No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ANIMAL PROTECTION AND RESCUE LEAGUE, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Animal Protection and Rescue League, Inc. (APRL) is a 501(c)(3) nonprofit organization based in San Diego, California which coordinated volunteer efforts to gather thousands of signatures for Proposition 12 and contributed over $25,000 to promote its passage, including through printing promotional literature and hiring a local campaign coordinator to organize volunteers. APRL was also a co-signer on the rebuttal argument in favor of Proposition 12 in the California General Election Official Voter Information Guide (VIG).[2]

APRL has an interest in ensuring that a duly enacted law approved by nearly two thirds of California voters, which APRL volunteers expended hundreds of hours and tens of thousands of dollars helping to pass, is not eliminated based on the fiction that there is no local benefit to California.

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[1] Pursuant to this Court's Rule 37.3(a), amicus affirms that all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, amicus further affirms that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] California Secretary of State (2018) https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf, p.71

SUMMARY OF ARGUMENT

Petitioners fail to ever allege in their complaint, and fail to show in their briefing, that States lack any local interest in banning the sale of products of animal cruelty within their borders.

Animal cruelty statutes fall under the general police power of the State to protect public morals. Violating such laws is not a crime against animals, which are not legal persons and have no legal rights, but rather is a crime against the State. A ban on the sale of products of animal cruelty is no different. The legally cognizable interest is in *people* not being exposed to the sale of products of cruelty by retailers within the State.

The vast majority of California voters have made a value judgment to require *all* consumers in California to pay slightly more money for pork from animals that were raised with enough room to move and turn around. By virtue of economies of scale, this means all consumers in the State will have access to pork from more humanely raised animals at a lower price than they would be able to purchase otherwise as individual consumers. This is another clear local benefit which Petitioners do not address at all.

Finally, there are health and safety benefits to not consuming the flesh of animals that have been crammed into such tiny spaces for their entire lives. Absent Congressional action to the contrary, voters have an absolute right to ban the sale of pork in their State that is the product of intensive confinement leading to such health, safety, and moral concerns.

ARGUMENT

I. Petitioners' complaint fails to plausibly allege lack of any local benefit, and Petitioners' brief provides no support for this unpleaded allegation

Petitioners and the United States argue extensively that California voters can have no legitimate interest in how animals are raised in another State. However, this issue is not raised *at all* in the pleadings. In fact, Petitioners' complaint contradicts this argument and takes the exact opposite position by extensively alleging that extreme confinement is somehow *better* for animal welfare, and that this is why the putative local interest advanced by Proposition 12 is outweighed by extraterritorial effects. Pet.App. 202a, 215a-231a.

Petitioners' allegations, in addition to being implausible, are also irrelevant, as Proposition 12 does not regulate farms in other states. The issue here is what types of products voters in California consider to be morally acceptable for *local retailers* to sell and profit from. Thus, Proposition 12 regulates the *local sale* of products that voters deem cruel, not the actions of farms in another state, which can choose to supply or not supply the local retailers that are the entities actually subject to the law.

Paragraph 465 of the complaint alleges, "Proposition 12 places excessive burdens on interstate commerce without advancing any legitimate local interest." Pet.App. 232a. This is the only time at all that the complaint mentions "local interest" or "local benefit."

The complaint fails to ever even allege that there is no local benefit in California to a law that regulates sales *in California*. Instead, Petitioners improperly conflate lack of an out of state animal welfare interest with a local interest in regulating what types of products may be sold in California, alleging in the next paragraph, "Proposition 12 is not justified by any animal-welfare interest." *Ibid.*

Petitioners seem to believe that if they can convince a federal court these allegations are true, this would allow the court to overrule any local concerns in California regarding the sale of such products as being outweighed by alleged increased costs to pork suppliers, even though these costs will be borne by California consumers.

However, it is the voters of California who get to determine whether sale of a product violates public morals of the State, not a federal court. California voters have done so in passing Proposition 12.

The law at issue only regulates sales in California and not any conduct outside of California. Thus, California's undisputed lack of jurisdiction to regulate actions outside of California is not only irrelevant but also goes outside of the pleadings in a case that was dismissed at the pleading stage *with leave to amend*—which Petitioners failed and refused to do.

A. Petitioners' argument that States can have no legitimate interest in banning products of animal cruelty is supported by no authority and is directly at odds with States' rights to protect public morals

Petitioners cite no law to support their unpleaded allegation that voters can have no local interest in banning the sale of products of animal cruelty in their State. Petitioners instead cite only to the California Department of Food and Agriculture (CDFA) analysis finding that consumers in California may take comfort in knowing the pork products being sold in the State were not produced with extreme animal cruelty, and assert without any authority that this is not a valid State interest. Pet.Br. 36 ("its concern for the 'moral satisfaction, peace of mind, social approval' of its citizens is not within the police power. Pet. App. 75a," citing to CDFA analysis, and providing no authority for the "not within the police power" contention.)

Thus, Petitioners contend without any authority whatsoever that the State can have no local interest in ensuring consumers within its borders have this protection and peace of mind.

The United States repeatedly makes the same contention as well and relies on *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 644 for support. U.S.Br. 10, 20. However, *Edgar* is inapposite.

The United States selectively quotes the sentence fragment, "has no legitimate interest in protecting," and then misleadingly inserts the words, "the welfare of animals located outside the State." *Ibid.* The actual quote from *Edgar* is, "While protecting local investors

is plainly a legitimate state objective, the State has no legitimate interest in protecting *nonresident shareholders*." *Edgar,* 457 U.S. 624, 644, emphasis added. Here, the animals are not the shareholders. The shareholders here—i.e. the *people* the law is intended to protect—are California residents, who voters do not want being exposed to the sale of certain products of animal cruelty in their State.

Just as the State has an interest in protecting local investors, it also has an interest in protecting local consumers, in this case from being exposed to the sale of products within the State which the general electorate has deemed to be products of animal cruelty.

The United States goes on to assert without any support that the cruelty "occurs entirely outside California and has *no impact within California*." U.S.Br. 11, emphasis added. This presumes that the only purpose of animal cruelty statutes is to protect animals, which is not correct. Animal cruelty statutes derive from the State's general police power over health, safety, and welfare to protect *people* from being exposed to immoral behavior.

Thus, animal cruelty laws are "directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts." *Collins v. Tri-State Zoological Park of W. Md., Inc.* (D.Md. 2021) 514 F. Supp. 3d 773, 781, citing *Commonwealth v. Higgins* (1931) 277 Mass. 191, 194.

"A legislative proscription, such as that found in the cruelty to animals statute, is declarative of public policy and is tantamount to calling the proscribed

matter prejudicial to the interests of the public." *Pa. Soc. for Prevention of Cruelty to Animals v. Bravo Enterprises, Inc.* (1968) 428 Pa. 350, 237.

"When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public." *Pennsylvania Public Utility Com. v. Israel* (1947) 356 Pa. 400, 1947 Pa. LEXIS 355, ***6.

California voters have deemed it harmful to public morals for retailers *in California* to profit from the sale of meat derived from pigs confined for their entire lives in crates too small to turn around in or even move. This is not an issue of California seeking to regulate conduct that occurs outside of the State, but rather to protect public morals *in* California by regulating what products *local* retailers may sell.

Petitioners' entire argument in their brief—which is only referenced in passing in a single, boilerplate sentence of their 470-paragraph complaint—is that there can be no local benefit to a law prohibiting the sale of products in a State that voters in that State have deemed to have been cruelly produced. Pet. App. 232a, ¶465.

Perhaps recognizing States do have an interest in avoiding the harm to public morals that can be caused by allowing the sale of products of extreme animal cruelty within the State, Petitioners spend a great deal of their brief and the majority of their underlying complaint arguing that confining animals in cages barely larger than their bodies for their entire lives is actually *more humane* than the alternative.

The United States does not take a position on whether Petitioners' allegations are correct, but asserts that because Petitioners have made such allegations, the case must be allowed to survive the pleading stage. U.S.Br. 5. However, Petitioners must allege facts not merely showing that they may be right, but that no reasonable person could think otherwise. States are allowed to make value judgments with which others may disagree.

Petitioners fail to plead facts plausibly meeting that demanding standard and thus fail to overcome the *Iqbal/Twombly* pleading standard under Federal Rule of Civil Procedure 8. *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, *Ashcroft v. Iqbal* (2009) 129 S. Ct. 1937.

Claiming there can be no moral concerns with refusing to allow animals to move or turn around for their entire lives defies common sense. Alleging that a State's view to the contrary is irrational is not a plausible allegation.

Even if the Court were to find Petitioners' allegations plausible, voters and their representatives are entitled to determine what constitutes a product of cruelty that harms public morals if allowed to be sold in their State. *United States v. Stevens* (2010) 559 U.S. 460, 476 (recognizing "there may be 'a broad societal consensus' against cruelty to animals," and that there is also "substantial disagreement on what types of conduct are properly regarded as cruel.")

States are entitled to "ensure that retailers comply with local laws and norms." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas* (2019) 139 S.Ct. 2449, 2477. In this case, as evidenced by 63% of California

voters approving Proposition 12, the local laws and norms are that certain products should not be sold within the State that are derived from such extreme confinement of animals.

B. Unless prohibited from doing so *by Congress*, States have a Tenth Amendment right to ban the sale of products that harm public morals

The Tenth Amendment provides the general police power of the State. "The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered." *Barrett v. State* (1917) 220 N.Y. 423, 428.

"The right of a State in the exercise of the police power to make regulations which indirectly affect interstate commerce has been frequently sustained." *Field v. Barber Asphalt Paving Co.* (1904) 194 U.S. 618, 623.

> Police power may be lawfully resorted to for the purpose of preserving public health, safety and morals; a large discrimination is necessarily vested in the legislature to determine what the public interests require and what measures are necessary for the protection of such interests.

Cook v. Marshall County (1905) 196 U.S. 261, 268.

The United States dismissively refers to the sale ban at issue here as having "no in-state impact based on a philosophical objection." U.S.Br. 11. In fact, the United States uses the phrase "philosophical objection," or some variation after "philosophical," such as position, disagreement, opposition, or

position, a total of seven times in its brief, in a disparaging way, as if the fact that voters have a moral objection to the sale of a certain type of product occurring within their State means nothing.

However, a "philosophical objection," i.e. a *moral* objection, *is* an in-state impact. Absent a directive otherwise from *Congress,* California voters do not have to tolerate products of animal cruelty being sold in their State.

Petitioners' reference to the Pork Promotion, Research, and Consumer Information Act, 7 U.S.C. § 4801(a)(2) is misdirection and actually highlights that there is no federal preemption, as Congress could have passed a law preempting local sale bans as part of this set of laws but did not. Pet.Br. 8-9.

The United States also quotes *Tenn. Wine, supra,* 139 S.Ct. 2449, 2460 for the unremarkable holding that, "without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." The Framers would also find it surprising that instead of traditional farms, we now have massive, consolidated factory farms that cram animals into cages too small to move or turn around. Even more surprising would be an argument that States that have a moral objection to such extreme confinement must be *required* by the Constitution to allow the sale of products of such extreme confinement to be sold within their State, even though Congress has been silent on the topic.

Tenn. Wine was about protectionism for in-state businesses, which has always been held to be a violation of the dormant Commerce Clause. *Ibid* ("it

would be strange if the Constitution contained no provision curbing state protectionism.")

As Petitioners would have it, despite California having banned such confinement by farms *within* its borders, California must nonetheless allow its local retailers to profit from the sale of products that California voters have a moral objection to. This turns *Tenn. Wine's* disallowance of protectionism on its head. Instead of stopping protectionism, such a ruling would actually require California to put its in-state farms at a *disadvantage*, by allowing only out of state producers to access to a market that in-state producers are not allowed to cater to.

The United States also makes a passing reference to *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 293 to selectively quote four words: "sovereignty of each State." U.S.Br. 20. *World-Wide Volkswagen* had nothing to do with sale of a product in a state that was produced in another state. It was about personal jurisdiction over an out of state resident in order to issue a judgment. The ruling was, "we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma." *Id.* at 295.

Proposition 12, in contrast, applies only to retailers *in California* selling products of extreme animal cruelty that California voters find inflicts moral injury upon the *people* of the State. Petitioners' purported "members" remain free to do whatever they wish in their own States, subject to those States' laws

and federal law.[3] Proposition 12 only places a restriction on *retailers in California*. Cal. Health & Safety Code § 25991(o).

Sending conflicting messages about treatment of animals—for instance, that dogs should be treated humanely, but that pigs can be locked in cages too small to move or turn around, and that local businesses are free to profit from this cruelty—can have damaging impacts on public morals. And this harm is what voters are entitled to address.

> With their emotional retardation and great difficulty recognizing the feelings of others, it's no wonder that animal abuse is common among kids with difficult attachment histories…From the perspective of a troubled boy, our society has rather ambiguous moral standards about the treatment of animals. This helps create a moral space for cruelty by boys who seem to lack the regular emotional feedback systems that cause most children to stop the hurting once they receive the victim's signals of distress and pain.

Garbarino, James, *Lost Boys: Why our Sons Turn Violent and How We Can Save Them* 54 (1999 Kindle Edition).

The benefit to *people* of not being exposed to products of animal cruelty is highlighted in the following anecdote about President Lincoln:

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[3] Petitioners are not pork producers but rather lobbying organizations that claim those they lobby for have been injured, and that this gives them both associational and direct standing.

> Lincoln and other attorneys were riding on the old Eighth Judicial Circuit when they passed by a pig caught firmly in a mud mire. The poor pig was squealing piteously, slowly sinking to its doom. Lincoln and his fellow attorneys rode by. After about a mile Lincoln stopped. He couldn't get that pig out of his mind. Turning back he rescued the pig using two boards, the pig getting him muddy in the process and ruining the new suit he was wearing. Lincoln noted that by freeing the pig from the mire, he had also freed him from his conscience, and that was worth a suit.

The American Catholic (2015) https://the-american-catholic.com/2015/05/17/lincoln-and-pigs/.

It was irrelevant in this anecdote that the pig was likely to eventually be slaughtered and eaten. The issue was the effect of the pig's needless suffering in the interim on someone who was aware of it, in this case Lincoln. California voters similarly do not wish to be exposed, or have the people of their State exposed, to the sale of products of animal suffering that could corrupt public morals and dull humanitarian feelings.

> People are informed and concerned about animal farming methods, and in surveys assessing shoppers' attitudes toward factory farming, a majority of respondents prefer practices that are more humane. Beyond the weighty ethical questions, thanks to recent research, we can also now quantify and monetize consumer sentiment toward animal farming. For example, agricultural economists

> F. Bailey Norwood and Jayson Lusk show in their 2011 book, Compassion by the Pound, that consumers are actually willing to spend their own, real money—in average amounts ranging from $23 to $57 per thousand animals—to improve farm animals' lives. Factory farming often exacts a toll on animals in the form of pain and stress, **and because humans care about how animals are treated, we suffer too**.

Simon, David Robinson, *Meatonomics* 134-135 (2013 Kindle Edition), emphasis added.

Individual consumers may determine they cannot afford to pay significantly higher prices for specially produced, cage free pork. However, when asked whether *everyone* in the State should be required to pay slightly higher prices so that *all* consumers in the State have access to *only* pork from pigs that have been given enough space to move and turn around, voters overwhelmingly approved Proposition 12. More affordable humanely raised pork due to economies of scale is another clear local benefit that Petitioners completely fail to address.

II. Petitioners erroneously conflate *Pike* balancing with the inapplicable per se rule against discriminatory laws

Petitioners wish for the Court to strike down a law duly enacted by millions of voters that bans the sale of certain products in their State. In order to justify this extreme incursion into the sovereignty of individual States, which could never survive *Pike* balancing given the State's general police power to protect public health, safety, and morals, Petitioners instead attempt to invoke the per se rule against

discriminatory or protectionist laws while misleadingly framing the issue as *Pike* balancing.

The United States does the same and engages in aggressive burden shifting by stating, "respondents cited no precedent of this Court holding that one State's bare philosophical disagreement with the public policy of other States, concerning activities outside the regulating State's borders, qualifies as a legitimate local interest under *Pike*." U.S.Br. 20.

However, Petitioners are the side who must produce *some authority* that "philosophical disagreement"—i.e. a moral objection—is *not* a sufficient local interest for banning sale of a product. Neither Petitioners nor the United States have done so. Petitioners did not even allege this in their complaint, but are now making this argument for the first time before this Court.

Petitioners erroneously argue their position is supported by *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.* (1986) 476 U.S. 573, which holds that a law requiring one State's permission before a liquor seller can reduce prices in another State, is unconstitutional. *Brown-Forman* was a price control case and is nothing like the present case, which does not require Petitioners' purported members to take *any* action in another State. This argument also conflates *Pike* balancing with the per se rule against extraterritorial price control laws.

Pork producers could open pig farms inside or outside of California that comply with Proposition 12 and sell their products in California. Or they could not do so at all. There is nothing requiring current pork

producers operating as they are currently to sell their products in California.

In *Brown-Forman,* the issue was not that producers could only sell a certain type of product in New York. Rather, it was that New York wanted to impose its own price control scheme *outside* of New York, such that producers had to ask *permission* from New York before they could lower prices in another State. Thus, the sale of the particular alcohol in New York was not objectionable at all—rather the only thing that was objectionable was the price that was being charged to distillers *in another State*. In the present case, in contrast, the actual product being sold is something California voters take issue with, and voters find the sale of such products to be offensive to the public morals of the State and harmful to health and safety.

Petitioners and the United States also repeatedly refer to a hypothetical example in *Baldwin v. G.A.F. Selig, Inc.* (1935) 294 U.S. 511 of conditioning sale of a product on a certain wage scale being met in another State being impermissible. This is an example of another type of price control law. However, this is very different from the sale of a product itself being considered harmful or offensive to public morals.

In *Baldwin,* New York tried to justify its milk price control law based on sanitation reasons. *Baldwin* referred to a number of hypothetical examples of laws that could cause milk producers in other States to have more money which could then theoretically be used to provide better sanitation. *Baldwin* found that such laws in New York that are intended to cause milk producers in other States to have more money is

too attenuated a link to be supported by New York's interest in having milk produced in sanitary conditions be sold within its borders, which was the only interest asserted by New York in *Baldwin*.

Thus, the State's interest in milk being produced in sanitary conditions was too attenuated from the law at issue, which was a price control law and nothing else. This is a completely separate issue from confining animals in cages too small to turn around. Sellers in California profiting from the sale of such products harms public morals in California, according to the voters. The purpose of Proposition 12 is not to control prices.

A hypothetical minimum wage law as described in *Baldwin*, based entirely on economics, could not escape being protectionist at its core and intended to control the price of a product for no reason other than protecting in in-state markets. This was in fact the only purpose of the actual law at issue in *Baldwin*. Bellush, Jewel, *Milk Price Control: History of Its Adoption* (1933), included in New York History, Volume XLIII, Proceedings of the New York State Historical Association, Volume LX (1962).

The cost of living as well as the required minimum wage varies widely between and even within States, as many cities also have their own minimum wage. Conditioning sale of a product in one State on a certain minimum wage being paid in another State could be nothing other than an invalid price control law, as it is unrelated to any interest in the State where the product is being sold other than controlling prices, which is an invalid purpose. *Baldwin, supra,* 294 U.S. 511, 524.

In contrast, a product made by cruelly confining animals in cages where they cannot move or turn around is a moral issue, not a price control issue. California voters are concerned that the pork industry routinely confines pigs in cages too small to turn around or move for their entire lives, and 63% voted to ban the sale of such products within their State. Only Congress has the power to preempt such a State law and has not done so.

The amicus brief of Hudson Valley Foie Gras (HVFG)[4] attempts to expand the minimum wage hypothetical to other labor laws and treatment of workers in another State generally, and claims that because California has no jurisdiction over conditions for workers in another State, it also can have no interest in banning the sale of certain products based on how animals are treated to make them.

As part of its hypotheticals, HVFG repeatedly asserts the State's only interest in passing such laws would be to "influence" actions in another State. HVFG Br. 6-8. However, Petitioners have not alleged this is a purpose of Proposition 12, nor is there any evidence that this is such a purpose. Variations of the word "influence" only appear in paragraphs 173, 367,

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[4] HVFG force feeds ducks by machine to enlarge their livers to over 12 times normal size, and then sells the grossly enlarged, sickly livers as "foie gras." *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta* (9th Cir. 2022) 33 F.4th 1107, 1131. California has banned products of such cruel force feeding. Cal. Health & Safety Code § 25982. HVFG selectively quotes the statute and misleadingly omits the word "force" before "feeding," to make it seem as though California is arbitrarily attempting to regulate how much food ducks can be fed to allow the product to be sold in California. HVFG Br. 5.

and 375 of the complaint, and none refer to the purpose of Proposition 12. Pet.App. 187a, 217a, 219a.

HVFG relies on *Nat'l Foreign Trade Council v. Natsios* (1st Cir. 1999) 181 F.3d 38, 69, *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council* (2000) 530 U.S. 363, in which Massachusetts implemented economic *sanctions* on businesses that did business with the country of Burma due to human rights abuses. HVFG Br. 7. Thus, Massachusetts was not banning products that were directly the result of human rights abuses, but was imposing its own economic sanctions on businesses that did business with Burma.

Proposition 12 does not impose economic sanctions. Rather, Proposition 12 bans specific products from being sold *in* the State that the State has a direct moral objection to. The increased costs of providing animals more space will then be borne by purchasers *in California.*

In affirming *Natsios*, this Court explicitly declined to address the First Circuit's ruling that the law violated the dormant Foreign Commerce Clause, which is analogous to the dormant Commerce Clause. *Crosby v. Nat'l Foreign Trade Council* (2000) 530 U.S. 363, 374, fn. 8. Instead, this Court affirmed on the ground that Congress had already passed its own sanctions against Burma, and the "statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions." *Id.* at 378.

This Court further found the law "undermines the President's capacity, in this instance for effective diplomacy…they compromise the very capacity of the

President to speak for the Nation with one voice in dealing with other governments." *Id.* at 381.

The need for Petitioners and amici to rely on inapplicable price control and protectionism cases as well as States imposing economic sanctions against businesses that do business with a foreign government, while disingenuously claiming that this all somehow falls under *Pike* balancing, shows that there is a gaping whole in Petitioners' position.

Petitioners' entire argument is premised on seeking to move past the pleading stage to prove that the putative local benefits of Proposition 12 are outweighed by its extraterritorial effects. But, realizing that this will be impossible, Petitioners instead attempt to invoke the inapplicable per se rule against discriminatory or price control laws.

In another case, the Tenth Circuit arrived at a similar conclusion as the Ninth Circuit here, ruling "it isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters." *Energy & Env't Legal Inst. v. Epel* (10th Cir. 2015) 793 F.3d 1169, 1173.

"EELI reads *Baldwin, Brown-Forman*, and *Healy* as standing for a (far) grander proposition than we do. Exploiting dicta in *Healy*, EELI contends that these cases require us to declare 'automatically' unconstitutional any state regulation with the practical effect of 'control[ling] conduct beyond the boundaries of the State.'" *Energy & Env't Legal Inst. v. Epel* (10th Cir. 2015) 793 F.3d 1169, 1174.

III. Petitioners rely on inapplicable caselaw prohibiting discrimination against out of state businesses

Petitioners and the United States also rely on *C & A Carbone v. Town of Clarkstown* (1994) 511 U.S. 383, which only prohibited discrimination against out of state businesses.

The issue in *C&A Carbone* was the town using a local ordinance to steer business to a waste plant in order to pay for construction of the plant, thus openly discriminating against out of state interests for *purely economic* reasons. *Id.* at 393.

The United States selectively quotes a passage and inserts the words "over animals welfare" in it. U.S.Br. 11. The sentence preceding the one quoted by the United States was, "Nor may Clarkstown justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment." *C & A Carbone,* 511 U.S. 383, 393.

Purported "harm to the environment" was not an interest actually asserted by the town in *C & A Carbone*, but the Court was simply cautioning the town that it could not manufacture some other reason regarding some occurrence in another State to justify steering business to its disposal site. Once the waste leaves one State, that State is not free to dictate to another State how to process it.

C & A Carbone held that the town *could* enact "uniform safety regulations enacted without the object to discriminate. These regulations would ensure that competitors like Carbone do not

underprice the market by cutting corners on environmental safety." *Ibid.*

Here, California has enacted a ban on the sale of certain products *within* the State. The State is not attempting to regulate what happens to a product after it *leaves* the State, as in *C & A Carbone,* or even before it comes into the State, which does not have to occur at all. Rather, California is regulating the exact opposite—whether a product may be sold *within* its jurisdictional bounds.

The Second Circuit Court of Appeals distinguished *C & A Carbone* in a case in which the town did not discriminate against out of state competitors but instead evenhandedly prohibited *all* garbage haulers from participating in the market. *USA Recycling v. Town of Babylon* (2d Cir. 1995) 66 F.3d 1272, 1283. The law at issue there also easily overcame *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137 ("*Pike*") balancing. *USA Recycling* at 1286-1287.

Proposition 12 is more like the law at issue in *USA Recycling,* which did not discriminate between in state and out of state commerce, and is nothing like the law at issue in *C & A Carbone*.

As this Court has previously held, the relevant inquiry in a dormant Commerce Clause analysis of a State law is "to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." *Fulton Corp. v. Faulkner* (1996) 516 U.S. 325, 331 (cleaned up.)

Proposition 12 applies equally to the sale of pork products wherever they are from. Any effects on

interstate commerce are only incidental to the State's overriding interest in protecting public health, safety, and morals.

IV. Voters are aware of the extreme confinement now commonly used in pork production, and requiring California to allow the sale of such products inflicts moral injury on the State

Consumers are by now very much aware of cruelty involved in modern day pork production, as evidenced by the overwhelming vote in favor of Proposition 12. There are many articles and best selling books that go into detail about how this industry now operates, which underscores that States have a legitimate local interest in protecting public morals by banning the sale of products of this cruelty that its citizens are aware of.

A widely circulated photo of what one of these intensive confinement cages looks like is seen below from a Vermont Law School website:

Winders, Delcianna, *Survey Says…Californians Can Have Their Pork and Let Pigs Move* (2021),

https://www.vermontlaw.edu/blog/animal-law/survey-says-californians-can-have-pork-let-pigs-move.

And this photo that appeared in the National Review recently:

Matthew Scully, *A Brief for the Pigs: The Case of* National Pork Producers Council v. Ross, National Review (July 11, 2022), https://www.nationalreview.com/2022/07/a-brief-for-the-pigs-thecase-of-national-pork-producers-council-v-ross/.

These intensive confinement systems first began coming into use in the 1970s. In a 1976 issue of Farmer and Stockbreeder, the following letter appeared from a pig farmer:

> May I dissociate myself completely from any implication that this is a tolerable form of husbandry? I hope many of my colleagues will join me in saying that we are already tolerating systems of husbandry which, to say the least of it, are downright cruel… Cost effectiveness and

> conversion ratios are all very well in a robot state; but if this is the future, then the sooner I give up both farming and farm veterinary work the better.

An Enquiry into the Effects of Modern Livestock Production on the Total Environment (London: The Farm and Food Society, 1972), p.12, as quoted in Robbins, John, *Diet for a New America 25th Anniversary Edition: How Your Food Choices Affect Your Health, Your Happiness, and the Future of Life on Earth* 72 (2012 Kindle Edition).

The same year, the following letter appeared in the factory farming journal *Confinement* from a retired farm veterinarian:

> More and more I find myself developing an aversion to the snow-balling trend toward total confinement of livestock… If we regard this unnatural environment as acceptable, what does it portend for mankind itself?… How can a truly human being impose conditions on lower animals that he would not be willing to impose on himself? Freedom of movement and expression should not be the exclusive domain of man…What (then) of human behavior (in the future)? Will it sink to the nadir of contempt for all that is naturally bright and beautiful? Will all of us become tailbiters without recognizing what we have become?

A. Koltveit, *Confinement* (November-December 1976), p.3, as quoted in Robbins, 71-72.

"These two letters were written in 1976, just as total-confinement systems for pork production were

gathering steam. Since then, despite the pleas of these and other warning voices, the trend has continued: more total confinement, more frustration of all the animals' natural urges, more farming by automation and technology, more drugs, and more assembly-line pork." Robbins, 72-73.

> In 1967 there were more than a million hog farms in the country; today there are about 114,000, all of them producing more, more, more to meet market demand. About 80 million of the 95 million hogs slaughtered each year in America, according to the National Pork Producers Council, are intensively reared in mass-confinement farms, never once in their time on earth feeling soil or sunshine. Genetically designed by machines, inseminated by machines, fed by machines, monitored, herded, electrocuted, stabbed, cleaned, cut, and packaged by machines—themselves treated like machines "from birth to bacon"—these creatures, when eaten, have hardly ever been touched by human hands.

Scully, Matthew. *Dominion* 29 (2002 Kindle Edition).

> Small farmers, as seen from Smithfield, are hopelessly undisciplined, hopelessly behind the curve in consumer tastes. In Mr. Poulson's analogy, to persist in small-scale farming today is like trying to make cars in one's own backyard, refusing to automate and mass produce and get with the global program. Smithfield, he tells me, is like the Ford Motor of livestock agriculture. "Our farms are run by

Ph.D.'s, guys in white coats. We're the biggest company, and big is not bad. Big is efficient. If you wanted to add a couple of dollars to the price of a pork chop at the counter, you can do it very quickly. You can put them at free range."

Id, 255.

A mix of tolerance and pity describes the Smithfield attitude toward the traditional farmer. They'll let him linger on awhile, sponging off the government until his affairs are in order and he is ready to face his final extinction. At the same time they do not mind at all if consumers still think of their own corporate operations as small farms like the ones Smithfield has been systematically killing off. They understand the deep sentimental value of family farming, with its connotations of land stewardship and decent treatment of animals. That's why so many of our meat labels still bear the images of happy little farms with animals grazing afield. That's why the New Agriculture still trades on the reputation of the old with its countrified corporate brand names, all of this "Murphy Family Farms," "Clear Run Farms," "Sun-nyland," and "Patrick's Pride" when the more apt designations would be Murphy Factory Farms, Never Run Farms, Sunlessland, and Patrick's Shame.

Id., 256.

The sows each weigh 500 pounds. The crates are seven feet long, and in width less than twice the length of my 14-inch legal pad. Not much room, is there? I ask. How can they even lie

down on their sides? Gay gives a baffled shrug, like it's some kind of trick question or she has honest to God just never thought of it before. "I don't know. They just do." The answer can be seen in the swollen legs of the sows standing or trying to stand. To lie on their sides, a powerful inclination during months of confinement in twenty-two inches of space, they try to put their legs through the bars into a neighboring crate. Fragile from the pigs' abnormally large weight, and from rarely standing or walking, and then only on concrete, their legs get crushed and broken. About half of those pigs whose legs can be seen appear to have sprained or fractured limbs, never examined by a vet, never splinted, never even noticed anymore.

Id, 267.

We keep walking. Sores, tumors, ulcers, pus pockets, lesions, cysts, bruises, torn ears, swollen legs everywhere. Roaring, groaning, tail biting, fighting, and other "Vices," as they're called in the industry. Frenzied chewing on bars and chains, stereotypical "vacuum" chewing on nothing at all, stereotypical rooting and nest building with imaginary straw. And "social defeat," lots of it, in every third or fourth stall some completely broken being you know is alive only because she blinks and stares up at you like poor NPD 50-421, creatures beyond the power of pity to help or indifference to make more miserable, dead to the world except as heaps of flesh into which the AI rod may be stuck once more and more flesh reproduced.

> When they have conquered the "stress gene," maybe the Ph.D.'s and guys in white coats can find us a cure for the despair gene, too.
>
> *Id*. 267-268.

V. There are also legitimate health and safety concerns with the sale of products of extreme animal confinement

There are also health and safety concerns from raising animals in such extreme confinement, which Petitioners are well aware of:

> These excessively stressed animals have the industry worried, not because of their welfare, but because, as mentioned earlier, "stress" seems to negatively affect taste: **the stressed animals produce more acid, which actually works to break down the animals' muscle** in much the same way acid in our stomachs breaks down meat.
>
> **The National Pork Producers Council**, the policy arm of the American pork industry, reported in 1992 that acid-ridden, bleached, mushy flesh (so-called "pale soft exudative" or "PSE" pork) affected 10 percent of slaughtered pigs and cost the industry $69 million.
>
> By 2002, the American Meat Science Association, a research organization set up by the industry itself, found that more than 15 percent of slaughtered pigs were yielding PSE flesh (or flesh that was at least pale or soft or exudative [watery], if not all three).

Foer, Jonathan Safran, *Eating Animals* 154 (2009 Kindle Edition), emphasis added.

In addition to considering pork produced by extreme confinement to be immoral to sell in California, voters also have legitimate health and safety concerns regarding consumption of the flesh of such intensively confined animals.

VI. The complaint does not plausibly allege excessive extraterritorial effects and is internally inconsistent

Proposition 12 does not disadvantage or attempt to regulate any out-of-state businesses. The businesses subject to the law are grocery stores *in California* that are required to source from suppliers that meet Proposition 12's space requirements.

Petitioners allege, "Consumer demands from purchasers of pork to increase space for sows during gestation has led roughly 28% of the industry to convert from individual gestation stalls to group housing." Pet.App. 186a, ¶160.

Petitioners do not allege there has been any problem determining which pigs were raised in group housing to be able to sell pork labeled as such to consumers who want it. Petitioners have presented no authority for why a sovereign State has any less right than individual consumers for demanding a certain type of product for moral reasons.

Paragraph 162 of the complaint alleges, "Group housing generally provides around 16 to 18 square feet per sow," compared to the 24 square feet required by Proposition 12. Pet.App. 186a.

Thus, all the industry would have to do to adjust *some* group housing for supplying to California retailers would be to include 25% fewer sows in each group pen. This would hardly rise to the level of impermissible downstream effects.

The absurdly tight quarters 18 square feet provides is likely the source of the aggression and sanitation issues described by Petitioners that can occur in group housing. This can be solved by simply not cramming so many animals into the same pen.

Paragraph 111 alleges there are 125 million hogs slaughtered annually, "at a total gross income of $26 billion annually." Pet.App. 180a. The few hundred million dollars in capital improvements Petitioners allege would be needed is only around 1% of this $26 billion, and is a one-time cost. Pet.App. 209a. A one-time, one-percent cost is not sufficient to outweigh a sovereign State's right to regulate what products may be sold within its borders as an issue of public health, safety, and morals.

Paragraph 126 alleges, "Producers who contract with packers do not sell directly to wholesalers or consumers." Pet.App. 181a. This is an admission that the producers are not impacted by the law *at all*. The retailers in California who ultimately must seek out cage-free pork to sell are the businesses subject to the law. Producers can cater to these requests *or not,* just as they do with any consumer demand.

Paragraph 128 claims, "Pork is a particularly difficult product to trace throughout the supply chain because of the multiple and segmented steps in the production process." Pet.App. 181a. Yet this is inconsistent with Petitioners' other allegations that

28% of the industry has transitioned to group housing in response to consumer demand. Pet.App. 186a, ¶160.

Paragraph 209 alleges, "Proposition 12's requirements were driven by activists' conception of what qualifies as 'cruel' animal housing, not by consumer purchasing decisions or scientifically based animal welfare standards." Pet.App. 192a. Petitioners claim this group housing is actually *worse* for animal welfare than individual confinement, due to fighting and sanitation issues, but this is logically the result of cramming too many animals into group pens, where they still cannot move or turn around without touching the sides of the pen or another animal.

Thus, the 24 square feet of space required by Proposition 12 allows the same group housing demanded by consumers, and addresses the welfare concerns raised by Petitioners of simply cramming animals into groups with the same miserly amount of space. Again, this is not an impermissible downstream effect when weighed against a State's right to ban the sale of products that voters deem to be morally unacceptable.

CONCLUSION

In claiming that States can have no legitimate interest in how animals are treated to create a product that is sold within the State, Petitioners seek to abrogate the States' general police power to protect public health, safety, and morals.

Proposition 12 does not regulate anything that occurs outside of California. The portion of Proposition 12 challenged in this case only imposes a

requirement on retailers within California to ensure that pork these businesses sell is not from animals that were cruelly confined.

Animal cruelty laws fall under the general police power of States to protect public morals, and violating such laws is a crime against the State and not against animals, which do not have legal rights. Accordingly, the relevant inquiry is the harm to society by the act being regulated, not the harm to animals.

Thus, Petitioners' allegations that extreme confinement of animals is somehow *better* for animal welfare are not only implausible, but they are also irrelevant. The only relevant inquiry is whether the voters of California believe allowing the sale of pork from pigs that could not move or turn around inflicts moral injury on the State. The overwhelming majority of voters do believe this, as shown by passing Proposition 12.

Because Petitioners have not plausibly alleged that Proposition 12 imposes extraterritorial effects that far outweigh its purported local benefit, Petitioners instead attempt to lump this case in with price control and protectionism cases. However, because this is clearly not a price control or protectionism case, Petitioners do so in a disingenuous manner, intended to disguise their challenge as an ordinary *Pike* balancing test.

Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

August 15, 2022

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