No. 21-468

IN THE
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL &
AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, ET AL.,

Respondents.

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

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are law professors who teach and write on constitutional law, state and local government law, and conflicts of law. *Amici* believe that it is important for the dormant Commerce Clause to be interpreted in a way that does not interfere with States' capacities to continue functioning as appropriately empowered sovereigns in our federal system. *Amici* are concerned that the extraterritoriality issues in this case will affect whether States can continue to pursue diverse policies that reflect local circumstances and sensibilities. *Amici* further recognize that this case also implicates whether States can continue to serve as laboratories of democracy that can test novel regulatory approaches that might be adopted by other States or the federal government.

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

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SUMMARY OF ARGUMENT

Of the many strengths of our federalist system, two of the most significant are States' abilities to reflect the particular sensibilities of their citizens and their capacities to serve as "laboratories of democracy" by testing out novel regulatory approaches that might serve as models for other States or the federal government.

Proposition 12 is an embodiment of both of these principles of federalism. It directly reflects the values of California's citizens—California voters duly considered the proposed law and decided that it was beneficial because it furthered their values of consuming humanely produced pork and preventing foodborne illness stemming from overcrowded hog farms. Likewise, Proposition 12 furthers the laboratories of democracy function of federalism and will yield beneficial data regarding the advantages and disadvantages of codifying these moral and health judgments concerning pork.

Accepting Petitioners' arguments that Proposition 12 violates the dormant Commerce Clause would seriously impair federalism's longstanding benefits of promoting State diversity and allowing States to serve as laboratories of democracy. Interstate commerce is ubiquitous in modern society, and many exercises of a State's police powers to further its citizens' values or to try an innovative policy approach in response to a problem have effects on commerce in other States.

Petitioners' strikingly broad interpretation of the dormant Commerce Clause—that state laws that have effects on commerce outside the State are "almost *per se*" prohibited, whether or not the laws are protectionist—would leave States little room to govern according to their citizens' values and sensibilities and would all but end States' abilities to conduct valuable policy experiments.

Likewise, the dormant Commerce Clause guarantees out-of-state citizens the right to access California's market on *equal terms* as California citizens, not a right of absolute and unconditional access. States retain authority to regulate the in-state sale of goods in accordance with the values and preferences of their citizens and to devise their own policy approaches in regulating those goods, regardless of whether the goods are largely or entirely imported from out-of-state.

Moreover, Petitioners' complaints that the effects of Proposition 12 outside of California encroach upon the sovereignty of other States are mistaken and ignore California's own sovereignty. California has no less sovereignty than any other State, and part of that sovereignty is to exercise its police powers to further the values of its citizens and to enact innovative policy approaches to problems as it deems appropriate. The existence of out-of-state, extraterritorial effects stemming from States' exercises of their historic police powers is simply a feature of our federalism that each State agreed to by joining the Union. And under the fundamental principle of equal sovereignty, the out-of-state effects of large States like California's exercise of

their police powers cannot be judged under a more exacting dormant Commerce Clause standard than that applied to the least populous states.

Thus, to invalidate Proposition 12 now on the basis that it violates the dormant Commerce Clause would nullify the direct will of California's citizens, debase California's sovereignty, and deal a body blow to federalism's longstanding salutary functions of promoting State diversity and allowing States to serve as laboratories democracy.

ARGUMENT

I. INTERPRETING THE DORMANT COMMERCE CLAUSE TO INVALIDATE STATE LAWS LIKE PROPOSITION 12 WOULD THWART THE STATE DIVERSITY AND "LABORATORIES OF DEMOCRACY" FUNCTIONS OF FEDERALISM

Proposition 12 directly reflects the values and judgments of California's citizens and is an innovative policy approach that will provide useful information about the benefits of consuming pork derived from sows that are not housed in extremely close quarters. To hold that the dormant Commerce Clause prohibits non-protectionist laws like Proposition 12 would thwart federalism's longstanding benefits of promoting State diversity and allowing States to serve as laboratories of democracy.

A. The Dormant Commerce Clause Guards Against Protectionism and Does Not Fundamentally Limit States' Regulatory Powers

"The principal objects" of the dormant Commerce Clause are, and always have been, protectionist laws "that discriminate against interstate commerce." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). That historical record is well-established, and *amici* do not repeat it in detail here. *See, e.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019); *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940); *Webber v. Virginia*, 103 U.S. 344, 351 (1880); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. Pa. L. Rev. 855, 922-26 (2002); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause,* 110 Yale L. J. 785, 788 (2001); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 Wm. & Mary L. Rev. 1191, 1210-16 (1998); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1094-98 (1986).

By the same token, the historical record conclusively shows that the Commerce Clause was not designed to, and does not, fundamentally limit the powers of the States to legislate and regulate as sovereigns within our federalist system. "[T]he Commerce Clause . . . was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the

legislation might indirectly affect the commerce of the country." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (quotations omitted); *see Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) ("[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." (quotation omitted)).

Put simply, the dormant Commerce Clause targets protectionist state laws and was never intended to interfere with States' historic police powers. "[T]hat the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

B. The Diversity Among States and States' Abilities to Serve as "Laboratories of Democracy" Are Two Primary Benefits of Our Federalism

1. State diversity and laboratories of democracy in general

Among the many strengths of our federalist system, two of the most significant are States' abilities to reflect the particular sensibilities of their citizens and their capacities to serve as laboratories of democracy.

First, a great advantage of federalism is that "a decentralized government . . . will be more sensitive to the diverse needs of a heterogenous society." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987). States retain historic police powers to protect their citizens' health and well-being in ways that reflect each State's particular conditions and sensibilities. "[S]tates differ in their citizens' tastes, morals, wealth, willingness to pay, and the like," and "[s]tate lawmakers are generally better positioned than federal lawmakers to ascertain such in-state preferences and implement the best policies based on them." Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, Tex. L. Rev. at 4 (forthcoming), https://ssrn.com/abstract=4142647; *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) ("The Framers . . . ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." (quoting The Federalist No. 45, at 293 (J. Madison))). "Acting through their state and local governments," citizens in each State "create the type of social and political climate they prefer." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 8 (1988). Our federalism's allowance of diverse political approaches to social problems is particularly beneficial in a nation as vast and heterogeneous as ours. *See generally* Rosen, *supra*, at 886-91.

Second, our federalism allows for States to serve as laboratories of democracy, testing out innovative regulatory approaches that might serve as models for other States or the federal government. Justice Brandeis vividly captured this principle in his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting). Justice Brandeis's famous insight is now firmly engrained in this Court's jurisprudence. *See Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."); *Gregory*, 501 U.S. at 458 (explaining that federalist structure provides the advantage of "allow[ing] for more innovation and experimentation in government").

Successful policy approaches taken by various States can be replicated by other States or scaled up to the national level. *See* Goldsmith & Volokh, *supra*, at 4; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 598. Indeed, "[u]nemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination in housing and employment all originated in state legislatures." Merritt, *supra*, at 9. When these laws proved to be successful at the state level, the federal government adopted them as nationwide policies. *See id.*; *cf.* Henry

J. Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1034 (1977) ("[W]e may end up with a uniform federal system or minimum federal standards, but we should never have had anything save for experimentation by the states."). Because the number of people needed to get to a regulatory "yes" is far smaller at the state than the federal level, state government may be the only place where many novel regulations are a realistic possibility.

Finally, the use of the States as "small-scale social laboratories" provides beneficial data "without incurring all of the possible risks that might result from a similar nationwide experiment." Redish & Nugent, *supra*, at 598; *see New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) (explaining that States may "try novel social and economic experiments without risk to the rest of the country"); Michael C. Dorf, *The Supreme Court 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 60 (1998). Once some States enact novel legislation, data will be generated that can be drawn upon to assess the law's wisdom, which can then informatively shape public opinion and the views of other government officials. And because any given policy typically can be operationalized in many different ways, States' divergent approaches can generate valuable specific information as to how federal law should be written.

For all these reasons, reducing States' capacities to try out innovative and new regulatory approaches poses a risk to good governance. And in addition to

hamstringing States, it risks impairing Congress's ability to effectively legislate.

2. State diversity and laboratories of democracy in the context of the dormant Commerce Clause

The State diversity and laboratories of democracy benefits of federalism are important reasons for interpreting the dormant Commerce Clause in a way that provides ample room for state discretion and autonomy. *See* Goldsmith & Volokh, *supra*, at 3.

In regard to the State diversity benefit, "diversity of commercial regulation" is as important "as diversity in other spheres." Regan, *supra*, at 1177. Indeed, because interstate commerce is "ubiquitous" in modern society, *New York v. United States*, 505 U.S. 144, 158 (1992), and "now embraces activities that were traditionally considered quintessentially local," *Garber v. Menendez*, 888 F.3d 839, 842 (6th Cir. 2018) (Sutton, J.), many—perhaps most—exercises of a State's police powers in furtherance of its citizens' values and tastes will affect interstate commerce. This Court has thus emphasized "the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles" and made clear that the "Commerce Clause . . . was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Tracy*, 519 U.S. at 306 (quotations omitted).

As to the laboratories of democracy benefit, new state policies must have adequate time and space to grow and mature before their worth can be properly assessed. An overly broad and forceful application of the dormant Commerce Clause prematurely and artificially limits new policy approaches:

> Our Constitution allows the states to act as laboratories; slow migration (or national law on the authority of the Commerce Clause) grinds the failures under. No such process weeds out judicial errors, or decisions that, although astute when rendered, have become anachronistic in light of changes in the economy.

Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 508 (7th Cir. 1989) (Easterbrook, J.).

Moreover, state laboratories' capacities for generating useful data are one reason why the absence of hard data is not an appropriate basis for finding state law to be invalid under the dormant Commerce Clause. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-70, 473-74 (1981) (rejecting dormant Commerce Clause challenge to state law where there was no empirical data showing the law's efficacy and the challengers had in fact offered evidence that the law would probably not be effective).

Finally, to the extent a State's policy approach fails or imposes excessive costs, Congress may enact remedial legislation under the Commerce Clause. Thus, the structure provided for in the Constitution "attempts to foster widespread state experimentation,

while simultaneously providing the safety net of congressional preemption in those situations in which the interference with the flow of interstate commerce is truly substantial." Redish & Nugent, *supra*, at 598; *see also* Regan, *supra*, at 1166.

C. To Hold that the Dormant Commerce Clause Bars Laws Like Proposition 12 Would Severely Impair States' Abilities to Reflect the Values of Their Citizens and to Implement Innovative Policy Approaches

1. California's police powers include furthering its citizens' values on matters of health, safety, and morals relating to pork sold in California

Proposition 12 is a valid exercise of California's police powers to protect and promote its citizens' health, safety, and morals because it furthers their interests in and values of consuming humanely produced pork and preventing foodborne illness caused by overcrowded hog farms. California, moreover, is free to choose its own policy approaches to address these matters within its police powers.

In November 2018, California voters approved Proposition 12 by a wide margin. As relevant here, Proposition 12 prohibits sales within California of pork from or derived from a sow that was not humanely housed. Prop. 12, §§ 2, 3 (codified Cal. Health & Safety Code §§ 25990, 25991). The Official Voter Information Guide for Proposition 12 explained

that the law will eliminate from the California marketplace the "inhumane and unsafe products" derived from these sows and will reduce the risk of foodborne illness in California. Cal. Sec'y of State, *Official Voter Information Guide* 70 (2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf. As explained by the California Department of Food and Agriculture, Proposition 12 furthers Californians' valid interests of "moral satisfaction" and "peace of mind" concerning the pork they buy, sell, or consume in California. Pet. App. 75a.

Proposition 12's protection and promotion of the health, safety, and morals of California's citizens is a valid exercise of California's police power. This Court has long recognized that a State's police power "extends to all matters affecting the public health or the public morals." *Stone v. Mississippi*, 101 U.S. 814, 818 (1879); *contra* Pet. Br. 36 ("[Proposition 12's] concern for the moral satisfaction, peace of mind, social approval of its citizens is not within the police power." (quotation omitted)). The Court, moreover, has specifically upheld legislation on the basis that it was "designed to protect morals and public order." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

Here, Proposition 12 is a direct manifestation of Californians' moral judgment that whole pork meat sold in California should be humanely produced, and it therefore protects and promotes public morals. It thus fits comfortably within California's police power. *See Stone*, 101 U.S. at 818. That others outside of California may question or disagree with this moral judgment is of no moment. A fundamental reason for

"having separate states is to allow diversity," Regan, *supra*, at 1177, and citizens of a State, "[a]cting through their state and local governments, . . . create the type of social and political climate they prefer," Merritt, *supra*, at 8. *See also Gregory*, 501 U.S. at 458; McConnell, *supra*, at 1493. Likewise, Proposition 12 is an innovative policy approach that will yield beneficial data regarding the advantages and disadvantages of codifying this moral judgment regarding pork.

Proposition 12 is also a valid exercise of California's police power to protect the health and safety of California's citizens because it seeks to lower the incidence of foodborne illness in Californians. *See Stone*, 101 U.S. at 818. As the California Department of Food and Agriculture explained, although the issue is not settled in the scientific community, it was reasonable "for California's voters to pass the Proposition 12 initiative as a precautionary measure to address any potential threats to the health and safety of California consumers while such health and safety impacts remain a subject of scientific scrutiny." Suppl. App. 74a-75a. Proposition 12 also furthers California's interest in preventing the spread and development of zoonotic human illnesses like swine flu, which can be made more transmissible through the use of gestation crates. *See* Merits Br. for Intervenor Respondents 41.

Nevertheless, the United States criticizes the California Department of Food and Agriculture for its statement that "there is not currently a consensus in peer-reviewed published scientific literature that

would allow the [agency] to independently confirm" that Proposition 12 has any health and safety benefits. U.S. Br. 25. Petitioners likewise take the Department to task for its statement that Proposition 12's "[a]nimal space confinement allowances" are "not based on specific peer-reviewed published scientific literature or accepted as standards within the scientific community to reduce human food-borne illness." Pet. Br. 12-13.

But there does not need to be a national or scientific "consensus" on a given issue before a State makes its own policy. As this Court held in *Maine v. Taylor*, 477 U.S. 131 (1986), a State has "a legitimate interest" in guarding against risks or harms that are uncertain, "despite the possibility that they may ultimately prove to be negligible." *Id.* at 148; *see also K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir. 1992) (Easterbrook, J.) ("The dormant commerce clause does not call for proof of a law's benefits, after the fashion of substantive due process, whenever the subject is trade."). Striking down innovative state laws due to an absence of data would perversely undermine States' capacities to serve as laboratories of democracy that generate data in the first instance.

The States, moreover, "may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). This Court's dormant Commerce Clause

jurisprudence thus avoids "second-guess[ing] the empirical judgments of lawmakers concerning the utility of legislation." *CTS Corp.*, 481 U.S. at 92 (quotation omitted); *cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) ("It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself."). In short, "a single courageous State" can go out on its own and try something different to address a particular problem. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting). So it is here with Proposition 12's attempt to lessen the incidence of foodborne illness from pork.

2. The out-of-state effects of Proposition 12 do not make it an improper enactment of Californians' policy preferences or an improper policy approach

Contrary to Petitioners' erroneously broad reading of this Court's dormant Commerce Clause decisions concerning extraterritoriality, the out-of-state effects of Proposition 12 do not make it an improper enactment of Californians' policy preferences or an improper policy approach. To accept Petitioners' views would significantly frustrate States' abilities to reflect and promote their citizenries' values and interests and would stifle States' implementation of innovative policy solutions.

Petitioners assert that under the dormant Commerce Clause's so-called extraterritoriality

principle, "regulation of 'commerce that takes place wholly outside of the State's borders' is prohibited 'whether or not the commerce has effects within the [regulating] State.'" Pet. Br. 21 (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). "State laws that have the practical effect of controlling commerce outside the State," argue Petitioners, are "almost *per se* invalid" under the extraterritoriality principle of the dormant Commerce Clause. Pet. Br. 19. Petitioners further contend that Proposition 12 is such a law because it "in practical effect regulates wholly out-of-state conduct." Pet. Br. 27.

But in making these arguments, Petitioners are merely "[e]xploiting dicta in *Healy*" to present the extraterritoriality principle "as standing for a (far) grander proposition" than this Court ever has ascribed to it. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015) (Gorsuch, J.). Indeed, "[*Healy*'s] dicta, if taken seriously, would require a dramatic rethinking of state authority." Goldsmith & Volokh, *supra*, at 6. States long have regulated their citizens' in-state transactions and conduct in ways that generate out-of-state effects, and "[s]cores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects." Goldsmith & Sykes, *supra,* at 790. State laws, moreover, "are routinely upheld despite what is obviously a significant impact on outside actors." *Id.* at 803; *see Hunt*, 432 U.S. at 350 ("[T]here is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." (quotation omitted)); *Epel*, 793

F.3d at 1173 ("[S]tate regulations nominally concerning things other than price will often have ripple effects, including price effects, both in-state and elsewhere."); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring) ("The modern reality is that the States frequently regulate activities that occur entirely within one State but that have effects in many."); Rosen, *supra,* at 922-26.

The dormant Commerce Clause simply does not strike down state laws like Proposition 12 merely because they have effects in other States. To hold otherwise would entail "a dramatic rethinking" of our federalism that would severely constrain States' abilities to exercise their police powers to further their citizenries' values and interests and would unduly interfere with States' abilities to try new policy approaches to problems. Goldsmith & Volokh, *supra*, at 6.[2]

Petitioners acknowledge the importance of the laboratories of democracy function of federalism, but attempt to cabin it by arguing that States' novel policy solutions should not have effects in other States: "[A]s Justice Brandeis described that 'happy inciden[t] of the federal system,' 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel

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[2] Petitioners appear to view state laws' out-of-state effects as presenting a form of "Balkanization." Pet. Br. 23-25, 30. Petitioners' repeated use of that term is misguided, as this Court's opinions have used it to refer to the state economic protectionism that occurred prior to the Constitution's framing, not to the out-of-state effects from States' exercise of their historic police powers in-state. *See Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2460-61.

social and economic experiments *without risk to the rest of the country*.'" Pet. Br. 35 (emphasis in original) (quoting *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting)). But Justice Brandeis was merely explaining that there are fewer risks and potential costs involved when a single State tries a new policy approach than when the federal government implements a new policy nationwide, *see, e.g.*, Dorf, *supra*, at 60, *not* that concerns regarding out-of-state effects provide any significant limitation on States' abilities to implement innovative policy solutions. There is no requirement that a State's policy experiments remain hermetically sealed within its borders.

Furthermore, even taking *Healy* on its own terms, Petitioners' argument that Proposition 12 impermissibly controls or regulates out-of-state conduct still fails. The "practical effect" of Proposition 12 is not to "control" or "regulate" sow housing in other States—sow farmers and every other out-of-state participant in the upstream pork industry can each decide for themselves whether it makes economic sense for them to raise Proposition-12 compliant sows or to deal in pigs and cuts of pork that satisfy Proposition 12. *See* Agricultural Economics Professors Br. 10-11. That some in the pork industry may decide to conduct their business in a way that satisfies Proposition 12 and allows them to avail themselves of California's retail market is a far cry from them being *compelled* to do so. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) ("To the extent the statute may be said to 'require' labels on lamps sold outside Vermont, then, it is only because

the manufacturers are unwilling to modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont-bound lamps."). It is a very different thing from, for instance, a state law that directly applies to and regulates citizens in other States. *See* Brilmayer Br. 4-5. Petitioners' allegations that Proposition 12 will "force" or "require" participants in the pork industry to conform their operations to Proposition 12, Pet. Br. 4, 28-29, are therefore incorrect. *See also* Merits Br. for State Respondents 30-31; Merits Br. for Intervenor Respondents 32-34.

Moreover, even assuming these allegations' accuracy *arguendo*, they would not state a violation of the dormant Commerce Clause. The dormant Commerce Clause protects commerce, not competitors. *See Exxon Corp.*, 437 U.S. at 127-28. If the pork industry restructured itself and altered its production methods in response to Proposition 12, this would be legally irrelevant—this Court has unequivocally held that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market." *Id.* at 127.

An intriguing *amicus* brief in this case has argued that the internal consistency test from the state taxation jurisprudence—would double or multiple taxation result if every State taxed as the State in question has—should apply to state regulations with extra-state effects. *See* Knoll & Mason Br. 6, 11-12. But this would be problematic. As these *amici* correctly note, "whereas internally inconsistent taxes are also discriminatory, internally inconsistent

regulations are not." *Id.* at 8 n.4. For this very reason, the distinction between tax and regulatory laws is critical for purposes of the internal consistency test. The internal consistency test is sensible for tax laws because it smokes out discrimination,[3] which (almost always) is improper in our federalism. But for regulatory laws, an internal consistency requirement would be unduly constraining.[4] For example, under these *amici's* proposed application of the internal consistency test, California could impose its sow-husbandry requirements on pork sold in California, but not on pork produced in California. *See id.* 15-17. Limiting California's regulatory authority in this

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[3] As regards taxes, the internal consistency test is designed to determine when a state law over-allocates to itself the portion of an interstate transaction or occurrence that it can tax for purposes of securing revenue. Overallocation can lead to double (or multiple) taxation if other States also tax the portion taxed by the over-allocating State. Such multiple taxation discriminates against interstate commerce insofar as an analogous intrastate transaction or occurrence would be taxed by only a single State, and hence subject to a lower aggregate tax. *See generally Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 561-64 (2015).

[4] This is because while multiple taxation owing to over-allocation is virtually *per se* wrongful, *see supra* note 3, there is nothing presumptively wrongful about multiple States regulating their portion of an interstate transaction or occurrence, even if those regulations have extra-state effects. *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) (plurality) ("[A] set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction."). Unlike tax laws, the dormant Commerce Clause concern with regulatory laws is not multiple States' regulations as such, but whether multiplicity threatens to impair interstate commerce.

manner would be not only nonsensical but pernicious, for such a law would have the protectionist effect of giving a competitive advantage to California farmers, who would not be subject to California's heightened sow-husbandry requirements. And because such a law would be vulnerable to invalidation for being protectionist, an internal consistency requirement would mean that California could only ban California sales of California-produced pork.

Petitioners likewise err by placing emphasis on Justice Jackson's famous statement from *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), "that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *Id.* at 539 (discussed at Pet. Br. 25). This passage merely explained that States may not *discriminate* against interstate merchants by imposing measures like embargoes and customs duties. *See Granholm v. Heald*, 544 U.S. 460, 472 (2005) (citing *H.P. Hood* for the proposition that "[t]he mere fact of nonresidence should not foreclose . . . access to markets in other States"). The dormant Commerce Clause forbids States from "depriv[ing] citizens of their right to have access to the markets of other States on *equal terms*." *Id.* at 473 (emphasis added). It by no means grants citizens and businesses absolute and unconditional access to the markets of other States—this Court has long held that the "commerce clause is not a guaranty of the right to import into a state whatever one may please." *Robertson v. California*, 328 U.S. 440, 458 (1946); *see* Goldsmith & Volokh, *supra*, at 3 ("[O]ur federal system presumptively preserves traditional state

power to control what happens 'in' or what is sent 'into' states, and to protect state residents from what the state perceives as harms."). States plainly retain authority to regulate incoming goods in accordance with the values and preferences of their citizens and to choose their own policy approaches in doing so, especially when the goods are food. *See Gregory*, 501 U.S. at 458; *Hunt*, 432 U.S. at 350 (explaining that States' "residuum" of power to make laws that regulate matters of local concern but that affect interstate commerce is "particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs").

Petitioners' repeated emphasis on their allegation that over 99% of pork in the United States is produced outside of California is also misguided. A State does not lose its ability to regulate a good used or consumed by its citizens in-state just because there happens to be little or no production of that good in-state. *See, e.g.*, *Exxon Corp.*, 437 U.S. 117 (all companies burdened by Maryland statute were out-of-state); *Amanda Acquisition Corp.*, 877 F.2d at 506 (explaining that "[a] law making suppliers of drugs absolutely liable for defects will affect the conduct (and wealth) of Eli Lilly & Co., an Indiana firm, and the many other pharmaceutical houses, all located in other states," but that "Wisconsin has no less power to set and change tort law than do states with domestic drug manufacturers"). California is thus free to implement its citizens' values and policy preferences and try an innovative policy approach through Proposition 12, despite the fact that most pork consumed there is imported from out-of-state. *See*

Robertson, 328 U.S. at 458; Goldsmith & Volokh, *supra*, at 3.

And this principle cuts both ways—a State may regulate in-state use or consumption of an out-of-state good, but must also accept that other States can do the same to its goods produced in-state that are exported to other States. *See* Regan, *supra*, at 1181-82 (describing this principle as part of the "basic federalist compromise"). For example, if another State with no dairy farms were to enact a law setting milk quality standards for milk sold within that State that are more stringent than California's, California would have no ground to complain that the other state is regulating California's milk production, despite California's being the leading producer of milk in the United States. *See* U.S. Dep't of Agric., Milk Production, https://usda.library.cornell.edu/concern/publications/h989r321c (collecting recently monthly releases on milk production, including production by state). This is the give-and-take of horizontal federalism and our 50-state system.

Petitioners warn that allowing Proposition 12 to stand "would encourage other States to impose sow housing requirements on out-of-state farmers, resulting in a regulatory patchwork that would throttle the nationwide pork market." Pet. Br. 30. But the potential for a regulatory patchwork is not anything unique to the pork industry, and there is no reason to think that industry participants will be stymied by it. Rather, individuals and firms participating in today's nationwide market must

accept the responsibility and costs of complying with the laws in the various States in which they do business. Goldsmith & Volokh, *supra*, at 6 ("It is widely accepted that, consistent with the Dormant Commerce Clause, a firm doing multi-state business must bear the cost of discovering and complying with state laws—tort laws, tax laws, franchise laws, health laws, privacy laws, and much more—everywhere it does business."). "This is simply the cost of our having chosen a federal system of government" that values State diversity and States' capacities to serve as laboratories of democracy. Redish & Nugent, *supra*, at 599.

Nor is there any especial need for uniformity in sow housing that would warrant sacrificing California's abilities to regulate according to its citizens preferences and to devise its own policies regarding pork sold in California. Petitioners' argument to the contrary, Pet. Br. 32, is belied by their own recognition that other States' laws already differ on sow housing requirements. *See* Pet. Br. 31. Likewise, the Pork Promotion, Research, and Consumer Information Act does not evince any federal policy of uniformity in sow housing. Instead, that Act simply requires the federal government to promote the American pork industry through research and marketing efforts. *See Humane Soc'y of the U.S. v. Perdue*, 935 F.3d 598, 600 (D.C. Cir. 2019). Furthermore, this Court's modern uniformity opinions rightly concern the means by which goods are transported interstate or the instrumentalities of interstate commerce, not the characteristics of goods themselves or the means by which they are produced. *See Kassel v. Consol. Freightways Corp. of Del.*, 450

U.S. 662 (1981) (plurality) (length of semi-truck trailers); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (same); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (type of mudflaps used on trucks and trailers); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945). (maximum number of cars in railroad train).

Moreover, to the extent any policy experiments cause substantial harm to interstate commerce that will not correct itself, Congress may step in and legislate to remedy the situation. *See* Redish & Nugent, *supra*, at 598; Regan, *supra*, at 1166.

As a more general point, Petitioners repeatedly portray the out-of-state effects they allege Proposition 12 will cause as an affront to the sovereignty of other States. Pet. Br. 20-21, 25-26, 31. These complaints are mistaken for multiple reasons. First, and as discussed above, Proposition 12 has no effect on other States' abilities to set sow housing standards or standards for pork sold within their own borders. Second, these complaints wholly ignore California's *own* sovereignty. California has no less sovereignty than any other State in the Union. *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (emphasizing that our Nation is "a union of States, equal in power, dignity and authority" (quotation omitted)). Part of that sovereignty is to exercise its police powers to regulate goods in-state in accordance with the values and interests of its citizens and to do so through the particular laws or policies it determines are appropriate. *See Gregory*, 501 U.S. at 458. That sovereignty would be seriously degraded if these police

powers were forbidden from having out-of-state effects under the dormant Commerce Clause. *See Tracy*, 519 U.S. at 306-07.

Instead, the existence of out-of-state effects stemming from States' exercise of their historic police powers is simply a feature of our federalism that each State agreed to by joining the Union. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019) (describing foundational principle of horizontal federalism that "[e]ach State's equal dignity and sovereignty under the Constitution implies certain constitutional limitation[s] on the sovereignty of all of its sister States" (quotation omitted)). And under the "fundamental principle of *equal* sovereignty," the out-of-state effects of large States like California's exercise of their police powers cannot be judged under a more exacting dormant Commerce Clause standard than that applied to the least populous states. *Shelby County*, 570 U.S. at 544 (emphasis in original).

Petitioners nevertheless complain that Proposition 12 "upends the foundational principle of horizontal federalism that guarantees each state equal footing in the Union and its own sovereign dignity." Pet. Br. 20. This principle, however, means that the States are constitutionally equal to one another and that there are not different sets of rules that apply to different States. *See Shelby County*, 570 U.S. at 544 (noting that "fundamental principle of equal sovereignty" applies in assessing "disparate treatment of States"). It does not mean that all States, as a practical matter, must be equally influential or equally prosperous. And as discussed, the equal footing principle in fact

decidedly favors *Respondents*' position—large States like California cannot be penalized for having a large number of citizens and a large consumer market. *See id.*

In an attempt to lessen concerns about the harm that would be inflicted on California's ability to exercise its police powers, Petitioners argue that a State like California should not worry about its police powers being limited by a muscular interpretation of the dormant Commerce Clause's extraterritoriality doctrine because when it comes to "the health and safety of its residents, it may reasonably be assumed that its sister States share those concerns and will regulate their own businesses accordingly." Pet. Br. 35. Petitioners then provide the consolation that if the other States do not, "the Commerce Clause gives Congress authority to step in." Pet. Br. 35.

This argument stands in fundamental opposition to the principle of federalism that States retain historic police powers to protect their citizens' health and well-being in ways that reflect each State's particular conditions and sensibilities, including by regulating the goods being shipped into them. *See Gregory*, 501 U.S. at 458; *Robertson*, 328 U.S. at 458; Goldsmith & Volokh, *supra*, at 3. It also seriously devalues the laboratories of democracy benefit of federalism by barring States from enacting innovative new laws—which will necessarily be different from those of other States—if the laws have out-of-state effects.

Finally, this brief's argument that the dormant Commerce Clause does not categorically bar non-protectionist state laws that impose costs in other States is not tantamount to suggesting there are no restrictions on state extraterritoriality. Indeed, this Court has primarily tethered constitutional extraterritorial restrictions to the Due Process Clause. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819 (1985) (upholding applications of state law so long as there is a "significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair" (quotation omitted); *Am. Beverage Ass'n*, 735 F.3d at 380 (Sutton, J., concurring); Rosen, *supra*, at 864-76 (identifying cases where States have applied their laws to extraterritorial activities of both citizens and non-citizens). And as this Court has also recognized, the Effects Clause of the Full Faith and Credit Clause gives Congress power to determine the "extra-state effect" of state law. *See Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 502 (1939); *see also Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988). The right to travel also might impose some extraterritoriality limitations. *See* Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. Rev. 1013, 1027-31 (2017) (linking the right to travel to the Fourteenth Amendment's national and state citizenship clauses, and explaining how the scope of state extraterritorial powers helps determine the nature of national and state citizenship).

In other words, the dormant Commerce Clause is not the only—or even the main—source of limitations on States' extraterritorial powers. Moreover,

Congress has an important role to play in determining States' extraterritorial powers—through the Effects Clause as explained above, and also under the Commerce Clause, which empowers it to revise dormant Commerce Clause rulings by either restricting what caselaw allows or authorizing what it prohibits. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 655 (1981).

3. Federalism's laboratories of democracy function helps explain why the dormant Commerce Clause bars protectionist laws, not laws like Proposition 12

Our federalism's laboratories of democracy function helps explain why the dormant Commerce Clause appropriately bars protectionist state laws, but not laws like Proposition 12 that merely impose costs in other States. State laboratories are useful for generating laws that can be beneficially *scaled-up* to the national level (by being adopted by the federal government) or *multiplied* (by being adopted by many other state or local governments). Protectionist beggar-thy-neighbor policies do not qualify. As to scaling-up: because Congress represents the interests of all States as well as the Nation as a whole, a well-functioning Congress would not enact legislation that licensed protectionist state actions that harmed the national interest by threatening to Balkanize the national market. As to multiplying: from the vantage point of the Nation, laboratory-perfected protectionist

laws that other States can copy are precisely what is *not* wanted.

By contrast, state laws that impose costs in other States, but are not protectionist, are not presumptively disruptive of the national market and may be beneficially scaled-up or multiplied. To provide but one example, in a tightly integrated national economy as ours where manufacturers that offer their goods nationwide do not typically have production plants in every State, out-of-state effects of state laws that apply to products used by state citizens are the rule rather than the exception. Non-protectionist state laws that help ensure that an out-of-state manufacturer internalizes its product's costs can be productively copied by other States, or scaled-up to federal law.

In short, protectionist laws and laws that have out-of-state effects are two different things. As this Court has previously observed, "the fact that the burden . . . falls solely on interstate companies . . . does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce." *Exxon Corp*, 437 U.S. at 125.

4. This Court's review of laws like Proposition 12 should be deferential and not interfere with the State diversity and laboratories of democracy functions of federalism

As explained, the dormant Commerce Clause's virtually *per se* invalidity rule is inapplicable to

Proposition 12. If this Court reviews Proposition 12 under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), it should do so in a manner that is deferential to States' sovereign prerogatives and does not interfere with federalism's State diversity and laboratories of democracy functions.

To begin, the criticism from courts and commentators that *Pike*'s balancing test has endured over the years counsels against a stringent or expansive application of it. Under the *Pike* undue burden test, a non-discriminatory state law may violate the dormant Commerce Clause when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. As this Court has noted, "there is . . . no clear line" between the analysis for facial discrimination and the *Pike* undue burden test, and "several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations." *Tracy*, 519 U.S. at 298 n.12. Indeed, "it has been a long time since [this] Court used *Pike's* approach to deem any state law invalid," and the Court's "prevailing approach has been to sustain neutral state laws while finding invalid those that discriminate against interstate commerce." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Holcomb*, 990 F.3d 565, 568 (7th Cir. 2021) (Easterbrook, J.). Jurists have also explained that the *Pike* test cannot be mechanically applied to all state laws affecting interstate commerce, *see K-S Pharmacies*, 962 F.2d. at 731, and described it as an "ineffable test" that "asks courts to balance interests they are ill-equipped to

measure, let alone to compare," *Am. Beverage Ass'n*, 735 F.3d at 379 (Sutton, J., concurring). And as Justice Scalia observed, *Pike*'s "balancing" analogy "is not really appropriate" because "the interests on both sides are incommensurate," and the endeavor is more akin to "judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

Moreover, if the *Pike* test is interpreted broadly, it could give courts license to perform freewheeling measuring and balancing of the costs and benefits of States' laws. And because interstate commerce is "ubiquitous" in modern society, *New York*, 505 U.S. at 158, this unbounded interpretation of the *Pike* test would apply to many of the States' exercises of their historic police powers. The result would be a dormant Commerce Clause jurisprudence that "call[s] for proof of a law's benefits, after the fashion of substantive due process, whenever the subject is trade." *K-S Pharmacies*, 962 F.2d at 731. Such a jurisprudence would significantly curtail States' historic police powers to protect their citizens' health and well-being in ways that reflect each State's particular conditions and sensibilities. It would also prematurely and artificially preclude State policy approaches that could yield beneficial data and serve as models for other States or the federal government.

Therefore, if this Court applies *Pike* to Proposition 12, it should do so in a manner that is deferential to States' sovereign prerogatives and does not interfere

with federalism's State diversity and laboratories of democracy functions.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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