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 TRADE LAW PROFESSOR
MARK WU AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*

Professor Mark Wu is the Henry L. Stimson Professor of Law at Harvard Law School.[1] He is a legal scholar with longstanding academic interest in domestic and international law as it pertains to interstate and foreign commerce. As a law professor, he teaches courses on U.S. Trade Law and Economic Statecraft, as well as International Trade Law. His areas of research and academic interest include distinctions between protectionist measures and legitimate sovereign actions taken in pursuit of health, food safety, environmental, public morality and other concerns. In addition, he regularly advises on trade-related policy matters, including through his recent service as a Senior Advisor in the Office of the U.S. Trade Representative.

SUMMARY OF THE ARGUMENT

This case centers on the proper scope of the dormant Commerce Clause with respect to facially neutral state laws that have ancillary effects on commercial actions that take place outside of the enacting State's borders. Petitioners call for a broad reading of this Court's past precedents in three decades-old cases – *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935), *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy v. Beer Institute*, 491 U.S. 324 (1989). Petitioners argue that these cases render "*per se*

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[1] Petitioners and Respondents have consented to the filing of this *amicus curiae* brief. Pursuant to this Court's Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

invalid State laws that have the practical effect of controlling commerce outside the State." Pet. Br. 19. However, circuit courts have consistently found that "the Court's holdings have not gone nearly so far," *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015) (Gorsuch, J.); *see also, e.g., Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (explaining that these past precedents "are not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices."); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.4d 628, 647 (6th Cir. 2010) (finding no violation of the test set forth in the *Brown-Forman* and *Healy* line of cases for "labeling requirements [that] have no direct effect on . . . out-of-state labeling conduct").

The more limited understanding of this Court's precedents is the correct one. The core purpose of the dormant Commerce Clause has been to prohibit States from imposing tariffs and other similar protectionist measures. Preserving balance between facilitation of a common market and respect for States' regulatory sovereignty is critical. As long as a facially neutral regulation does not function as a disguised tariff-like protectionist measure, or otherwise discriminate against commerce, the dormant Commerce Clause should not inhibit its enactment. Proposition 12 does not operate as such. It is a legitimate exercise of California's regulatory powers.

ARGUMENT

I. The Dormant Commerce Clause Safeguards Against Tariff-Like Protectionist State Regulations.

The Constitution grants Congress the power "to regulate Commerce with foreign nations, and among several States." US Const. art. 1, § 8, cl. 3. At the same time, each of the States within our federal union remain coequal sovereigns, with the authority to regulate conduct, including of markets, within its own borders. *Id*., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.").

This Court's jurisprudence has long recognized, even in the absence of Congressional action, that the Commerce Clause, by way of a negative implication, imposes limitations on certain state regulations that unduly interfere with interstate commerce. *See, e.g.*, *Cooley v. Bd. of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1852); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994) ("The Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."). This interpretation has engendered controversy. *See Camps Newfound/Owatona, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in its application."); *Comptroller of Treasury of Maryland v. Wynne* 575 U.S. 542, 574 (Scalia, J., dissenting) ("One glaring defect of the negative Commerce Clause is its lack of a governing

principle. Neither the Constitution nor our legal traditions offer guidance about how to separate improper state interference with commerce from permissible state taxation or regulation of commerce. So we must make up the rules as we go along.").

Given the dormant Commerce Clause's controversial origins, this Court has exercised "extreme caution" in applying the doctrine. *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (Black, J. (concurring)). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008).

A. Tariffs And Tariff-Like Protectionist Measures Are The Paradigmatic Dormant Commerce Clause Violations.

This Court has recognized "the paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty . . . . Because their distortive effects on the geography of production, tariffs have long been recognized as violative of the Commerce Clause." *W. Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994). This focus on tariffs as the paradigmatic dormant Commerce Clause violation follows straightforwardly from the historical record.

At the time of the Founding—as today—one State's regulatory actions had the potential to affect commerce in a neighboring State. *See, e.g.*, Br. for State Respondents 23. For example, how New York

or Pennsylvania regulated products produced or arriving in its jurisdiction affected the flow of commerce of products flowing to and from neighboring communities in New Jersey. Nevertheless, the Constitutional Convention debate did not address broad concerns over the potential of one State's regulatory actions to produce effects in other States. Instead, historical records indicate that the debate over the Commerce Clause focused on the application of tariffs to interstate commerce. *See, e.g.*, James Madison, *Preface to Debates in the Convention of 1787*, 3 The Records of the Federal Convention of 1787 (Max Farrand ed. 1911), appendix A, 542 (emphasizing the need to resolve a "source of dissatisfaction [arising from] the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on.")

Scholars have summarized the limited historical evidence as indicating that "the states were using their imposts as weapons against each other, either offensively, as where the importing states imposed tariffs the ultimate incidence of which was calculated to fall on others not blessed by geography with as good and accessible harbors, or defensively, as by strengthening their tariff walls against each other to compensate for revenue deficiencies resulting from diversion of foreign shipments to the states with the least onerous imposts." Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 449-449 (1941) (footnotes omitted); *see also* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 Yale L.J. 965, 980 (1998) ("The Framers of the Commerce Clause, after all, took focused aim, not at subsidies, but at disfavored forms

of taxation, particularly the protective tariff." (footnotes omitted)).[2] The contemporaneous statements indicated concerns about exploitation of geographical advantage to impose taxes on goods passing through ports and about interstate rivalry. Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 53-54 (1988).

While tariffs serve as the paradigmatic example of a dormant Commerce Clause violation, their imposition by States is almost non-existent in the contemporary context. *W. Lynn*, 512 U.S. at 194 ("In fact, tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one."). Recognizing, however, that States may "aspire to reap some benefits of tariffs by other means," this Court has focused on applying the dormant Commerce Clause to invalidate state laws that approximate tariffs in their purpose and effect. *Ibid*.

[2] Note that the accuracy of this historical account has been called into question by some scholars. *See, e.g.*, Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 Harv. J. L. & Pub. Pol'y 119, 121 (1982) ("[W]hen I went back to review the documentation of the claim that the states under the Articles of Confederation had in fact impeded trade among themselves, I found nothing to support the claim. The Federalist papers keep suggesting that this was a serious problem, but if you read carefully you are struck by the consistent failure to give examples and the constant reference to possibilities."). Others contend, that while this may be true, "it is more important what the framers feared (or what they thought they saw) than what they actually experienced." Donald H. Regan, *The Supreme Court and State Protectionism*, 84 Mich. L. Rev. 1091, 1287 n.55 (1986).

B. In Applying The Dormant Commerce Clause To Facially Neutral State Regulations, The Court Has Focused On Whether The State's Regulatory Scheme Generates Tariff-Like Effects.

To enact something like a tariff through other means, a State could do one of the following: It could impose a discriminatory tax, duty, or other charge that places a higher economic burden on out-of-state entities than their in-state competitors. *See W. Lynn*, 512 U.S. at 210 (Scalia, J. dissenting). Or it could impose a facially neutral tax or duty scheme that applies equally to in-state and out-of-state entities alike, but when coupled with other elements of the general scheme, renders an advantage to in-state interests akin to a tariff. *Ibid.*

This Court has long held the first approach – a discriminatory tax or duty scheme – to be in violation of the dormant Commerce Clause. *See, e.g.*, *Guy v. Baltimore*, 100 U.S. 434 (1880) (invalidating a wharfage duty applicable to those who use public wharves in Baltimore, with no equivalent charge on in-state producers); *Chem. Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992) (invalidating special fees assessed on nonresidents for use of local services).

The Court has emphasized repeatedly that a State cannot "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). "Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would incite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects." *Boston*

Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (citing *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

Consequently, States seeking to disadvantage out-of-state interests have turned primarily to the second approach – that of implementing facially neutral schemes that nevertheless seek to achieve similar discriminatory and protectionist benefits for in-state entities. *W. Lynn*, 512 U.S. at 193. The Court has recognized that such schemes can take on multiple forms. Several have been invalidated through the dormant Commerce Clause doctrine.

One possible form is to enact a tax scheme that is nondiscriminatory in its application, but which contains an added element through which in-state entities nevertheless obtain a disproportionate economic benefit. This additional element might be an exemption or a credit provided in conjunction with in-state economic activity. Several tax schemes of this form have been deemed to be a violation of the dormant Commerce Clause.[3]

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[3] *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (holding that a "state tax must be assessed in light of its actual effect considered in conjunction with the other provisions of a State's tax scheme" and thereby invalidating a tax scheme with special exemptions in conjunction with in-state production or use); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (invalidating a state tax scheme due to the differential impact of tax credits provided for in-state and out-of-state activity); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a law which advantaged local production through grant of a tax exemption); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (invalidating a statute providing a tax credit for sales of ethanol produced in-state, but not ethanol produced in certain other States).

Another form has been to enact a facially neutral tax scheme applicable to in-state and out-of-state entities alike but to then use the revenue generated to finance a subsidy for an in-state interest. Again, the Court has deemed such a scheme to violate the dormant Commerce Clause. *W. Lynn*, 512 U.S. at 200 (emphasizing that while "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse.").

A third form has been to apply a facially neutral tax scheme which, when considered in conjunction with another State's tax scheme, results in a higher net tax being paid for interstate activity than intrastate activity. In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), the Court warned States that their tax schemes should not subject interstate commerce to "the risk of a multiple burden to which local commerce is not exposed." *Id*. at 439; *see also Nw. States Portland Cement*, 358 U.S. at 458 (holding that a State may not "impose a tax which discriminates against interstate commerce . . . by subjecting interstate commerce to the burden of 'multiple taxation.'"). Over the years, this Court has declared several other state tax schemes of this form to violate the dormant Commerce Clause.[4]

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[4] *See, e.g., J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938) (holding Indiana's tax scheme to violate the dormant Commerce Clause because it taxed "without apportionment, receipts derived from activities in interstate commerce."); *Cent. Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662 (1948) (finding New York's tax scheme covering gross receipts derived from services provided in neighboring States to violate the dormant Commerce Clause because it imposed an "unfair burden" on interstate commerce); *Wynne,* 575 U.S. at 1803-1804 (invalidating Maryland's income tax scheme because it resulted

In short, whenever a State's facially neutral measure gives rise to a tariff-like effect, this Court has not hesitated to apply the dormant Commerce Clause to strike down the measure on that basis. *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1989) (noting that a State "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."); *Wynne,* 575 U.S. at 565 (invalidating Maryland's tax scheme because it "is inherently discriminatory and operates as a tariff").

To be clear, this Court has applied the dormant Commerce Clause doctrine to invalidate state measures that are egregiously protectionist or overtly discriminatory but not necessarily tariff-like in their effect.[5] However, it has rarely invoked the doctrine to invalidate facially neutral measures that are applied in an evenhanded manner to interstate and intrastate commerce. *See W. Lynn*, 512 U.S. at 200

in the levying of differential net tax rates on the basis of where income was earned).

[5] *See, e.g.*, *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 526 (1949) (law "deny[ing] [certain] facilities to acquire and ship milk in interstate commerce where the grounds of denial are that such limitation upon interstate business will protect and advance local economic interests"); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (milk regulatory scheme reserving a substantial share of the local milk market to in-state producers); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (prohibition on importation of most solid or liquid waste which originated or was collected outside the territorial limits of the State); *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 677 (1981) (truck-length regulation adopted by the State with the seeming hope "to limit the use of its highways by deflecting some through traffic"); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (law requiring in-state utilities to purchase a certain amount of Oklahoma-mined coal).

("Nondiscriminatory measures . . . are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected is a powerful safeguard against legislative abuse.") (citations omitted); *General Motors Corp.* 519 U.S. at 298 n.12; *see also*, *e.g.*, Br. for State Respondents 38-40 (discussing the few categories of cases where the Court has struck down facially neutral laws).

Beyond being solidly grounded in the history of the Founding era,[6] this Court's emphasis on tariff-like effects when applying the dormant Commerce Clause doctrine is sensible for two additional reasons. First, this narrow focus is consistent with the principle of State sovereignty that underlies our federal system. While "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States," *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944), "[t]he Commerce Clause does not . . . eclipse the reserved power of the States" *Boston Stock Exch.*, 429 U.S. at 329. Absent Congressional action, a State retains its sovereign dignity; "its citizens may choose . . . [to] serve as a laboratory . . . and try novel social and economic experiments without risk to the rest of the country." *W. Lynn*, 512 U.S. at 216-217 (Rehnquist, C.J. dissenting) (citations omitted).

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[6] Examining founding-era sources, Justice Thomas has suggested that certain tariff-like measures may be invalid under the Constitution's Import-Export Clause. *Camps Newfound*, 520 U.S. at 638-640 (Thomas, J., dissenting); *see id.* at 637 (describing the Import-Export Clause as "a textual mechanism with which to address the more egregious of state actions discriminating against interstate commerce").

Second, the Court's narrow focus on tariff-like effects is proper, given constraints on the judiciary's institutional capacity. If applied too broadly, the dormant Commerce Clause would invite judges to strike down state and local policies on the basis of complex economic judgments that require expert study and examination. *See, e.g.*, *Davis*, 553 U.S. at 354-356. By confining the ambit of the doctrine, the Court can avoid giving courts "a roving license … to decide what activities are appropriate for state and local government to undertake." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007). *See also Wynne*, 575 U.S. at 577 (Scalia, J., dissenting) (lamenting that an expansive reading of the doctrine would drive the Court to undertake a "'perplexing inquiry, so unfit for the judicial department" and to prescribe a national scheme that "plainly exceeds the judicial competence").

II. The Court's Decisions In *Baldwin*, *Brown-Forman*, And *Healy* Struck Down Tariff-Like Protectionist Measures Bearing No Resemblance To Proposition 12.

Petitioners' challenge in this case relies in substantial part on three decades-old decisions – *Baldwin*, *Brown-Forman*, and *Healy*. Collectively, those cases concern price control and price affirmation statutes enacted by States. Petitioners assert that these cases give rise to a sweeping dormant Commerce Clause's extraterritoriality principle, which they boldly argue stands for the proposition that any "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 (citing *Healy*, 491 U.S. at 336).

Since *Healy*, commentators have debated extensively the proper interpretation and application of this so-called third prong of the dormant Commerce Clause doctrine. *See, e.g.*, Brandon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979 (2013); Susan Lorde Martin, *The Extraterritoriality Prong of the Dormant Commerce Clause is Not Dead*, 100 Marquette L. Rev. 497 (2016). This prong has been described as "the least understood of the Court's three strands of dormant [C]ommerce [C]lause jurisprudence" and "certainly the most dormant" *Epel*, 793 F.3d. at 1172 (Gorsuch, J.).

Indeed, some judges have questioned "whether the *Baldwin* line of cases is really a distinct line of dormant commerce clause jurisprudence at all" or whether it is simply "an application of the [doctrine's] anti-discrimination rule" *Id*. at 1173 (noting that "*Baldwin* was decided before the anti-discrimination rule was solidified" and "*Healy* applied *Baldwin's* rule only as an alternative holding to an application of anti-discrimination doctrine"). Others have "express[ed] skepticism about the extraterritoriality doctrine" and described it as a "relic" with "no useful role" to play in the modern economy. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013) (Sutton, J., concurring). Scholars too have expressed grave concerns about an expansive reading of the extraterritoriality principle of the dormant Commerce Clause doctrine.[7]

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[7] *See, e.g.*, Jack Goldsmith & Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 806 (2001) (describing the *Healy* dicta as "overbroad"); Katherine Florney, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*,

To date, this Court has applied this prong only in the limited context of price control and price affirmation statutes. Importantly, in each of the three cases, just as was true of the facially neutral tax schemes struck down by this Court (as discussed above, *supra* pp. 7-9), the statute in question gave rise to tariff-like effects that discriminated against out-of-state entities in interstate commerce. The prominence of the tariff-like effects, rather than simply the incidental effect on commercial transactions beyond the enacting State's borders, is the critical element that triggers a violation of the dormant Commerce Clause.

A. A Proper Reading Of These Precedents Suggests That Facially Neutral State Laws With Ancillary Effects On Out-of-State Commerce Should Be Invalidated Only If They Give Rise To Protectionist, Tariff-Like Effects.

Petitioners misconstrue the *Baldwin, Brown-Forman*, and *Healy* line of cases to stand for a broad proposition that any state law should be struck down if it has effects on commercial actions outside of the enacting State's borders, even if the law directly regulates only commerce within the enacting State. Pet. Br. 19. Such an expansive reading would call into question a plethora of state laws concerning

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84 Notre Dame L. Rev. 1057, 1104 (2009) (suggesting that technological developments give rise to an acute "need for a [more] coherent understanding of the limits of state power" than the *Healy* dicta); Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 100 Texas L. Rev. __ (forthcoming 2022) at 6 ("[I]t is clear that [the *Healy*] dicta has not and cannot be taken seriously.").

public health, food safety, labeling, licensing, privacy, public morality, and other issues in which preferences of citizens of various States differ in terms of how they wish to regulate their local market. *See, e.g.*, Br. for State Respondents 18 & n. 11, 23 & n. 12 (collecting examples); Br. for Intervenor Respondents 28-29 (same).

Instead, this Court's precedents in the price control and price affirmation cases ought to be interpreted as applying the dormant Commerce Clause doctrine to strike down a State's facially neutral regulatory scheme if such a scheme gives rise to tariff-like effects.

Tariffs, by applying a tax on importers at the border, act to raise the cost of imported products and therefore raise the prices of such goods. *See generally* Paul R. Krugman et al., International Economics: Theory and Policy 195-198 (9th ed., 2012). Other regulations, such as licensing requirements, labeling requirements or food safety standards, can have a similar effect by raising the costs of production – costs that are then passed on to consumers in the form of higher prices. However, the difference between the tariff and these other forms of regulations is that the former is enacted primarily for the goal of economic protectionism for in-state producers, whereas the latter is enacted in service of another goal designed to serve the public at-large.

Not surprisingly, in identifying which regulatory actions function as disguised tariffs, this Court has focused on state regulations that deliberately act to raise or control prices for the economic protection of in-state producers in a manner resembling tariffs.

In *Baldwin*, the Court struck down a New York law prohibiting businesses from selling milk in the State unless they purchased their milk from dairy farmers at the same minimum price paid by dealers to in-state dairy farmers. This prohibition, in effect, raised the cost of out-of-state milk imported into New York, as would be the case were a tariff applied at the border. The Court's ruling explicitly references the tariff analogy in the very first sentence discussing its reasoning. As the Court explained, "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." 294 U.S. at 521.

The *Baldwin* Court rejected New York's argument that "[t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk" with price security functioning "only as a special form of sanitary security; the economic motive [being] secondary and subordinate" *Id*. at 523. Instead, the Court opined that less trade-restrictive forms of regulation existed to achieve such objectives. *Id*. at 524 (suggesting certification of sanitary conditions). Under such circumstances, and especially in light of the tariff-like effects triggered by the law, the Court refused to uphold a protectionist price control statute "as a valid exercise by the state of its internal police powers," finding that "[t]o give entrance to that excuse would be to invite a speedy end of our national solidarity." *Id*. at 523.

Baldwin, and its focus on whether a state regulatory action effectively generates a tariff-like impact, remains instructive in articulating the core principles underlying the dormant Commerce Clause prohibition on State-against-State protectionism. "Neither

the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is the *equivalent to a rampart of customs duties* designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result." *Id*. at 527 (emphasis added).

The remaining two cases concern price affirmation statutes with similar tariff-like effects. In *Brown-Forman*, this Court held that New York could not require distillers to provide an affirmation alongside their monthly price schedule that the prices to be charged in New York that month are no higher than the lowest prices that the distiller will charge wholesalers anywhere else in the United States during the month covered by the affirmation. In *Healy*, this Court invalidated a Connecticut law that required out-of-state shippers of beer to affirm that their prices for products sold to in-state wholesalers are no higher than those at which the products are being sold in three bordering States.

In both instances, the price affirmation statute was designed to negate the competitiveness of an out-of-state business entity at for the benefit of an in-state business entity. Consider the example where an out-of-state producer or business holds a cost advantage over an in-state producer or business, and is therefore able to sell its product at a lower price than the in-state produce or business. One means by which a State could equalize the playing field would be to apply a tariff to the out-of-state product to eliminate

the price differential. However, even if a tariff could be legally enacted, residents of the enacting State could circumvent this measure by simply traveling to the neighboring State to buy the product at the cheaper price. *See, e.g.*, *Healy*, 491 U.S. at 326 (noting that "Connecticut residents living in border areas frequently crossed state lines to purchase beer at lower prices" and the price affirmation statute was enacted "[i]n an effort to eliminate the price differential between Connecticut and border States").

The classic economic policymaking response to this behavior would be for the enacting State to apply customs duties to out-of-state purchases. *See* Krugman et al., International Economics at 193. Connecticut, for example, could have stopped entering individuals at its border, asking them to declare any out-of-state beer purchases being transported into the State and requiring them to pay a duty on such purchases. This practice is commonly applied at national borders. However, enactment of a tariffs and customs duties scheme at a State's borders is patently unconstitutional. *See, e.g., W. Lynn,* 512 U.S. at 193.

Barred from enacting a tariff or customs duties scheme, New York and Connecticut sought to create a similar economic outcome through the next-best alternative – a price affirmation statute. The goal and effect were essentially the same: manipulating prices for products of interstate commerce to serve protectionist ends. Indeed, the challenger in *Healy* itself compared "[t]he impact of the Connecticut statute … to that of a tariff." Br. for Appellees at 27 (1989 WL 1127816).

Unsurprisingly, then, commentators have pointed out the "clearly protectionist bent" of the laws struck

down in *Brown-Forman* and *Healy*. *See* David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 Tul. L. Rev. 1, 38-39 (1992); *see also* Brannon P. Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* § 6.07[B] (2d ed. 2013) (highlighting that the purpose of the price affirmation statute in *Brown-Forman* and *Healy* was "to discourage residents from buying their ardent spirits from shops in a neighboring state"). The objective of the problematic laws struck down in these cases was similar to local processing laws and other statutes struck down in other dormant Commerce Clause cases – namely, to "hoard" commerce "for the benefit of local businesses" at the expense of out-of-state competitors. *C&A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 391-392 (1994) (collecting examples of such cases).

The economic effect of such price affirmation statutes is the same as that of a price control statute or that of a tariff: the unnatural equalization of prices between in-state and out-of-state products through regulatory interference to serve local producers' economic interests. Beyond price affirmation schemes, this Court, to date, has not applied the dormant Commerce Clause doctrine to strike down other facially neutral laws on the grounds of improper ancillary effects on commerce outside of the borders of the enacting State. The common thread that runs through all three of these cases is the existence of a tariff-like effect that renders the law in question problematic and akin to the paradigmatic violation of the dormant Commerce Clause.

B. This Narrow, Tariff-Focused Reading Of *Baldwin, Brown-Forman*, And *Healy* Aligns With The Common Sense Realities Of Our Federal System.

Our federal system envisions States as co-equal sovereigns with autonomy to enact local market regulations reflecting of the preferences of its citizenry. *See New York v. United States*, 505 U.S. 144, 181 (1992) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power."). "Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which 'in the ordinary course of affairs, concerns the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant bureaucracy." *Nat'l Fed. of Indep. Business v. Sebilius*, 567 U.S. 519, 536 (2012) (citing The Federalist No. 45, at 293 (J. Madison)).

In the modern economy, such regulations govern a wide range of citizens' legitimate concerns about products and services offered in the marketplace, including quality, health, safety, privacy, and consumer protection. "In today's interconnected national marketplace, . . . [w]e readily recognize that state regulations . . . will often have ripple effects, including price effects, both in-state and elsewhere." *Epel*, 793 F.3d at 1173. Because industries organize their production to serve a regional, national, or international market, differences across state regulations will impact a wide range of business processes that may take place outside of the boundaries of the

enacting State. As then-Judge Gorsuch noted, "the Court has never suggested that they trigger near-automatic condemnation under *Baldwin*." *Ibid.*

It cannot be the case that a State forgoes the right to regulate the offering of sale of a given product or service whose production process it deems problematic, simply because that upstream commerce underlying the production of that product or service takes place entirely outside of the enacting State. States retain this right, absent Congressional intervention or a judicial determination that the regulation enacted "impermissibly discriminates against interstate commerce" and/or facilitates "economic protectionism." *Tenn. Wine & Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2458-2460 (2019). Indeed, this Court, in *Pharm Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003), expressly declined to extend the rule that was applied in the *Baldwin, Brown-Forman*, and *Healy* line of cases is to any state law that "does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect."

Petitioner's request that the Court revisit the *Healy* dicta to create a sweeping new extraterritoriality principle embedded within the dormant Commerce Clause does not make sense when considered against the realities of our federal system. To hold that the *Baldwin* line of cases now stands for a broad check on state regulatory power whenever a state regulation has an ancillary effect on commerce in other States threatens to upend the careful balance between interstate free trade and the Constitution's commitment to States' regulatory autonomy.

As this Court has recognized, the time has passed when the Court "under the guise of interpreting the

Due Process Clause" "presumed to make . . . binding judgments for society" that overrode the preferences of voters and lawmakers. *United Haulers*, 550 U.S. at 347. "We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause." *Ibid.*

Therefore, the far better reading of the *Baldwin* line of cases is a narrow one, in which the Court seeks to identify instances when a State improperly legislates to create price effects comparable to a tariff, the paradigmatic Commerce Clause violation, for protectionist ends.

C. Proposition 12 Is Not Comparable To The Laws Struck Down In *Baldwin*, *Brown-Forman*, And *Healy*.

The State laws invalidated in *Baldwin*, *Brown-Forman*, and *Healy* share the commonality that they all negated an otherwise inherent advantage that accrues to out-of-state producers in a free market, with the primary goals being economic protectionism: specifically, the manipulation of interstate prices for the benefit of in-state producers, retailers, or businesses. Proposition 12 has no such objective or effect.

Proposition 12 does not contain the features of a disguised tariff. It neither seeks to tax in-state and out-of-state production differently nor stabilize prices across state lines so as to eliminate the benefits of interstate trade and competition. Nor does it seek to neutralize an otherwise inherent advantage that accrues to out-of-state businesses for the benefit of in-state businesses. To the contrary, out-of-state producers whose products are sold in California remain free to sell whole pork meat produced with

practices inconsistent with Proposition 12's standards in all other States. Californians living near the border are free to travel to Nevada, Arizona, or Oregon to purchase such pork at possibly cheaper prices and to bring it back to California.

Furthermore, businesses are not forced to choose between satisfying Proposition 12 and another State's competing regulations; they simply must decide whether or not to segment their production chains. Nor does Proposition 12 create any disincentives for businesses to engage in interstate commerce. Businesses do not gain a pricing advantage if they restrict their commercial dealings to California only rather than sell into multiple States.

While the enactment of Proposition 12 may well incidentally affect prices in California and perhaps other States, the mechanism through which this occurs is entirely different than that of a tariff or tariff-like measure. Proposition 12 does not, for example, mandate any price increases for pork imported into the State for the benefit of in-state producers. Additionally, unlike the laws in *Brown-Forman* and *Healy*, Proposition 12 does not mandate the raising of prices in out-of-state markets so as to neutralize an advantage that would otherwise accrue to out-of-state retailers. In fact, some experts have suggested that precisely the opposite price effect is likely to occur. *See* Br. for Agricultural & Resource Economists in Support of Neither Party 20-23 (estimating that while California pork prices will increase, out-of-state pork prices will decrease). If anything, Proposition 12 may make it more attractive for Californians living near the border to buy pork in neighboring states. In short, any ancillary price effects triggered by Proposition 12's enactment are

not the result of an economic protectionist scheme designed to curtail interstate commerce for the benefit of in-state producers. It is not comparable to the other facially neutral state regulations with ancillary out-of-state effects that this Court has invalidated under the dormant Commerce Clause.

CONCLUSION

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

Respectfully submitted,

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