceptions and variations," *Wayfair*, 138 S. Ct. at 2091, address situations in which a state "prescribe[s] standards for interstate carriers" that may "conflict with the standards of another State, making it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles" when crossing state lines, *Bibb*, 359 U.S. at 526; *e.g.*, *id.* at 527 (requiring a unique type of truck hardware); *Kassel*, 450 U.S. at 665 (restricting highway vehicle size); *S. Pac. Co.*, 325 U.S. at 774 (limiting train length).

Like protectionism, restrictions on the ability "to move commodities through the State," *Kassel*, 450 U.S. at 667, may pose a unique threat to economic union. If every state could "place a great burden of delay and inconvenience on [vehicles] crossing its territory," *Bibb*, 359 U.S. at 529-30, their cumulative impact could make multi-state trips untenable, *S. Pac. Co.*, 325 U.S. at 774. Such laws, therefore, have the "inevitable effect of threatening the free movement of commerce." *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (brackets and quotation marks omitted).

That concern echoes Founding-era complaints about the "tribute" that states without good harbors were forced to pay for items imported through their neighbors' territories. *See supra* Part I; *Federalist No. 42*, *supra*, at 267 (Madison) (the Commerce Clause was designed for "the relief of the States which import and export through other States"). These laws also open the door to protectionism and to other forms of hostile competition. *See Kassel*, 450 U.S. at 676 (Iowa sought to "secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs"). As with protectionism, therefore,

this Court has required states to justify such restrictions. Nowhere else is anything like "balancing" a reality.

III. Neither the Constitution Nor this Court's Precedents Provide a Basis for Judicial Invalidation of Proposition 12.

A historically grounded approach to the Commerce Clause, as well as a faithful application of this Court's precedents, requires dismissing Petitioners' lawsuit. Proposition 12 is neither protectionist nor discriminatory. Pet. Br. 2 n.2. It does not "prohibit the flow of interstate goods." *Exxon*, 437 U.S. at 126. Those are virtually the only types of state laws this Court has struck down for nearly a century.

Under this Court's longstanding approach, therefore, there is no basis for striking down Proposition 12. The law causes none of the problems that prompted the adoption of the Commerce Clause and creates none of the risks that have long guided this Court's precedents. It does not "neutralize the economic consequences of free trade among the states." *Baldwin*, 294 U.S. at 526. It does not "convey advantages" on local interests. *Camps Newfound*, 520 U.S. at 577. It neither "deprives out-of-state businesses of access to a local market," *C&A Carbone*, 511 U.S. at 389, nor encourages "intrastate rather than interstate economic activity," *Wynne*, 575 U.S. at 545.

The prospect that other states will impose "contradictory" requirements on pork production, Pet. Br. 30, is chimerical, as Petitioners offer no reason why states would mandate confinement in tiny pens. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960) ("appellant argues that other local governments might impose differing requirements," but "has pointed to none"). And if a profusion of state laws

somehow were to become cumbersome, Congress always has the power to step in.

Because precedent does not support them, Petitioners ask this Court to change—yet again—the standards for evaluating nondiscriminatory state laws, by smuggling a form of policy balancing into an "extraterritoriality" framework. *See* Pet. Br. 12 ("the extraterritoriality doctrine should be given a scope that bars Proposition 12"). That is why Petitioners urge this Court to "eschew[] formalism" in favor of "case-by-case" adjudication. *Id.* at 26 (quoting *Healy*, 512 U.S. at 201). But as shown above, this Court's previous experience with fuzzy standards and outcome-driven decisions is a cautionary tale that should not be repeated.

What Petitioners really want are "artificial competitive advantages," *Wayfair*, 138 S. Ct. at 2094, for the supposed "natural functioning" of the pork industry, by which they mean their own "particular structure or methods of operation," *Exxon*, 437 U.S. at 126. In their telling, the Constitution forbids interference with the "segmented commercial pork production process that has evolved in this country." Pet. Br. 28.

Indulging that plea would turn the dormant Commerce Clause into the "judicial economic veto" that its critics have long charged. *Wynne*, 575 U.S. at 572 (Scalia, J., dissenting); *see United Haulers*, 550 U.S. at 355 (Thomas, J., concurring in the judgment). It would also plunge this Court back into the unworkable conceptual morass of the late nineteenth and early twentieth centuries. The "national market" that the Commerce Clause guarantees, Pet. Br. 32, is "a national market *free from local legislation that discriminates in favor of local interests*," *C&A Carbone*, 511 U.S. at 393 (emphasis added). The Clause does not promise "free access to every market in the Nation," Pet. Br. 25, in

the sense of sweeping away local requirements that any particular business finds inconvenient. Rather, it prevents each state from placing "burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking*, 545 U.S. at 433 (quotation marks omitted).

To be sure, *Congress* could give Petitioners what they seek, either by establishing uniform federal standards for pork production or simply by preempting state action. The text of the Constitution expressly grants Congress the power to regulate commerce among the states, and in exercising that power to decide where national uniformity is desirable, Congress is not limited to targeting protectionism or discrimination. *See Gibbons*, 22 U.S. at 196 (Congress's power to regulate interstate commerce "acknowledges no limitations, other than are prescribed in the constitution"); *Currin v. Wallace*, 306 U.S. 1, 14 (1939) (under its "plenary" commerce power, Congress "may exercise its discretion," "choose the commodities and places to which its regulation shall apply," and "consider and weigh relative situations and needs").

But the role of the non-elected judiciary in overturning state laws under the dormant Commerce Clause is more modest: striking down only those measures—of which protectionist laws are the exemplar—that are fundamentally irreconcilable with commercial and political unity. When this Court has strayed beyond that function and attempted a more active role in managing the national economy, the results have been deeply problematic.

Economic protectionism, unlike Proposition 12, is "hostile in conception," *Baldwin*, 294 U.S. at 527, "destructive to the harmony of the States," *Camps Newfound*, 520 U.S. at 571 (quoting *Gibbons*, 22 U.S. at 224

(Johnson, J.)), and inimical to "the project of our Federal Union," *id.* at 595. This Court's important but narrow role is to guard against that type of danger—nothing more.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

August 15, 2022 * Counsel of Record