No. 21-468

In The
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNSEL &
AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS
SECRETARY OF THE CALIFORNIA DEPARTMENT
OF FOOD & AGRICULTURE, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF *AMICUS CURIAE*
UNITED STATES SENATOR CORY BOOKER
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY	1
ARGUMENT	3
I. The Court Should Not Expand the Dormant Commerce Clause Doctrine in the Ways Proposed by Petitioners	4
A. The Court's Precedent Exhibits Deference to Congress When Addressing Dormant Commerce Clause Challenges	5
B. The Court Should Exercise the Same Cautionary Deference Here	8
II. Congress Has Repeatedly Rejected Proposals To Regulate This Subject Matter And Thereby Preempt State Laws Like Proposition 12	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Am. Beverage Ass'n v. Snyder,
735 F.3d 362 (6th Cir. 2013)....................................12

Am. Trucking Associations, Inc. v. Smith,
496 U.S. 167 (1990) 13

Dep't of Revenue of Ky v. Davis,
553 U.S. 328 (2008) 5, 6, 7, 9, 12

Edwards v. California,
314 U.S. 160 (1941) 3

GMC v. Tracy,
519 U.S. 278 (1997) ....*passim*

H. P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949) 18

McKiver v. Murphy-Brown, LLC,
980 F.3d 937 (4th Cir. 2020)..............................11, 12

Nat'l Pork Producers Council v. Ross,
6 F.4th 1021 (9th Cir. 2021) 3

Northwest Airlines, Inc. v. Minnesota,
322 U.S. 292...4

S. Pac. Co. v. Arizona ex rel. Sullivan,
325 U.S. 761 (1945) 14

United Haulers Ass'n v.
Oneida-Herkimer Solid Waste Mgmt. Auth.,
550 U.S. 330 (2007) 4, 7, 8, 9

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE MATERIALS

H.R. 1731, 113th Cong. § 7A (2013-2014) 15

H.R. 4999, 117th Congress (2021-2022) 16

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U.S. Const. art. I, § 8 4

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TABLE OF AUTHORITIES—Continued

Page

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Leslie Pray, *Antibiotic Resistance, Mutation Rates, and MRSA*, 1 Nature Ed. 30 (2008)............ 12

Loftus et. al, *The Effect of Two Different Farrowing Systems on Sow Behaviour and Piglet Behaviour, Mortality, and Growth*, Applied Animal Behaviour Science, Vol. 232 (Nov. 2020) available at https://doi.org/10.1016/j.applanim.2020.105102 12

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TABLE OF AUTHORITIES—Continued

Page

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STATEMENT OF INTEREST

Amicus Curiae is a United States Senator with an interest in this case and its effect on the implementation and interpretation of the Commerce Clause. *Amicus* has a strong interest in the separation of powers between the legislative and judicial branches and that the Courts refrain from making quintessentially legislative determinations. *Amicus* submits this brief to urge the Court to adhere to the settled principle that regulation of interstate commerce is a decisively legislative matter. Petitioners' attempt to rewrite Commerce Clause doctrine, in contravention of its textual and historical roots, to create a new constitutional privilege for their preferred methods of operation, strays far from preserving and giving meaning to the actual grant of authority to Congress in the Commerce Clause, and thus undermines the interest of *Amicus*.[1]

SUMMARY

This Court should reject Petitioners' bid to expand the Dormant Commerce Clause doctrine. By its very nature, the Dormant Commerce Clause threatens the separation of powers, a cornerstone of American governance. In narrow circumstances, the Dormant

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[1] No counsel to a party authored this brief in whole or in part. No party, or party's counsel, or any person or entity, other than the *Amicus Curiae* and its counsel, contributed money to fund preparing or submitting the brief. The parties have consented to this filing.

Commerce Clause doctrine empowers courts preemptively to strike down state laws insofar as they are deemed contrary to the Commerce Clause, even though the Commerce Clause itself grants exclusive authority over interstate commerce to Congress. To avoid interference with Congress's plenary commerce authority, the Dormant Commerce Clause should be interpreted and applied strictly.

This case exemplifies the dangers associated with an expansive Dormant Commerce Clause doctrine. Petitioners would bypass Congress and the voting public, instead inviting the Court to engage in a fact-intensive analysis of the many economic and policy implications of California's Proposition 12. Unlike Congress, however, federal courts are ill-equipped to engage in fact-finding missions and to weigh the costs and benefits of local, state, and national commerce policy. Nonetheless, Petitioners would foist these inquiries upon the Court, requesting that the Court unilaterally mandate a single nationwide rule for the regulation and sale of pork under the implied Dormant Commerce Clause. Petitioners make this request even though Congress has repeatedly considered and declined to enact a unified rule under its explicit, textual Commerce Clause authority. This Court should thoughtfully consider the implications of any such rule, as Petitioners' request poses serious risks of unfettered judicial policymaking and potential usurpation of Congress' plenary commerce authority.

ARGUMENT

Petitioners' primary contention is that Proposition 12 violates "the dormant Commerce Clause's extraterritoriality principle[.]" Brief for Petitioners at 4. However, as the Ninth Circuit reasoned below, any "extraterritoriality test cannot strictly bar laws that have extraterritorial effect [. . .] because 'in practice, states exert regulatory control over each other all the time.'" *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1027 (9th Cir. 2021) (citation omitted). Because Proposition 12 neither dictates pricing nor directly regulates transactions occurring in other states such that it prevents the free flow of commerce, Petitioners' extraterritoriality argument falls flat. *See id.* at 1028-29. Nor have Petitioners otherwise shown that Proposition 12's neutral, nondiscriminatory in-state sales regulation violates the Commerce Clause. While state statutes that impede interstate travel might well run afoul of the Commerce Clause, *see*, *e.g.*, *Edwards v. California*, 314 U.S. 160 (1941) (holding Commerce Clause required invalidation of state statutes designed to restrict interstate migration), Proposition 12 is far removed from such scenarios.

The Court should reject Petitioners' proposed expansion of the Dormant Commerce Clause. Such an expansion is unnecessary and inconsistent with our structure of government. Congress has ample authority—and expertise—to address and preempt virtually any State law with an impermissible effect on interstate commerce. Allowing Congress to perform that role is consistent with our principles of democratic

government and would place the issue appropriately before the branch of government with expertise, experience, resources, and a Constitutional grant of authority over commerce.

I. The Court Should Not Expand the Dormant Commerce Clause Doctrine in the Ways Proposed by Petitioners

The Commerce Clause grants Congress plenary power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce," this Court has "long interpreted the Commerce Clause as an implicit restraint on state authority[.]" *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The Court, however, has also recognized the need for "extreme caution" in applying the Dormant Commerce Clause doctrine to invalidate state legislation. *GMC v. Tracy*, 519 U.S. 278, 310 (1997) (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (Black, J., concurring)). The Court's approach is well reasoned, for it is the political branches, not the judiciary, which are best suited to make economic judgments about the degree to which state laws interfere with interstate commerce—and whether there is an ultimate need to preempt and invalidate such laws.

A. The Court's Precedent Exhibits Deference to Congress When Addressing Dormant Commerce Clause Challenges

Throughout its Dormant Commerce Clause jurisprudence, the Court has repeatedly emphasized the many reasons for its deference to Congress and the voting public. For example, in *Dep't of Revenue of Ky v. Davis*, 553 U.S. 328 (2008), the Court considered a challenge to a Kentucky state law exempting interest earned on state-issued bonds from income taxes. In weighing the various commercial benefits and burdens at issue, the Court recognized the near futility of the judicial inquiry. *Id.* at 355 ("What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all."); *see also id.* (citing *Tracy*, 519 U.S. at 308) ("the Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them"). The *Davis* Court reasoned that evaluation of the commercial effects of the challenged statute in a legislative, rather than judicial, forum "has two advantages. Congress has some hope of acquiring more complete information than adversary trials may produce, and an elected legislature is the preferable institution for incurring the economic risks of any alternation in the way things have traditionally been done." *Id.* at 356. Moreover, the

Court highlighted the serious possibility that overturning the regulation could result in more harm than good, "expos[ing] the States to the uncertainties of the [judicial] economic experimentation[.]" *Id.*

In a second example, in *Tracy*, 519 U.S. 278, the Court likewise recognized the wisdom in deferring to Congress' judgment as to whether a challenged law unduly interfered with interstate commerce. *Tracy* addressed a challenge to an Ohio tax scheme which imposed general sales and use taxes on natural gas purchases from all sellers except certain regulated public utilities. *Id.* at 281-282. Petitioner GMC purchased virtually all the gas for its plants from out-of-state independent marketers, rather than from the exempted, regulated public utilities. *Id.* at 285. Accordingly, the Tax Commissioner applied the general use tax to all of GMC's purchases. *Id.* GMC challenged this levy under the Dormant Commerce Clause. *Id.* In holding that Ohio's differential tax treatment of natural gas sales by public utilities and independent marketers did not violate the Dormant Commerce Clause, the Court emphasized that where "Congress has done nothing to limit its unbroken recognition of the state regulatory authority[,] [. . .] [t]he clear implication is that Congress finds the benefits of the [challenged practice] for captive local buyers well within the realm of what the States may reasonably promote and preserve." *Id.* at 304-305. The Court also reasoned that its Dormant Commerce Clause doctrine "was 'never intended to cut off the States 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.' " *Id.* at 306 (citation omitted).

Furthermore, as in *Davis*, the *Tracy* Court heralded Congress as the proper factfinding institution. *Tracy*, 519 U.S. at 308 ("the Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them."). The Court reasoned, "it behooves us to be as reticent about projecting the effect of applying the Commerce Clause here, as we customarily are in declining to engage in elaborate analysis of real-world economic effects." *Id.* at 309 (citation omitted). The Court stressed that Congress has the "power and institutional competence to decide upon and effectuate any desirable changes" in the policy regime at issue. *Id.*

In a yet another example, in *United Haulers Ass'n*, 550 U.S. 330, the Court again expressed its preference for the political branches to weigh questions involving alleged interference with interstate commerce. There, petitioners, a trade association and solid waste haulers, sued New York's Oneida and Herkimer Counties and their Solid Waste Management Authority, challenging the Counties' flow control ordinances. *Id.* at 337. The challenged ordinances required all solid waste generated within the Counties to be delivered to processing facilities of the Authority, a public benefit corporation. *Id.* at 335-337. The ordinances also required private haulers to obtain permits to collect the Counties' solid waste and deliver it to the Authority's sites. *Id.* at 336-337. Petitioners sued, alleging that the

flow control ordinances violated the Dormant Commerce Clause by discriminating against interstate commerce. *Id.* at 337. Petitioners submitted evidence that without the ordinances, they could dispose of solid waste at out-of-state facilities for far less. *Id.* In rejecting petitioners' Dormant Commerce Clause argument, the Court reasoned, "[t]he Dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition." *Id.* at 343. And the Court again looked to Congress ultimately to assess and mitigate any burden on commerce. *Id.* at 345 n.7 (reasoning that, "[i]n any event, Congress retains authority under the Commerce Clause as written to regulate interstate commerce" when necessary.).[2]

B. The Court Should Exercise the Same Cautionary Deference Here

In line with the Court's prior Dormant Commerce Clause jurisprudence, the Court should reject Petitioners' various Dormant Commerce Clause challenges to Proposition 12. Petitioners would have this Court defy

[2] Indeed, members of Congress have repeatedly filed briefs in this Court to emphasize the legislature's superior investigatory and factfinding powers, whether on matters of economic policy or others. *See*, *e.g.*, Br. House Judiciary Committee Chairman et al., in No. 17-494, *South Dakota v. Wayfair, Inc.* at 8 (filed April 4, 2018) ("Only legislation can reliably resolve these complexities, taking into account the many competing interests among commercial entities of various sizes and rapidly evolving business models, as well as the fiscal interests of the States.").

its reasoning in *Davis*, *Tracy*, and *United Haulers* (among many other cases) to weigh various economic and policy concerns, despite Congressional consideration (and rejection) of these very concerns. *See* Section II, *infra* (identifying various federal legislation proposed to address Petitioners' very concerns; noting that despite vocal support by members of industry, including Petitioners, Congress has consistently declined to pass legislation on these issues). As Petitioners' brief makes clear, their Dormant Commerce Clause arguments turn on allegations and predictions of Proposition 12's economic effects on the pork industry and its consumers. Petitioners contend that Proposition 12 will cause "dramatic upstream [economic] effects" through "pervasive changes to the pork production industry nationwide." Brief for Petitioners at 4.[3]

In response, Respondents and other amici have exposed the many flaws in Petitioners' allegations. *See, e.g.*, Brief for State Respondents at 28 (explaining why out-of-state producers can "freely choose whether to make the adjustments necessary to produce Proposition 12-compliant pork that may be sold (at a higher price) in California."); *id.* at 29 (describing how "[p]ork producers have used segregated supply chains for years in response to growing consumer demand for specialized and ethically-produced pork products"

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[3] *See also id.* at 15 (alleging "farmers would need to spend $293,894,455 to $347,733,205 of additional capital in order to reconstruct their sow housing and overcome the productivity loss that Proposition 12 imposes"; "compliance will increase farmers' production costs by over $13 per pig, a 9.2% cost increase").

[and] "have publicly confirmed that they have developed segregated supply chains to produce Proposition 12-compliant pork for California while continuing to supply other States with other kinds of pork products.").[4] Moreover, Petitioners downplay the grave local health and safety risks at issue in industrial farm animal production:[5] air- and water-borne chemical

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[4] *See*, *e.g.*, Brief of Agricultural and Resource Economics Professors in Support of Neither Party at 4 ("Amici [. . .] submit this brief to explain why, as a matter of both economic theory and empirical data, Petitioners' central economic arguments are erroneous and implausible."); *id.* at 7 ("Out-of-State consumers will not have to pay higher prices for pork and so will see no material impact on their economic welfare."); *id.* at 10 ("The ability of some processors to choose not to comply with Proposition 12 is facilitated by the fact that supply-chain contracting for hogs ready for slaughter is largely accomplished through dedicated supply-chain relationships[.]"); *see also* Br. of Dr. Leon Barringer at 3 ("The pork industry has engaged in tracing and segregation, to varying degrees of sophistication, since at least the early 1900s. Segregating and tracing pork allows producers to comply with public health and food safety requirements, respond quickly to disease and foodborne illness outbreaks, meet consumer demand for pork produced in certain ways, and market their products effectively."); *id.* at 4 ("There is no plausible reason that existing tracing and segregation technology and practices cannot be used to segregate Prop 12-compliant pork from other pork in the pipeline, without any substantial burden to interstate commerce.").

[5] These risks include issues of farm generation of high-density manure, urine, and other air and water pollutants such as infectious and antibiotic-resistant bacteria, viruses, and fungi which are contaminating air and group water. *See* Dana Cole, Lori Todd, & Steve Wing, *Concentrated Swine Feeding Operations and Public Health: A Review of Occupational and Community Health Effects*, 108 Envtl. Health Perspectives 685-88 (2000) ("Cole") available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1638284/ (last accessed Aug. 11, 2022); *see also* Food Print, *How Our Food System Affects Public Health* (Oct. 8, 2018)

pollutants that cause illness to pigs and chronic respiratory illness (and others) in workers and surrounding communities[6]; the likelihood of swine, human, and avian influenzas mixing in closely-confined pigs to facilitate a new "swine flu"-like outbreak (or pandemic) of human disease[7]; as well as public health implications of the issuance of antibiotics to densely-packed pigs, leading to a breeding ground for spontaneous mutation of antibiotic-resistant bacteria (e.g., *E. coli*), the harms of which are directly transferred to humans via contaminated pork.[8] Petitioners would also have the

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https://foodprint.org/issues/how-our-food-system-affects-public-health/ (last accessed Aug. 11, 2022) ("Food & Pub. Health").

[6] *McKiver*, 980 F.3d at 977-83; *see also*, Cole at 685-94; Food & Pub. Health at 34-43.

[7] Humane Soc. Int'l, *An HSI report: The connection between animal agriculture, viral zoonoses, and global pandemics* at 6, 9-11 (Sept. 2020) available at https://blog.humanesociety.org/wp-content/uploads/2020/10/Animal-agriculture-viral-disease-and-pandemics-FINAL-4.pdf ("HSI Report"); *see also* Sigal Samuel, *The Meat We Eat is a Pandemic Risk, Too*, Vox (Aug. 20, 2020), https://www.vox.com/future-perfect/2020/4/22/21228158/coronavirus-pandemic-risk-factory-farming-meat/ (last accessed August 3, 2022); Ctrs. For Disease Control & Prevention, *Origin of the 2009 H1N1 Flu (Swine Flu): Questions and Answers* (Nov. 25, 2009), https://www.cdc.gov/h1n1flu/information_h1n1_virus_qa.htm (last accessed Aug. 11, 2022).

[8] Maryn McKenna, *Farm Animals Are the Next Big Antibiotic Resistance Threat*, Wired (Sept. 19, 2019), https://www.wired.com/story/farm-animals-are-the-next-big-antibiotic-resistance-threat/ (last accessed Aug. 11, 2022); Food & Water Watch, *Antibiotic Resistance 101* at 4-5 (Mar. 6, 2015) ("AR 101") *available at* https://foodandwaterwatch.org/wp-content/uploads/2021/03/Antibiotic-Resistance-101-Report-March-2015.pdf (last accessed Aug. 3, 2022); Pew Charitable Trusts, *Record-high Antibiotic Sales for Meat and Poultry Production* (Feb. 6, 2013), https://

Court wrestle with the ethical concerns involved in animal cruelty, including without limitation pigs living "covered in feces," *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 979 (4th Cir. 2020) (Wilkinson, J., concurring), comparative mortality rates between free farrowing and confined farrowing, and confinement so restricted that pigs gnaw and bite their cages until the bars are dripping with blood.[9]

In line with this Court's precedent, Petitioners' assertions of economic harm (and Respondents' arguments to the contrary) are best evaluated by Congress. As this Court has acknowledged, courts are "institutionally unsuited to gather the facts upon which economic predictions can be made." *Davis*, 553 U.S. at 355 (citing *Tracy*, 519 U.S. at 308); *see also Am. Beverage*

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www.pewtrusts.org/en/research-and-analysis/articles/2013/02/06/recordhigh-antibiotic-sales-for-meat-and-poultry-production#sthash.fTWHXIJP.dpuf (last accessed Aug, 11, 2022); Ctrs. For Disease Control & Prevention, *About Antibiotic Resistance*, https://www.cdc.gov/drugresistance/about.html (last accessed Aug. 3, 2022); World Health Organization, *Antimicrobial Resistance*, https://www.who.int/health-topics/antimicrobial-resistance (last accessed Aug. 11, 2022); Leslie Pray, *Antibiotic Resistance, Mutation Rates, and MRSA*, 1 Nature Ed. 30 (2008) *available at* https://www.nature.com/scitable/topicpage/antibiotic-resistance-mutation-rates-and-mrsa-28360/ (last accessed Aug. 11, 2022).

[9] Humane Society of the United States, *Undercover at Smithfield Foods* (2010) ("Undercover at Smithfield Farms"), *available at* https://www.humanesociety.org/sites/default/files/docs/2010-undercover-investigation-smithfield.pdf (last accessed Aug. 11, 2022); Loftus et. al, *The Effect of Two Different Farrowing Systems on Sow Behaviour, and Piglet Behaviour, Mortality, and Growth*, Applied Animal Behaviour Science, Vol. 232 (Nov. 2020) available at https://doi.org/10.1016/j.applanim.2020.105102.

Ass'n v. Snyder, 735 F.3d 362, 379-380 (6th Cir. 2013) (Sutton, J., concurring) (finding courts are "ill-equipped" to assess which types of "extraterritorial effects exceed [the] bounds" of a "'practical effect' inquiry" and "which do not"). Petitioners invite the Court "to accommodate, like a legislature, the inevitably shifting variables of a national economy." *Am. Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring). The Court should decline Petitioners' invitation in favor of restraint, leaving these fact-intensive questions of policy, economics, and politics to Congress.

II. Congress Has Repeatedly Rejected Proposals To Regulate This Subject Matter And Thereby Preempt State Laws Like Proposition 12

The Commerce Clause enables Congress to override state regulation and, if necessary, to preempt state regulation of commerce. In the context of Proposition 12, Congress can not only consider whether California's state enactment is consistent with the best interests of the national economy, but also, after full exploration of the many aspects of a complicated question, devise a balanced national policy. *See* Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 583 ("[The Commerce Clause] enables Congress to override state regulation of interstate commerce and, if necessary, to preempt state regulation of commerce under the supremacy clause."). If the impending harm

to industry were as grave as Petitioners assert, Congress, including *Amicus*, would and could act. *See id.* at 597 ("While the framers selected what they deemed especially egregious or disruptive state economic practices for express constitutional prohibition, they apparently decided that in the great majority of situations the exercise of state authority should be presumed valid, subject solely to the political check of Congress's preemptive power."). Thus, the structure adopted by the Constitution should foster widespread state experimentation, with the understanding that Congress will exercise its preemption power if state interference with interstate commerce is truly substantial. *Id.* at 598. Congress has, many times, declined to pass legislation related to California's Proposition 12. If the efficiencies of Petitioners' supply chain dynamics were so critical to interstate commerce, Congress could act.

In fact, Congress has considered direct legislative action in response to Proposition 12 and other state agriculture laws. Any such law, if enacted, would of course preempt state law (including Proposition 12). *See S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). But despite extensive consideration, Congress has, to date, rejected multiple proposals for federal regulation in this arena.

One such proposal, the Egg Products Inspection Act Amendments of 2013, was introduced on April 25, 2013 by a bipartisan group of representatives to provide a uniform national standard for the housing and treatment of egg-laying hens, prohibiting the sale of eggs in interstate commerce that fail to meet certain

outlined requirements.[10] The Senate companion bill was introduced on the same day by a bipartisan group of senators.[11] The bills had 149 and 15 bipartisan co-sponsors, respectively, and extensive public support from Agriculture and Egg Producers, Veterinary Groups, Consumer Protection Groups, Animal Welfare Groups and numerous egg farmers from at least 34 states.[12] However, without a vote in either chamber, the bill failed to advance beyond the agricultural committees of both the Senate and the House of Representatives.

More recently, another set of bills was introduced in direct response to Proposition 12, but they have likewise failed to gain enough support to become law. The Exposing Agricultural Trade Suppression ("EATS") Act, an exercise in Commerce Clause authority, seeks to prevent state and local governments from

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[10] Egg Products Inspection Act Amendments of 2013, H.R. 1731, 113th Cong. § 7A (2013-2014) (introduced by Reps. Kurt Schrader (D-OR), Jeff Denham (R-CA), Sam Farr (D-CA), Michael Fitzpatrick (R-PA), John Campbell (R-CA) and Jared Huffman (D-CA)).

[11] Egg Products Inspection Act Amendments of 2013, S.B. 820, 113th Cong. (2013-2014) (introduced by Sens. Dianne Feinstein (D-CA), Debbie Stabenow (D-MI), and Susan Collins (R-ME)).

[12] The Egg Products Inspection Act Amendments of 2013 was supported by an extensive diverse coalition, including the United Egg Producers, the Association of Avian Veterinarians, the Center for Food Safety, Humane Society Legislative Fund, the American Society for Prevention of Cruelty to Animals, numerous family farms and religious leaders as well as newspapers including the Los Angeles Times and the New York Times.

establishing certain standards or conditions on production and manufacturing of agricultural products in interstate commerce.[13] The EATS Act (S. 2619/H.R. 4999) was introduced in the Senate on August 5, 2021 by five senators, but there have been no additional cosponsors since the bill was introduced.[14] The House companion bill was introduced on August 10, 2021 by three representatives, but to date has only garnered six additional partisan cosponsors after being introduced.[15] At the time of the writing of this brief, neither the House nor the Senate bill has been scheduled for a hearing or markup. Failing to garner bipartisan support, the EATS Act appears stalled in the 117th Congress.

This legislation is a renewed attempt after a similar bill, the Protect Interstate Commerce Act ("PICA"), and related amendments offered by Representative Steve King were kept out of the Farm Bills of 2014 and 2018, following strong opposition by a diverse list of agricultural, consumer, environmental, animal protection, labor, governmental, and other interests.[16]

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[13] Exposing Agricultural Trade Suppression Act of 2021, H.R. 4999, 117th Congress (2021-2022).

[14] S.B. 2619 was introduced by Sens. Roger Marshall (R-KS), Chuck Grassley (R-IA), Joni Ernst (R-IA), John Cornyn (R-TX), and Cindy Hyde-Smith (R-MS).

[15] H.R. 4999 was introduced by Reps. Ashley Hinson (R-IA), Mariannette Miller-Meeks (R-IA), and Randy Feenstra (R-IA)).

[16] H.R. 4879. With a similar purpose in preventing state and local government interference in agricultural products regulation as the EATS Act, PICA and the King amendments were opposed by a diverse set of more than 170 groups, including the National

Petitioners, vocal supporters of PICA and the King Amendments,[17] now seek an end-run around their failed legislative attempts via Dormant Commerce Clause challenge. But it is Congress that is positioned to act on these issues, not the judiciary. Indeed, Petitioners themselves initially sought out the legislative process.

For a decade now, Congress has been positioned to take affirmative action to federally regulate agricultural standards. However, *Amicus* can attest that Congress's ultimate inaction is not complicit silence; rather, the several proposed initiatives have failed to garner enough support to be enacted. Thus, where Congress has not acted the states are free to exercise their police power to address critical public policy concerns. The Commerce Clause, the Court has reasoned, "does not say what the states may or may not do in the absence of congressional action, nor how to draw the line

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Governors Association, National Conference of State Legislatures, National Association of Counties, National League of Cities, FreedomWorks, Fraternal Order of Police, National Farmers Union, National Dairy Producers Organization, National Sustainable Agriculture Coalition, Consumer Federation of America, Consumer Reports, as well as a bipartisan group of hundreds of federal and state legislators (bipartisan) and many individual farmers, veterinary professionals, faith leaders, and legal experts.

[17] Protect the Harvest, *Call to Action: Support the King Amendment*, https://protecttheharvest.com/news/call-to-action-support-the-king-amendment/ (last accessed Aug. 5, 2022) ("the National Pork Producers Council (NPPC) is asking for your help supporting Iowa Congressman Steve King's Amendment, the Protect Interstate Commerce Act (PICA), also referred to as the 'King Amendment.' ").

between what is and what is not commerce among the states." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-35 (1949). If Congress were inclined to see California's adoption of a nondiscriminatory in-state sales regulation as a truly excessive burden on interstate commerce, it could have and surely would have seized the many opportunities presented to implement uniform federal standards. In the absence of Congressional action, the decision to regulate which pork products may be sold within a State's borders remains in the hands of that State's government.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the decision of the court below be affirmed.

Respectfully submitted,

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