

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 NATIONAL PORK PRODUCERS COUNCIL,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 21-468
7 KAREN ROSS, IN HER OFFICIAL)
8 CAPACITY AS SECRETARY OF THE)
9 CALIFORNIA DEPARTMENT OF FOOD &)
10 AGRICULTURE, ET AL.,)
11 Respondents.)
12 - - - - -

13
14 Washington, D.C.
15 Tuesday, October 11, 2022
16

17 The above-entitled matter came on for
18 oral argument before the Supreme Court of the
19 United States at 10:02 a.m.
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12 et al., Respondents.
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-468, National Pork Producers versus Ross.

Mr. Bishop.

ORAL ARGUMENT OF TIMOTHY S. BISHOP

ON BEHALF OF THE PETITIONERS

MR. BISHOP: Mr. Chief Justice, and may it please the Court:

The facts we allege are assumed to be true for purposes of decision here. They state a claim that Proposition 12 violates the Commerce Clause almost per se because it's an extraterritorial regulation that conditions pork sales on out-of-state farmers adopting California's preferred farming methods, for no valid safety reason. Proposition 12 also fails the Pike test because it burdens interstate commerce for no local benefit.

California wants to change farming methods everywhere to "prevent animal cruelty by phasing out extreme methods of farm animal confinement." That confinement occurs in other states. California imports 99.9 percent of its

1 pork.

2 Decisions like Baldwin establish that
3 even when a law is triggered only by in-state
4 sales, a state may not project its legislation
5 into other states in that way. To do so
6 infringes the territorial autonomy of sister
7 states and it impedes our national common
8 market.

9 No other state makes its farmers house
10 pigs the way that California does. And very few
11 farmers do. They keep sows in individual pens
12 during the vulnerable breeding period, and they
13 provide less than 24 square feet of space in
14 group pens. An Iowa farmer doesn't know where
15 pork from his sows will be sold. Pigs go to a
16 nursery, a finisher, then a slaughterhouse,
17 where the packer butchers them into parts that
18 are sold around the world in response to demand.

19 The only safe course is to raise all
20 pigs the California way, which is what we see
21 buyers demanding, and the costs of doing that
22 inhere in pork parts sold in places where buyers
23 are unwilling to pay more to satisfy
24 California's policy preferences.

25 If Proposition 12 is lawful, New York

1 can say that pigs have to have 26 feet of space
2 an -- and send inspectors into farms to police
3 compliance as California does. Oregon can
4 condition imports on workers being paid the
5 minimum wage. And Texas can condition sales on
6 the producer employing only lawful U.S.
7 residents. And at that point, we have truly
8 abandoned the framers' idea of a national
9 market.

10 I invite the Court's questions.

11 JUSTICE THOMAS: Mr. Bishop, when
12 exactly is a state -- intrastate regulation
13 impermissibly extraterritorial?

14 MR. BISHOP: Well, the --

15 JUSTICE THOMAS: Because this, as I
16 read California's law, it is about products
17 being sold in California. Unlike some of the
18 cases you cite, it's not reaching out and
19 regulating something across state line or
20 regulating prices.

21 MR. BISHOP: Well, the test that we
22 propose is that a state law that conditions
23 sales on an out-of-state business operating in a
24 particular way is almost --

25 JUSTICE THOMAS: And how does

1 California exactly do that?

2 MR. BISHOP: You cannot sell pork in
3 California unless you raise your sows in a
4 particular way out of state. It's a condition
5 on sale. That's very little different from
6 Baldwin. Baldwin conditioned the sale of milk
7 in New York predicated on the Vermont producer
8 being paid the New York rate, and it did that
9 because it thought that it was necessary to pay
10 Vermont farmers that much in order for them to
11 use sanitary methods on the dairy.

12 JUSTICE THOMAS: Right, but --

13 MR. BISHOP: This Court held that --

14 JUSTICE THOMAS: -- but what if --
15 what --

16 MR. BISHOP: -- New York could not
17 project its legislation that way on Vermont.

18 JUSTICE THOMAS: But what if -- what
19 if California -- I'm sorry to interrupt you, I
20 apologize.

21 MR. BISHOP: That's all right.

22 JUSTICE THOMAS: What if California
23 said a house has to be built according to
24 certain rules by certain standards with certain
25 products, hence, excluding products that are

1 made in another state? For example, it says
2 that you can't build a house entirely out of
3 wood, so you can't import wood from another
4 state like -- that's a lumber state like
5 Georgia.

6 MR. BISHOP: That -- that's -- that's
7 different, Justice Thomas. We -- we have --

8 JUSTICE THOMAS: Why is it? I mean,
9 it's affecting -- it's affecting your product
10 from your -- from -- extraterritorially.

11 MR. BISHOP: No, a state may ban a
12 product. There's no doubt about that. It could
13 ban pork. It can ban lumber to be used in
14 building houses. What it can't do is condition
15 sales in the state on a business in another
16 state adopting particular methods of production.
17 That tramples on the other state's rights.

18 JUSTICE KAGAN: I understand New York
19 has a law that says that if you want to import
20 firewood into the state, you have to have used a
21 certain kind of pesticide to make sure that
22 various pests don't come in with the firewood.

23 Would that be forbidden?

24 MR. BISHOP: Well, I think you can --
25 you can ban a product that contains certain

1 pests. The -- the -- Maine -- Maine versus
2 Taylor, I think, establishes -- establishes
3 that. And there is a --

4 JUSTICE KAGAN: But you -- but you
5 can't -- New York can't say any producers that
6 don't use -- that -- that don't use some -- you
7 know --

8 MR. BISHOP: A particular --

9 JUSTICE KAGAN: -- some list of
10 approved pesticides?

11 MR. BISHOP: A particular pesticide.
12 I think -- and -- and this won't always be easy
13 --

14 JUSTICE KAGAN: Your answer is that
15 you can't?

16 MR. BISHOP: You can't, right.

17 JUSTICE KAGAN: So anytime a state
18 does something that I say forces -- it doesn't
19 really force, but it -- you know, if you want
20 the -- the state's market, it forces you.

21 MR. BISHOP: Right.

22 JUSTICE KAGAN: Anytime a state does
23 something that forces you to change production
24 methods in any way, that would be --

25 MR. BISHOP: Yes.

1 JUSTICE KAGAN: -- banned?

2 MR. BISHOP: That's -- anytime --
3 well, banned, I mean, I say this is almost a
4 per se rule, even for discrimination cases.
5 There's always a safety out if the -- the state
6 can show that the -- the rule is necessary --

7 JUSTICE JACKSON: But, counsel --

8 MR. BISHOP: -- for safety --

9 JUSTICE JACKSON: -- can I just --

10 MR. BISHOP: -- and can't be achieved
11 --

12 JUSTICE JACKSON: -- can I just --

13 MR. BISHOP: -- but, yes, that is the
14 -- that's our position.

15 JUSTICE JACKSON: Can I just clarify?
16 Because I -- I perceive a difference in the rule
17 that you're articulating right now than what's
18 in your briefs, and I just want to make sure I
19 understand the per se rule that you are
20 articulating.

21 I thought your briefs were asking us
22 for a rule that says that a state may not elect
23 -- enact laws that have the practical effect of
24 controlling conduct outside the state's borders.
25 And that's different, I think -- and maybe I'm

1 wrong, so you can tell me -- than the rule that
2 you're now saying, which is a state law that
3 conditions sales on an out-of-state business
4 operating in a particular way is prohibited.

5 So which --

6 MR. BISHOP: Well --

7 JUSTICE JACKSON: -- which one of
8 these --

9 MR. BISHOP: -- well, I think, you
10 know, our -- our -- our view is that an
11 extraterritorial -- an extraterritorial rule
12 always has that practical effect on -- on
13 commerce. It does two things. It affects
14 commerce out of state, and it tramples the
15 rights of the states in which the business is
16 located.

17 JUSTICE JACKSON: But I could -- I see
18 a delta between the question of whether or not
19 the state's regulation controls conduct outside
20 of the state's borders and a -- what seems to me
21 to be a narrower proposition that you want a
22 per se rule that says if a state conditions
23 sales on out of -- on an out-of-state business
24 operating in a particular way.

25 Am I wrong --

1 MR. BISHOP: Well, it may --

2 JUSTICE JACKSON: -- that that's a
3 narrower thing?

4 MR. BISHOP: -- it may be a
5 narrower -- it may be a narrower subset, but
6 this Court has used that control language in --
7 in cases like Carbone and -- and Baldwin to
8 stand for this proposition that you may not
9 condition in-state sales on out-of-state --
10 out-of-state operations.

11 JUSTICE ALITO: Mr. Bishop, you have
12 -- you have several arguments, and I gather that
13 your answer to Justice Kagan based on your
14 extraterritoriality argument is no, New York
15 can't do that.

16 MR. BISHOP: It can't do that, right.

17 JUSTICE ALITO: But what -- how would
18 that play out under your other argument, which
19 is that the Pike balancing test would apply?

20 MR. BISHOP: Well -- well, Pike --
21 Pike is a -- you know, it's a factual -- it's a
22 factual test. It's a highly factual test, and
23 so you consider what is the impact on interstate
24 commerce, and then you weigh that against --
25 that -- that burden against the local interest.

1 But, I mean, what I -- what the rule
2 -- what the extraterritorial rule that we are
3 proposing does really operates at that first
4 level, the burden level, and what it says is
5 it's so clear that laws that condition sales on
6 out-of-states operation, changes in operations
7 is always going to be a significant burden on
8 interstate commerce that implicates the very
9 concerns that the framers had about
10 balkanization.

11 JUSTICE KAGAN: So suppose it were
12 Wyoming or Rhode Island --

13 MR. BISHOP: It wouldn't make --

14 JUSTICE KAGAN: -- that passes a law
15 like this.

16 MR. BISHOP: -- it wouldn't make any
17 difference, Your Honor.

18 JUSTICE KAGAN: It -- it -- it
19 certainly makes a difference in the kind of
20 burden that's involved, right?

21 MR. BISHOP: It -- it does.

22 JUSTICE KAGAN: Somebody could easily
23 just cut off the Wyoming market.

24 MR. BISHOP: But what we are
25 proposing, Your Honor, is a -- is a -- a per se

1 rule that these conditions on sale in state --

2 JUSTICE BARRETT: But that's not a
3 matter of Pike balancing. Your per se rule goes
4 to the extraterritorial rule, and I think
5 Justice Alito was asking you about Pike.

6 MR. BISHOP: Right. Well, and I'm --
7 what I'm trying to explain is the -- is the
8 relationship between extraterritoriality and
9 Pike, which is that the extraterritoriality rule
10 establishes per se that that burden is -- is
11 present in every case. It cuts out the need to
12 do the --

13 JUSTICE ALITO: It -- it establishes
14 --

15 MR. BISHOP: -- individualized --

16 JUSTICE ALITO: -- it establishes that
17 there is a substantial burden on interstate
18 commerce.

19 MR. BISHOP: Yes, exactly, Justice
20 Alito.

21 JUSTICE ALITO: Or there -- there
22 certainly is in the case where the state is a
23 behemoth like California, but if you go to Pike
24 balancing, then you would also take into account
25 in a situation like the one that was posited by

1 Justice Kagan the strength of the state's
2 interest. And so, if New York has a --

3 MR. BISHOP: Yes. If this Court
4 doesn't think --

5 JUSTICE ALITO: -- has a very strong
6 interest in preventing a really dangerous
7 product from coming into its borders, that would
8 be taken into account.

9 MR. BISHOP: Yes, and we think that's
10 taken into account under extraterritoriality
11 too. I mean, even -- even in cases like Oregon
12 Waste, where it's a discriminatory law, this
13 Court does consider the safety rationale that is
14 offered by the -- by the state, but the state
15 has to offer a -- a real non-speculative safety
16 rationale that is not --

17 JUSTICE GORSUCH: Counsel, why -- why
18 isn't this Pike balancing test a bit reading too
19 much into too little? It's one paragraph in a
20 short unanimous opinion and it relies on three
21 very old cases, Baldwin, Healy, and Brown, which
22 were all --

23 MR. BISHOP: They're not so old, Your
24 Honor.

25 JUSTICE GORSUCH: Well, they're a

1 hundred years old about -- around about -- that
2 involve price fixing or price affirmation
3 statutes that, in effect, are a form of
4 discrimination against out-of-state market
5 participants. At least that's how many people
6 in many courts have read them.

7 I confess I'm guilty of that too on
8 the Tenth Circuit. That was my understanding of
9 what Pike was about. What's wrong with that
10 understanding, especially when the alternative
11 you are selling us appears to be that this Court
12 should engage in a freewheeling balancing test à
13 la Lochner to protect an economic liberty rather
14 than defer to state regulation on health and
15 safety?

16 MR. BISHOP: Well, let me make two
17 points. I mean, it -- Pike -- Pike -- you know,
18 Healy is a 1989 case, and Brown-Forman is 1986.
19 I mean, these are not ancient cases.

20 There -- Pike is an extremely
21 well-established precedent not only in this
22 Court but in the lower courts, and it has been
23 applied --

24 JUSTICE GORSUCH: That's not a
25 question. The question is what it means.

1 And -- and it could either mean what many lower
2 courts have thought it's meant, looking at these
3 very old dairy statutes, things like that, or it
4 could mean something very broad that would endow
5 this Court to weigh competing interest.

6 Is -- does California have enough of
7 an interest in pork compared to lumber, compared
8 to fireworks, compared to whatever you want to
9 come up with?

10 MR. BISHOP: The narrow read we --

11 JUSTICE GORSUCH: What business do we
12 have in that?

13 MR. BISHOP: The narrow reading would
14 not satisfy the interests of the Commerce
15 Clause. The Commerce Clause is intended to
16 prevent balkanization. It was a reaction to --
17 to balkanize rules at the time of the
18 constitutional convention. And it was intended
19 to stop interstate -- interstate strife over
20 these sorts of rules.

21 A narrow rule focused on old dairy
22 statutes is not going to achieve that. And what
23 we're proposing, this per se rule that we are
24 proposing --

25 JUSTICE GORSUCH: It's new, right?

1 MR. BISHOP: -- it's away from --

2 JUSTICE GORSUCH: It's -- it's a new
3 rule?

4 MR. BISHOP: No. Well, we don't think
5 it's new. We think it's firmly grounded --

6 JUSTICE GORSUCH: Where -- where is
7 that --

8 MR. BISHOP: -- in Baldwin.

9 JUSTICE GORSUCH: -- in Pike? I don't
10 see per se --

11 MR. BISHOP: It's -- it's in Baldwin,
12 Your Honor.

13 JUSTICE GORSUCH: It's in Baldwin?
14 Okay.

15 MR. BISHOP: That's what -- that's
16 what Baldwin --

17 JUSTICE GORSUCH: With respect to
18 price affirmation and price fixing?

19 MR. BISHOP: Price affirmation cannot
20 conceivably be an appropriate limitation of this
21 rule because it doesn't achieve what the
22 Commerce Clause is supposed to achieve --

23 JUSTICE GORSUCH: Well, then let me
24 ask you how this --

25 MR. BISHOP: -- which is a national

1 market.

2 JUSTICE GORSUCH: -- let me ask you
3 how this works, though. You say -- you say
4 California could ban pork.

5 MR. BISHOP: Yes.

6 JUSTICE GORSUCH: Okay. Why doesn't
7 that affect interstate commerce in some
8 impermissible way?

9 MR. BISHOP: Well, it -- it does
10 affect it. But the -- the -- the difference
11 between a ban is that then it seems to us to be
12 much more -- which are commonplace, bans are
13 commonplace, they're much more in-state focused.
14 All they do is reduce the size of the market for
15 out-of-state businesses. That is very different
16 from conditioning a sale on the precise way that
17 an out-of-state business conducts itself, how it
18 operates.

19 JUSTICE KAGAN: But -- but,
20 presumably, the reason why out-of-state
21 businesses care about change in production
22 methods is that those production methods will be
23 more costly. And if you're thinking about
24 costs, California banning your product would be
25 the greatest costs of all. So why would you,

1 you know, divide the world in that way?

2 MR. BISHOP: Well -- well, we're not
3 only talking about costs, Justice Kagan.
4 We're -- we're talking about the impact on the
5 state where the business is located.

6 You know, Iowa has 65,000 sow farms.
7 It has a very great interest in how those sows
8 are -- are housed. And what California is doing
9 is essentially trampling on Iowa's ability to
10 say, no, you know, our farmers really ought to
11 be able to use --

12 JUSTICE KAGAN: Right. But its --

13 MR. BISHOP: -- breeding sows.

14 JUSTICE KAGAN: -- interest is
15 cost-related. Its interest is, look, we think
16 that this is, you know, sufficient and we don't
17 want to do anything that's more expensive.

18 MR. BISHOP: It's not only
19 cost-related. It could be morally related.
20 California's moral position, moral view that
21 pigs shouldn't be kept this way can be matched
22 in Iowa by a view that the most important thing
23 about sows is -- is producing --

24 JUSTICE KAGAN: Well, I must say --

25 MR. BISHOP: -- inexpensive --

1 JUSTICE KAGAN: -- that seems
2 unlikely.

3 MR. BISHOP: -- inexpensive pork.

4 JUSTICE KAGAN: I must say that seems
5 unlikely.

6 MR. BISHOP: No, not at all, Your --

7 JUSTICE KAGAN: The -- the -- the
8 question from Iowa's position, and it's an
9 important question, is you're making this
10 incredibly costly for us.

11 MR. BISHOP: No, I don't think -- I
12 don't see how that -- how -- how you say that's
13 unlikely. If California can tell folks in Iowa
14 how to raise their sows, then Iowa can take the
15 moral position that the most important -- the
16 most important moral thing to do here is to feed
17 people at a reasonable cost by -- by raising
18 sows using pens.

19 But people -- or the 350 --

20 JUSTICE KAGAN: I mean, we're supposed
21 --

22 MR. BISHOP: -- million people in the
23 country each --

24 JUSTICE KAGAN: -- you're suggesting
25 that we decide this case on the premise that the

1 interests at stake in Iowa and among pork
2 farmers have nothing to do with costs?

3 MR. BISHOP: No, that you should
4 decide this case on the basis that Iowa's views
5 on how pork should be raised, whatever those
6 are, are just as weighty as California's.

7 JUSTICE SOTOMAYOR: But why?

8 MR. BISHOP: And that --

9 JUSTICE SOTOMAYOR: I -- I mean, I
10 know that you dismiss the moral objection, and
11 I'm going to put it aside, but we have brief
12 from scientists that point out that there are
13 some genuine scientific reasons for fearing the
14 -- the -- the raising of pigs.

15 You may disclaim it, and I know your
16 complaint says something different, but some
17 people could reasonably believe that close
18 confinement of farm animal increases the
19 likelihood of new diseases jumping from humans
20 -- from animals to humans or vice versa. That
21 -- we know that's happening.

22 It is also reasonable to think that
23 reducing close confinement of pigs may reduce
24 the use of antibiotics in pigs, thus reducing
25 the development of antibiotic-resistant

1 bacteria. And some think that the use of
2 gestation crates increases the presence of
3 diseases in piglets that carry -- can carry
4 through to time of slaughter.

5 Now I know you're going to tell me
6 there's no scientific proof, but there is
7 certainly a reasonable basis for these people to
8 think this.

9 MR. BISHOP: We don't think there's a
10 reasonable basis. Our -- our veterinarians say
11 exactly the opposite. But, for current
12 purposes, Justice Sotomayor, what counts is
13 we're here on motion to dismiss, okay? There
14 has been no opportunity to test these
15 propositions in --

16 JUSTICE SOTOMAYOR: Well, how about I
17 --

18 CHIEF JUSTICE ROBERTS: Thank -- thank
19 you -- thank you, counsel.

20 Mr. Kneedler?

21 JUSTICE GORSUCH: Chief?

22 CHIEF JUSTICE ROBERTS: Oh, I'm sorry,
23 Mr. Kneedler. Thank you.

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Very anxious

1 to hear from you.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE ALITO: Would -- I think you
5 touched on this in your final comments, but let
6 me just make sure about it.

7 Most of your argument seemed to be
8 arguing the merits of the extraterritoriality
9 argument and the Pike balancing argument to a
10 lesser extent. But is that the question we have
11 here? This is on the pleadings. So what is the
12 standard that we're supposed to apply?

13 MR. BISHOP: Well, under Iqbal, we
14 have to plausibly allege facts that are
15 sufficient to a basis for our legal claims.
16 You've got two counts in the complaint, one
17 based on extraterritoriality, one based on -- on
18 Pike. We -- we think that we have easily pled
19 both an extraterritorial regulation and a
20 significant burden on interstate commerce and
21 that at that point, the state has to show that
22 it has good reason for these rules. And that --
23 that whole process has been curtailed by the
24 dismissal. We should get a remand in order to
25 make our case.

1 JUSTICE ALITO: Justice Sotomayor
2 recited factual allegations made in an amicus
3 brief submitted in support of California, and,
4 certainly, those merit serious consideration.

5 But was any of that evidence in the
6 record here?

7 MR. BISHOP: No. In fact, to the
8 contrary. We think that we should be entitled
9 to judgment as a matter of law on remand because
10 California's expert agency, its Food and
11 Agricultural Department, looked at the law and
12 it concluded that the confinement standards,
13 which is what Prop 12 is, confinement standards,
14 are not based on specific peer-reviewed
15 scientific literature or accepted as standards
16 within the scientific community to reduce human
17 foodborne illness, promote worker safety, the
18 environment, or other human and safety concerns.

19 When they realized that that was a
20 litigation issue and they tried to claw some of
21 it back, the best they could come up with is
22 this: That the California voters -- it was
23 reasonable, not unreasonable, for them to adopt
24 this law as a "precautionary measure to address
25 any potential threats." All right?

1 That is not enough under Pike or our
2 extraterritoriality test to justify a law that
3 has massive effects on interstate commerce.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

7 JUSTICE SOTOMAYOR: Counsel, your
8 complaint acknowledges at paragraph 160 that
9 consumer demand has led roughly 28 percent of
10 the pork industry -- not quite a third, but
11 that's a very high percentage -- to convert from
12 individual gestation stall to group housing. To
13 meet that consumer demand, 28 percent of the
14 industry already must be able to trace its pork
15 meat back to how individual pigs were housed
16 because consumer demand demands it.

17 We have marketed already pork marked
18 as organic, crate-free, antibiotic-free, and
19 beta-agonistic-free. I have no idea what that
20 means.

21 (Laughter.)

22 JUSTICE SOTOMAYOR: But I know it's
23 there. I've seen it in supermarkets, okay? So
24 some tracing is already happening. This is
25 already recognized in your complaint.

1 MR. BISHOP: No. With all due
2 respect, Justice Sotomayor, you're talking about
3 two different things there.

4 Twenty-eight percent of the market uses group
5 housing after confirmation of pregnancy.

6 What -- what -- what Prop 12 does is
7 to prohibit the most critical period for
8 individual confinement, which is the period
9 after weaning through the confirmation --

10 JUSTICE SOTOMAYOR: You're missing my
11 point.

12 MR. BISHOP: -- of pregnancy. No, but
13 that -- that --

14 JUSTICE SOTOMAYOR: No, no --

15 MR. BISHOP: So it's not 28 percent.
16 So let me tell you what --

17 JUSTICE SOTOMAYOR: Let me finish my
18 question.

19 MR. BISHOP: So --

20 JUSTICE SOTOMAYOR: Let me finish my
21 question.

22 California's 13 percent of the market.
23 It's a huge market. But there are people -- you
24 have to concede there are some people who can
25 sell there. They're already labeling themselves

1 as organic or crate-free or antibiotic-free or
2 something-free.

3 What is the critical difference? How
4 much of the market does the producers in Iowa
5 have to control? All of it?

6 MR. BISHOP: No. No, here's --

7 JUSTICE SOTOMAYOR: Or just a small
8 part of it?

9 MR. BISHOP: No, no, look --

10 JUSTICE SOTOMAYOR: And why does that
11 make a difference? Because no one's forcing
12 them to sell to California. They can sell to
13 any other state that they prefer to sell to.

14 MR. BISHOP: Your Honor, nationwide,
15 13,500 pigs are slaughtered each day that comply
16 or about comply with Prop 12. California needs
17 65,000 pigs a day to satisfy its proper --

18 JUSTICE SOTOMAYOR: And so its people
19 are going to go without pork?

20 MR. BISHOP: Half a million pigs are
21 slaughtered in the state every day. What's
22 organic Prop 12 is a tiny, tiny proportion.
23 It's sold in Whole Foods --

24 JUSTICE SOTOMAYOR: You still haven't
25 --

1 MR. BISHOP: -- for \$8 a pound.

2 JUSTICE SOTOMAYOR: -- you still
3 haven't answered my question. What's the line
4 that we draw to say that this is an
5 impermissible control by California of others
6 when it's giving it a choice to say: Sell my
7 way or don't sell my way? If you want to sell
8 my way, you can sell here. If you don't, sell
9 in New York.

10 MR. BISHOP: Well, we think the rule
11 derived from your cases, from Baldwin, from
12 Healy, from Brown-Forman, from Carbone, is the
13 one that I've expressed, that -- that it
14 violates the Commerce Clause to condition
15 in-state sales on out-of-state producers
16 operating a particular way.

17 And there's very good reasons for that
18 in the reasons for the -- for the -- for the
19 adoption of the Commerce Clause in the first
20 place, to avoid balkanization, to avoid
21 California imposing its philosophical views in
22 other states, and to -- and to avoid trampling
23 on the sovereign prerogative of other states.
24 And a rule like this does all of those.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: Mr. Bishop, suppose I
2 asked you to for a moment ditch the
3 extraterritoriality argument and just go to Pike
4 balancing. What would your position sound like?

5 MR. BISHOP: That Prop 12 has a very
6 significant effect on interstate commerce, that
7 essentially what will happen, as we've explained
8 in the briefs, is that farmers won't have --
9 most farmers won't have any choice but to adopt
10 this form of -- of -- of raising sows, and the
11 reason for that is that farmers don't know where
12 the -- the offspring, where the meat from the
13 offspring of their sows is going --

14 JUSTICE KAGAN: And on the other side?

15 MR. BISHOP: -- until much, much
16 later. I'm sorry, Your Honor?

17 JUSTICE KAGAN: And on the other side?
18 You know, there's a balance, two sides.

19 MR. BISHOP: Yeah, there's a balance,
20 and -- and California, we think, has given up
21 its safety -- any claim to -- to a genuine
22 safety rationale here. But that would be a
23 matter for --

24 JUSTICE KAGAN: Are you saying that
25 California has no distinctly moral interest

1 here?

2 MR. BISHOP: It -- it has a moral
3 interest that it can satisfy in state but not
4 one that by these conditions on sales --
5 conditioning sale on what is done elsewhere.

6 JUSTICE KAGAN: So, within Pike
7 balancing, there's a little bit of a per se rule
8 of its own, which is that moral interests cannot
9 justify conduct out of state? Is that the idea?

10 MR. BISHOP: Well, I -- I think that
11 that's sort of an essential -- you can say
12 that's in Pike balancing. I mean, it's an
13 essential feature of our horizontal federalist
14 system, which is that each state is sovereign
15 within its own territory.

16 And the reason this get brought into
17 the Commerce Clause is because the framers were
18 concerned about the sort of balkanization that
19 arises when -- when states adopt these rules.

20 JUSTICE KAGAN: And -- and, again,
21 just to make sure I understand your position,
22 you're saying that California could adopt a
23 complete ban on the product --

24 MR. BISHOP: Yes.

25 JUSTICE KAGAN: -- under your initial

1 territoriality rule? But also under Pike, it
2 can't -- but can't do --

3 MR. BISHOP: Yes. And --

4 JUSTICE KAGAN: -- what California is
5 doing here?

6 MR. BISHOP: But there are other
7 things that it can do. I mean, Justice
8 Sotomayor mentioned labeling. Labeling is
9 commonplace. You know, San Francisco requires a
10 label on meat disclosing what --

11 JUSTICE KAGAN: Well, gosh, that seems
12 to regulate out-of-state conduct too.

13 MR. BISHOP: Well, no -- well, no,
14 it really -- I mean, the label can be put on in
15 state, but it's really just a question of, you
16 know, putting a stamp on a -- a stamp on a -- on
17 a package. It really -- it does -- it's
18 something that --

19 JUSTICE KAGAN: That's just trivial?

20 MR. BISHOP: -- that's not
21 substantial.

22 JUSTICE KAGAN: Is that the idea?

23 MR. BISHOP: It's -- yeah, it's
24 trivial. I think it's trivial.

25 JUSTICE KAGAN: Okay.

1 MR. BISHOP: And what it does is it
2 allows California not to be complicit, if they
3 don't want to be complicit in raising pork the
4 way we raise it, then they have the information
5 in front of them to make that decision whether
6 to buy it or not.

7 JUSTICE KAGAN: Thank you.

8 MR. BISHOP: And also, you know,
9 whether to -- to -- to pay \$8 a pound for pork
10 at Walmart or 5.25 a pound at -- at -- at Whole
11 Foods or 5.25 a pound at Walmart.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 JUSTICE GORSUCH: Mr. Bishop, just to
15 follow up on Justice Kagan's line of questioning
16 where we've kind of laid out the costs and
17 benefits in our balancing test that you're
18 asking us to do, why isn't that just a form of
19 enshrining non-textual economic liberties in --
20 into the Constitution, something this Court -- a
21 project this Court disavowed a long time ago?

22 We're going to have to balance your
23 veterinary experts against California's
24 veterinary experts, the economic interests of
25 Iowa farmers against California's moral concerns

1 and their views about complicity in animal
2 cruelty.

3 Is that any job for a court of law? I
4 mean, the Commerce Clause, after all, is in
5 Article I, which would allow Congress to resolve
6 any of these questions.

7 MR. BISHOP: Well, I would like to say
8 two things in response. One is the courts have
9 not had difficulty applying the Pike test.

10 JUSTICE GORSUCH: Well, with respect
11 --

12 MR. BISHOP: I mean, we have not seen
13 a slew --

14 JUSTICE GORSUCH: -- let's put that
15 aside because I think --

16 MR. BISHOP: -- and if -- if you look
17 --

18 JUSTICE GORSUCH: -- a lot of lower
19 court judges would disagree with you.

20 MR. BISHOP: Well -- well -- I mean,
21 we don't see a lot of state laws struck down
22 under Pike balancing. When you do, it's
23 generally because the state has completely
24 failed, if you look at Kassel and Bibb and those
25 cases, the state has completely failed to make a

1 case for the necessity of the law.

2 But, you know, doctrinally, Your
3 Honor, you said that the -- the Dormant Commerce
4 Clause, which is -- you know, is just a label
5 for an interpretation of the Commerce Clause
6 that this Court has --

7 JUSTICE GORSUCH: Well, you've -- you
8 picked out a line of cases dating to 1935 that
9 is maybe the most dormant line of our Dormant
10 Commerce Clause jurisprudence.

11 MR. BISHOP: Well -- well, Your Honor,
12 you -- I mean, you've said that these -- that
13 these principles may be misbranded, but at this
14 point, the misbranding goes pretty deep, right?
15 I mean, the -- the -- this interpretation of the
16 Commerce Clause dates back to -- to Cooley.

17 The other ways in which the --
18 preventing the balkanization, preventing the
19 trampling of states' territorial sovereignty
20 that the doctrine is -- is -- is supposed to
21 protect against.

22 The other sources in the Constitution,
23 the P&I Clause has been interpreted not to --
24 you know, not to apply to corporations. The
25 Export and Import Clause has been interpreted

1 to -- to apply only to foreign trade.

2 Maybe the Court got it wrong when it
3 said that the Commerce Clause -- under the
4 Commerce Clause, Congress doesn't have exclusive
5 authority over true interstate commerce, but
6 it's too late to fix all of those things.

7 JUSTICE GORSUCH: Okay. Let me ask
8 another line --

9 MR. BISHOP: So the only way to
10 achieve --

11 JUSTICE GORSUCH: -- line -- line of
12 questioning. I'm sorry to interrupt, but I do
13 want to respect others' time.

14 Protecting interstate commerce, I
15 would have thought as an old -- just from an
16 antitrust mindset that we wouldn't be concerned
17 about protecting particular firms, but we'd be
18 concerned about protecting consumers at the end
19 of the day. And -- and a similar analysis might
20 apply here, it seems to me.

21 Your -- your complaint definitely
22 alleges harm to large pork producers in certain
23 places who would have difficulty segregating out
24 pieces of -- of pork. That -- I understand
25 that.

1 Less clear to me is whether you've
2 plausibly alleged harm to competition or harm to
3 interstate commerce itself. We have other pork
4 producers who say they're perfectly happy to
5 step into the void that your firms don't wish
6 to -- to fill and -- and to segregate out pork
7 parts, including, I think, Perdue is saying
8 that. And we also have one of your own members
9 attesting that prices will not increase to
10 consumers outside of California because they
11 won't bear it. And we have economists saying
12 the same thing on the other side, agricultural
13 economists.

14 So in what way have you plausibly
15 alleged harm to interstate commerce or consumers
16 rather than to your member firms?

17 MR. BISHOP: Well, we are here on
18 motion to dismiss, and what we have alleged is,
19 first of all, that prices -- prices cannot be
20 contained. The price increase from Prop 12
21 cannot be contained within California because,
22 at the time the farmer raises the sow, it
23 doesn't know where six months later the pork is
24 going to be sold to.

25 In a farm, "We sell everything except

1 the oink," is the phrase, so the blood, the fat,
2 the collagen, everything is sold, and it's sold
3 around the world in response to demand. Every
4 piece of that pig is going to bear the costs,
5 the significant costs of raising pork the way
6 that California demands.

7 As to the -- as to the -- you know,
8 the trace -- the difficulty of sort of tracing,
9 the -- the organic market, Niman Farms, which is
10 the -- the -- filed the amicus brief here, part
11 of Perdue, these are a tiny, tiny proportion, as
12 I said, 13,500 pigs a day slaughtered all around
13 the country compared to the 500,000 that are
14 slaughtered to supply the 350 million people in
15 this country with reasonably priced pork.

16 So this is not and we would prove at
17 trial that this is not something you -- you
18 suddenly -- you suddenly adapt to.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: To the extent we
22 have historically overinterpreted the Commerce
23 Clause, I think you were getting at something
24 that the amicus briefs also point out, is that
25 you couldn't correct that without correcting

1 also a historical underinterpretation perhaps of
2 the Export/Import Clause and the Privileges and
3 Immunities Clause. And Justice Thomas and
4 Justice Scalia wrote about the Export/Import
5 Clause, and others have written about the
6 Privileges and Immunities Clause.

7 Correct?

8 MR. BISHOP: Yes. I mean, my -- it
9 seems to me that it's just -- it's too late, all
10 right? Maybe the -- maybe the problem with the
11 --

12 JUSTICE KAVANAUGH: But -- but even if
13 it's not too late, you can't do one without
14 correcting the others, it would seem to me, or
15 else you're going to --

16 MR. BISHOP: Yes. It's -- it's deeply
17 -- there -- there are -- there are very few so
18 deeply entrenched principles in American
19 constitutional law as the Dormant Commerce
20 Clause going back to Cooley, and it serves --

21 JUSTICE KAVANAUGH: But the point
22 there --

23 MR. BISHOP: -- a very important
24 function.

25 JUSTICE KAVANAUGH: -- is the

1 principle behind it is embedded in our
2 Constitution, even if mislabeled.

3 MR. BISHOP: Yes.

4 JUSTICE KAVANAUGH: You couldn't just
5 say, oh, let's get rid of all those cases
6 because they're mislabeled without thinking
7 about the other clauses --

8 MR. BISHOP: Exactly right.

9 JUSTICE KAVANAUGH: -- might pick up
10 that same principle.

11 MR. BISHOP: Exactly, Your Honor.

12 JUSTICE KAVANAUGH: Okay. And second,
13 there are a lot of far-reaching arguments in
14 this case, but it seems to me, picking up on
15 Justice Alito's question, the -- Pike is a
16 long-standing precedent. You have a complaint
17 that alleges a claim under Pike that's on its
18 face sufficient.

19 Isn't that just the easiest way to
20 resolve this for now and we can --

21 MR. BISHOP: Well --

22 JUSTICE KAVANAUGH: -- deal with a lot
23 of these far-reaching arguments down the road?

24 MR. BISHOP: -- we don't think the
25 extraterritoriality is far-reaching. I mean,

1 the way to think about -- I think the way to
2 think about it is, as I've said, it's -- it just
3 means that you get into that first step of Pike
4 without having to go through all the factual
5 considerations that, you know, Justice Alito has
6 referred to as being potentially problematic.

7 If -- if you are conditioning sales on
8 -- on businesses in other states operating a
9 different way so that that rule is all about
10 what happens out of state, then per se you get
11 into that top --

12 JUSTICE KAVANAUGH: Okay. I've --

13 MR. BISHOP: -- top level.

14 JUSTICE KAVANAUGH: Thank you.

15 JUSTICE BARRETT: Counsel, I want to
16 ask you about extraterritoriality. So can you
17 tell me why you answered Justice Kagan that the
18 labeling wouldn't matter?

19 I mean, if it's a per se rule that you
20 can't control what's going on in other states,
21 and you said, well, it's just insignificant,
22 it's de minimis, but wouldn't the per se rule,
23 the principle, still apply?

24 MR. BISHOP: Well, I -- I don't think
25 so. I mean, I think the de minimis point is --

1 you know, is an important one. It -- this does
2 have to be a -- you know, a real impact on -- on
3 commerce and almost always, with a
4 extraterritorial law, it is.

5 But simply --

6 JUSTICE BARRETT: So it's not a per se
7 rule we would be balancing. I mean, you're --
8 the principle that you're asking for -- and I
9 guess this kind of goes to Justice Jackson's
10 question about what exactly is the principle
11 that you're articulating here.

12 It seems to me that you're not just
13 saying, well, if it controls markets and -- or
14 the way that production is conducted in other
15 states, it's if it does so in a significant way
16 or a burdensome way?

17 MR. BISHOP: No, no. If it does that
18 at all, then it's impermissible. But the --

19 JUSTICE BARRETT: Well, then why
20 doesn't the labeling do it?

21 MR. BISHOP: -- but the labeling
22 doesn't affect the way that the operation is
23 run, the way that the pig is raised. If you are
24 -- if you have to put a label on -- all you have
25 to do is put a label on that says, you know,

1 this does not comply with Prop 12 or this was
2 raised in 24 feet, it's -- it's -- it's a
3 factual statement --

4 JUSTICE BARRETT: Well, it seems to me
5 --

6 MR. BISHOP: -- about how you raised
7 the --

8 JUSTICE BARRETT: -- that you're still
9 then having to weigh it in. But -- but let me
10 shift gears and just ask a different question
11 also about extraterritoriality.

12 It seems to me -- you know, Justice
13 Gorsuch was pointing out that this line of
14 cases, the Baldwin line, is the most dormant of
15 the Dormant Commerce Clause cases, and I think
16 his point was that Baldwin was decided in 1935,
17 before Darby, before Wickard, and the idea of
18 what constituted interstate commerce was very
19 different then. We were trying to draw lines
20 between intrastate and interstate commerce that
21 don't exist anymore.

22 We have these three cases that are in
23 the pricing context, and it seems to me that
24 you're asking for an extension of those. I
25 mean, I get that you can draw on the principle

1 and the reasoning of those cases and the dicta,
2 but it would still be an extension. And I'm
3 wondering, how many laws would fall? I mean,
4 California has higher emissions standards on
5 automobiles than many other states. Does that
6 fall?

7 MR. BISHOP: No. No. Absolutely not.
8 I mean --

9 JUSTICE BARRETT: Why?

10 MR. BISHOP: -- that -- that is --
11 that -- that's -- that's entirely federalized.
12 The -- they have a waiver from the -- the
13 federal government regulates emissions, and
14 California has a waiver from the federal
15 government for that. If you look at the --

16 JUSTICE BARRETT: What if they didn't?
17 What if -- I understand California has some new
18 legislation --

19 MR. BISHOP: Well --

20 JUSTICE BARRETT: -- about electric
21 cars and electric vehicles and by 2035, that
22 would be --

23 MR. BISHOP: -- again, all -- and all
24 done under waivers. But -- but take -- I mean,
25 take the Apple example --

1 JUSTICE BARRETT: Okay. Well -- well,
2 let's assume -- I guess what I'm saying is
3 Justice Kagan gave you the example of the
4 firewood and the pesticide. If they have a
5 waiver about emissions, fine. There must be
6 many, many state laws that regulate
7 extraterritoriality, extra -- outside of their
8 territory in the way that you are saying is
9 impermissible. So would this have --

10 MR. BISHOP: No.

11 JUSTICE BARRETT: -- far-reaching
12 consequences?

13 MR. BISHOP: No, it wouldn't have
14 far-reaching consequences. Let -- let -- two
15 examples. Apple, in -- in Apple, that -- that
16 involved the -- you know, the rule that you have
17 to -- in order to sell electricity in Colorado,
18 you have to buy 20 percent of the power from
19 renewable sources. Clearly, that has a very
20 important safety impact in Colorado. Air
21 pollution anywhere is universal. So, I mean,
22 those rules are not going to fall.

23 The sort of rule that will fall is the
24 Seventh Circuit's rule -- the one the Seventh
25 Circuit considered in Legato Vapors, where

1 Indiana, on a safety rationale, tells vape
2 companies how -- exactly how they have to
3 operate if they want to sell into -- into
4 Indiana.

5 I mean, it is notable that there are
6 -- there are not cases like this in the books.
7 There are cases like -- the -- Baldwin and
8 Brown-Forman and Carbone, which we think are
9 very much on point, but the -- the closest by
10 far is Legato Vapors, where the Seventh Circuit
11 struck down that Indiana law.

12 JUSTICE BARRETT: Okay. Let me just
13 ask, because I don't --

14 MR. BISHOP: States don't do this.

15 JUSTICE BARRETT: Okay. I don't -- I
16 don't want to take up too much time, so let me
17 just ask you one last clarifying question.

18 In your interchange with Justice
19 Kagan, did I understand you right when -- to say
20 that morals, just when you're doing Pike
21 balancing, can't count as a state interest as
22 opposed to safety and health?

23 MR. BISHOP: Right, because, if the --
24 if -- if they could, then the -- the -- the
25 common -- the common national market would just

1 fall apart because Texas can say you have to
2 certify that -- that everything was produced by
3 lawful residents. Oregon can say, unless you
4 provide particular healthcare, which we think
5 is -- you know, X is included in the healthcare
6 plan, we're not going to buy those -- those
7 products. And just --

8 JUSTICE BARRETT: Okay. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: Yes. So I just have
12 one set of questions about extraterritoriality
13 and one quickly about Pike balancing.

14 So you've said repeatedly, I think,
15 that extraterritoriality is about the burden.
16 Am I right about that? It's about -- the -- the
17 sort of rule that you want us to establish is
18 related to the burden part of the Pike
19 balancing? Didn't you say that?

20 MR. BISHOP: Extraterritoriality is a
21 shortcut into burden, into the --

22 JUSTICE JACKSON: Yes, for -- for
23 establishing the burden. But the problem I
24 think you might have is that if that's the case,
25 then you're about to lose the benefit of a per

1 se rule or a bright-line rule because, as
2 Justice Kagan pointed out, the burden might vary
3 depending upon whether it's California versus
4 Rhode Island, that you can't have a per se rule
5 that relates to the effect because then we've
6 got to figure out how much control, how
7 significant is this regulation, as opposed to
8 the rules in -- or the way in which the rule
9 played out in -- in Brown and Healy, where it
10 was about the nature of the regulation, not its
11 effect.

12 So I worry that you really aren't
13 talking about a per se rule. It's more always,
14 as Justice Barrett pointed out, really a
15 balancing.

16 MR. BISHOP: No, it's a per se -- it
17 is a per se rule. I mean, it does have a -- a
18 -- a -- a per se test, which is that if you --
19 you cannot condition in-state sales on
20 out-of-state changes in business operations. If
21 you do that, then you look at what the state's
22 rationale is on the other side, but always,
23 because a rule like that has one goal, and that
24 is controlling conduct --

25 JUSTICE JACKSON: Right, but it's --

1 MR. BISHOP: -- in other states.

2 JUSTICE JACKSON: -- but it's not
3 about the degree of control. It's just if you
4 do that kind of thing. Is that what you're
5 saying?

6 MR. BISHOP: Yes.

7 JUSTICE JACKSON: All right. So with
8 -- my other set of questions is about the Pike
9 balancing. So let me ask you, would there be a
10 problem under Pike if, instead of banning sales
11 based on morality concerns or whatever else,
12 California allowed the sales but required the
13 pork to be labeled?

14 You've said a couple times that you
15 suggested that labeling was fine.

16 MR. BISHOP: Labeling is fine. It
17 happens all the time. You know, you walk into
18 the market, organic --

19 JUSTICE JACKSON: Right.

20 MR. BISHOP: -- is labeled, it's --
21 it's --

22 JUSTICE JACKSON: So, if it's fine,
23 let me just ask you to react a little bit to
24 this thought: I'm wondering whether the problem
25 is that Pike balancing might not be nuanced

1 enough. Justice Gorsuch suggests, you know,
2 we've got to do the balancing and that's a
3 problem.

4 But it seems to me that the Pike
5 balancing has courts looking on the one hand to
6 the burden, on the other hand to the benefit,
7 but not whether there's a way to achieve that
8 benefit in a less burdensome way.

9 And -- and -- and so I would wonder
10 whether the Pike balancing actually is amenable
11 as it now stands or whether it needs to be
12 corrected to allow for an assessment of a state
13 that has a morality concern, for example, that
14 it considers to be a benefit.

15 Do courts or should courts analyze
16 whether or not that benefit could be achieved in
17 a less burdensome way?

18 MR. BISHOP: Well, there -- there is a
19 less burdensome factor in Pike itself. I mean,
20 the Pike test ends with -- by asking the
21 question whether the state's goals could be
22 promoted as well with a lesser impact on
23 commerce. So there is a sort of
24 least-restrictive means type element to the Pike
25 -- to the Pike test.

1 But morality should not be part of
2 that because, you know, we live in a very
3 divided nation and these are --

4 JUSTICE JACKSON: Right, but why not?
5 What if -- to the morality, as Justice Sotomayor
6 says, is animal welfare. We have science, says
7 the state. We really believe that, you know,
8 these animals should not be kept in pens in this
9 way.

10 Why couldn't that be a reason that the
11 state says so any animals that come in from Iowa
12 we're going to label --

13 MR. BISHOP: Oh.

14 JUSTICE JACKSON: -- as non-compliant,
15 you know, to our moral views about how this
16 should be done?

17 MR. BISHOP: Yeah. Labeling --
18 labeling can be required.

19 JUSTICE JACKSON: But there's -- but
20 it would be based on morality. It's just the
21 way in which they're achieving it --

22 MR. BISHOP: Yes, a state is perfectly
23 entitled to enforce its morals in state. I
24 mean, that's what Justice Brandeis said,
25 right --

1 JUSTICE JACKSON: Yeah.

2 MR. BISHOP: -- with his, you know,
3 experimentation. The states can -- can -- can
4 experiment as much as they like. They can be
5 laboratories, but the laboratory is the state.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Kneedler.

10 ORAL ARGUMENT OF EDWIN S. KNEEDLER
11 FOR THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONERS

13 MR. KNEEDLER: Mr. -- Mr. Chief
14 Justice, and may it please the Court:

15 Taking the allegations in the
16 complaint as true, Proposition 12's sales ban is
17 invalid under Pike because it imposes a
18 substantial burden on interstate commerce
19 without serving a legitimate local public
20 interest. Proposition 12 imposes a trade
21 barrier based on conduct beyond California's
22 borders. It fails to respect the autonomy of
23 California's sister states. It invites conflict
24 and retaliation and threatens the balkanization
25 of the national economic union.

1 California's disagreement with the
2 manner in which pigs are housed in other states
3 is not a cognizable local interest of California
4 that could support the imposition of such a ban.

5 A state's interest in protecting the
6 health and safety of its residents can support a
7 state law if that local interest is substantial
8 and not outweighed by its effects on commerce.
9 But the state here has taken the position that
10 Proposition 12 does not rest on any scientific
11 determination of such a basis, and Petitioners
12 also plausibly allege that Proposition 12 does
13 not substantially advance such an interest.

14 The judgment of the court of appeals
15 there should be reversed on the basis of Pike.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Mr. Kneedler,
18 couldn't you circumvent or avoid this problem
19 completely by having national legislation, and
20 then you would just simply have a preemption
21 issue?

22 MR. KNEEDLER: Yes, Congress could
23 certainly act in this field. And I -- I would
24 point out, for example, that with respect to
25 labeling, the -- the -- the Meat -- in --

1 National Meat Inspection Act regulates labeling.
2 Labeling has to be approved by USDA, and so the
3 content of the labeling could be localized,
4 could be -- could be national.

5 And, in fact, USDA has approved labels
6 such as cage-free or Proposition 12 compliant,
7 but it requires an explanation of what that
8 means in order that the consumer can understand.

9 So the -- the -- the state's interest
10 in allowing its citizens to exercise their right
11 not to be morally complicit if an individual
12 consumer believes that is furthered by the
13 labeling provisions that USDA has approved and
14 would be prepared to approve.

15 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
16 you mentioned the state's interest in health and
17 safety. Does that extend to moral values of the
18 state beyond health and safety?

19 MR. KNEEDLER: Well, the -- the -- the
20 state can certainly have moral -- rest on moral
21 values or its determination of them for
22 regulating conduct within the state. But the
23 question with respect to the raising of pigs in
24 other states, that -- the -- the -- how the
25 moral issue should be weighed there as against

1 economic, as against countervailing interest on
2 behalf of the pigs, is something that that state
3 should regulate, not California.

4 CHIEF JUSTICE ROBERTS: But what if
5 they're totally unrelated? You can't sell eggs
6 in California unless, you know, you have a
7 certain amount of energy, I guess it could be
8 related at some level, whatever, something
9 totally unrelated to eggs.

10 Is -- is that all right?

11 MR. KNEEDLER: No, I -- I would think
12 not. I mean, I -- I -- I think that the --
13 under -- under Pike balancing, there would have
14 to be some legitimate basis for the -- for
15 imposing such a burden on interstate commerce.

16 CHIEF JUSTICE ROBERTS: Well, the
17 legitimate basis is not some unrelated moral
18 objective?

19 MR. KNEEDLER: No, I -- I think a
20 moral objective --

21 CHIEF JUSTICE ROBERTS: In other
22 words, the state is trying to drive conduct in
23 the other state, just as it is here, but without
24 any connection to a particular industry or
25 activity.

1 MR. KNEEDLER: Well, I think, if it is
2 trying to regulate conduct in other states,
3 whether related or not related, where it doesn't
4 have a concrete, on-the-ground, scientifically
5 based, in the case of health and welfare, basis,
6 I -- I -- I think that's invalid under Pike
7 balancing, whether it's a related or unrelated
8 issue abroad.

9 The -- the Court made this point in
10 Baldwin when it said in -- in responding to the
11 argument that perhaps the way farms are run in
12 Vermont are not adequate, the Court said, if the
13 manner of -- of farms being operated in Vermont
14 is deficient, that's up to the legislature of
15 Vermont, not up to the legislature of New York
16 to address.

17 CHIEF JUSTICE ROBERTS: The cases that
18 you -- I think the cases that you cite most
19 frequently in your brief or at least cite a lot,
20 I think, can be distinguished on the grounds
21 that they're dealing with the arteries of
22 commerce. Kassel, you know, you have to change
23 the length of the truck, trucks, interfering
24 with the movement of commerce as opposed to
25 production.

1 Is that a fair distinction?

2 MR. KNEEDLER: Well, a -- a number of
3 those -- I think it's particularly strong, but
4 part of the reason that's so is because a
5 limitation on truck length or on train length or
6 on mud flaps inevitably has the effect of
7 controlling conduct in another state because
8 changes would be -- have to -- have to be made
9 at the border or before it reaches the border.

10 CHIEF JUSTICE ROBERTS: Well, that's
11 why I'm suggesting maybe you're overreading them
12 because it is inevitably going to have an -- an
13 impact on interstate commerce.

14 MR. KNEEDLER: But -- but the Court
15 has not limited its Pike balancing, for example,
16 to that sort of case at all. In fact, Carbone,
17 for an example, is a case sort of the mirror
18 image of Baldwin -- Baldwin, which had to do
19 with a sales restriction on milk produced out of
20 state.

21 Carbone was a -- a local ordinance
22 that restricted the export of a product out of
23 the state, and it had the effect of -- of -- an
24 effect on interstate commerce that was not a
25 channel of commerce and it was not a pricing

1 issue.

2 And the Court held that it was an
3 impermissible basis for the state, among other
4 things, for the -- excuse me -- locality to
5 regulate the disposition of waste because of
6 concerns about environmental impacts in another
7 state. That would be for that other state to
8 determine, not -- not the City of Clarkstown
9 that was involved in -- in Carbone.

10 JUSTICE ALITO: Under --

11 JUSTICE KAGAN: Mr. --

12 JUSTICE ALITO: -- under Pike, do you
13 think that a state's safety interests are
14 treated -- should be treated differently from
15 its moral interests?

16 MR. KNEEDLER: Yes. If -- if -- if it
17 is -- if the moral interest is a moral interest
18 in objecting to the way -- to conduct that
19 occurs in another state, yes, because we think
20 there has to be a -- you know, concrete evidence
21 showing an in-state, you know, tangible impact
22 on the citizens' state.

23 And, for example, the -- the director
24 of the state agency involved here, while
25 acknowledging there was no scientific basis for

1 the -- for this as a matter of safety or health,
2 said still California citizens might benefit
3 from knowing that the pigs that come into the
4 state have been humanely handled in the way
5 Californians discovered --

6 JUSTICE ALITO: But does that -- does
7 that distinction really work? Because I
8 understand that part of California's argument
9 and part of the reason why the voters of
10 California adopted this provision was to avoid
11 the feeling of moral complicity that they would
12 experience if they consumed -- if they purchased
13 and consumed pork that had been produced in what
14 they regard as an inhumane way.

15 So, in the case -- if -- if the pork
16 presents a safety problem, it's a safety problem
17 that they -- that the people, the consumers in
18 California, would experience. If it presents a
19 moral problem, it's a -- a moral -- it's moral
20 danger that they -- they don't want to incur.

21 MR. KNEEDLER: Well, as I was
22 explaining before, the labeling alternative,
23 Pike -- Pike, as has been pointed out, contains
24 a sort of less restrictive means sort of
25 standard or -- or -- or safety valve.

1 And labeling allows those citizens of
2 California who -- who want to avoid purchasing
3 pork because they believe they would be morally
4 complicit in conduct that they think is improper
5 in another state, enables them to do so. So
6 it -- it's -- it's tailored to the interest in
7 allowing individual citizens in California to
8 exercise their moral choice.

9 JUSTICE KAGAN: I mean, just to take
10 an extreme example of this, Mr. Kneedler,
11 suppose we imagine ourselves back into slavery
12 days.

13 Would it have been impermissible for a
14 state to have said we're not going to traffic in
15 products that have been produced by slavery?

16 MR. KNEEDLER: I -- I think the logic
17 of our position would say yes, but that -- that
18 was at a much earlier -- earlier time, both in
19 Commerce Clause and, of course, now we have the
20 Thirteenth Amendment that -- that would prohibit
21 -- and -- and that conduct is prohibited in
22 the -- in the state where it occurs. This is
23 the important thing to recognize.

24 JUSTICE KAGAN: Right. I was -- I was
25 imagining ourselves back into a world where it

1 wasn't, but I -- I -- I take the point.

2 How about, you know, you've -- you
3 also have said total product bans are -- are
4 permissible. But some total product bans are
5 based on moral feelings or even sort of feelings
6 of disgust, like a ban on horse meat. There's
7 nothing dangerous about eating horse meat.
8 People in Iceland do it all the time.

9 There's a kind of yick, disgust
10 factor, a kind of moral factor. So could a
11 state not do a ban on horse meat?

12 MR. KNEEDLER: No. I think, of
13 course, a state acting within -- within its own
14 territory can act on moral or other bases. And
15 a lot of laws have moral underpinnings.

16 JUSTICE KAGAN: Well, this is a ban on
17 the importation of horse meat for sale.

18 MR. KNEEDLER: Well, I -- I -- I
19 think, on the -- on the premise that you're
20 explaining, it would be -- it would be a total
21 ban on horse meat because the state has said
22 it's yucky to -- to allow it.

23 JUSTICE KAGAN: Right, but -- but --
24 but it's a moral interest that's involved, and
25 -- and the people who are going to be affected

1 are all of these out-of-state producers and
2 horse people.

3 MR. KNEEDLER: Well, there is an
4 incidental effect on commerce in that respect,
5 but this -- but I think the important
6 distinction is the state's judgment and its
7 action is focused on conduct within the state.

8 There will be no horse meat in this --
9 in this state. And, the fact it's --

10 JUSTICE KAGAN: Well, there won't be a
11 sale of horse meat, just as there won't be a
12 sale of pork produced in a certain way. I guess
13 I just don't really understand the distinction.
14 It naturally seems like, you know, the greater
15 includes the lesser.

16 MR. KNEEDLER: But there are
17 situations in which the greater does not include
18 the lesser, such as when --

19 JUSTICE KAGAN: I'm trying to figure
20 out why this is one of them.

21 MR. KNEEDLER: Well, I -- I -- I think
22 one of them is -- or the important one is -- is
23 the interstate Commerce Clause addresses whether
24 the state is trying to address interstate
25 commerce as opposed to a domestic issue. And

1 this case turns on the fact that the product was
2 produced in a certain way out of state and then
3 is brought into the state. That is interstate
4 commerce.

5 If the state is simply regulating the
6 production or the consumption of a product
7 within the state, that is not -- that is not
8 regulating interstate commerce. It may have an
9 incidental effect on commerce because people
10 won't ship it to the state anymore, but the
11 important thing is that it's regulating within
12 the state on the basis of valid state interests.

13 But, when it comes to moral judgments,
14 a state can make moral judgments for its own
15 people, but, when it comes to conduct in another
16 state, that's for that state's legislature to
17 decide.

18 If that -- a lot of laws can be -- can
19 be explained or -- or described as based on
20 moral determinations. Minimum wage laws, for
21 example. And this was true in Baldwin. The
22 Court made clear that a court could not limit
23 the import of goods from another state on the
24 ground that the workers were not paid a certain
25 amount.

1 Or I would say parallel to the housing
2 of the pigs here, if -- if California objected
3 to the importation of pigs because the workers
4 who worked at the pig farms were not housed
5 properly, that would be -- that would be wrong
6 too because that would be making -- that would
7 be resting California law on a judgment about
8 whether conduct in another state is proper or
9 not.

10 JUSTICE BARRETT: Mr. Kneedler, can I
11 ask you a question? I had understood your brief
12 to really focus on Pike balancing --

13 MR. KNEEDLER: Yes.

14 JUSTICE BARRETT: -- and to dismiss
15 the -- say we not -- we need not reach the
16 extraterritoriality point. The way that you're
17 describing Pike balancing in response to Justice
18 Kagan's questions seems like it very much
19 incorporates extraterritoriality into the
20 analysis because your answers have been very
21 focused on the fact that California was trying
22 to do something to reach outside of its borders
23 and regulate conduct in -- in Iowa.

24 What benefit would we get from
25 considering that part of Pike balancing rather

1 than just its own line of the Dormant Commerce
2 Clause?

3 MR. KNEEDLER: Well, I -- I -- I -- I
4 think the points I was making actually fit into
5 both sides of the -- of the Pike balancing.
6 Pike balancing, when it comes to the enacting
7 state's interest, the Court said it has to be a
8 legitimate local public interest. And
9 California does not have a cognizable local
10 interest in California in the conduct that is
11 occurring elsewhere.

12 So it's -- so the point I made about
13 California regulating conduct outside the state
14 is built in in that respect. But also, when
15 California is, by -- by virtue of a sales ban,
16 excluding products from other states, that is --
17 that is a pretty direct imposition on interstate
18 commerce. It's effectively a trade barrier by
19 saying it's not -- it's not a tariff because it
20 doesn't -- you don't have to pay more, but it's
21 excluding the product altogether by -- by the
22 avenue of a -- of a sales ban.

23 JUSTICE JACKSON: Mr. Kneedler --

24 JUSTICE BARRETT: Well, so was Justice
25 Kagan's example of just banning horse meat

1 altogether. I mean, it seems like that would be
2 a trade barrier as well, right?

3 MR. KNEEDLER: Well, but it's -- it's
4 -- it's not -- its basis is not a trade barrier.
5 Its basis is not this product was produced out
6 of state and is coming into the state. Its
7 basis is entirely on the local -- focusing
8 entirely on the -- on the consumption or -- or
9 sale within the state.

10 JUSTICE JACKSON: But, Mr. Kneedler,
11 is that really a line that you can draw?
12 Because it seems like it is totally based on the
13 state's subjective interest in the particular
14 circumstances.

15 Like in both cases, the horse meat
16 isn't coming in, to use Justice Kagan's analogy.
17 In Scenario 1, you say the state says we don't
18 want any horse meat because, say, you know, the
19 science is such that we don't like horse meat
20 and we're not going to offer it. And you say
21 that's okay, even though it has impacts from all
22 the horse farmers around the country.

23 But, in Scenario 2, if the state says
24 we don't like the horse meat because the way --
25 of the way the horses were raised in Kentucky,

1 that's not okay. And I'm just wondering if
2 that's something that we can really take account
3 of in a reasonable, you know, per se kind of
4 way.

5 MR. KNEEDLER: I'm not -- I'm not --
6 we're not proposing a per se rule. We believe
7 this case should be decided under Pike
8 balancing. But --

9 JUSTICE JACKSON: But, even under Pike
10 balancing, how do we draw the line between those
11 two scenarios based solely on whether the state
12 is saying we don't like it because of what -- of
13 the way in which these animals were raised
14 versus we don't like it because we think the
15 animals are going to harm our people?

16 MR. KNEEDLER: Again, I think it's the
17 distinction between -- and it reflects the --
18 the horizontal federalism that -- that is spread
19 throughout the Constitution. California has to
20 respect the autonomy of its sister states, the
21 -- its sister state's ability to regulate
22 conduct within its borders. And if Kentucky
23 thinks that the -- a particular method of
24 raising horses is okay, that's up to Kentucky.

25 But the horizontal federalism and

1 autonomy of the states allows California, for
2 example, to say we don't want horse meat in our
3 state at all, irrespective of interstate
4 commerce. In that situation, the law doesn't
5 turn on -- doesn't -- its operative -- its
6 operation does not turn on interstate commerce
7 --

8 JUSTICE JACKSON: And it doesn't --

9 MR. KNEEDLER: -- whereas this law
10 does.

11 JUSTICE JACKSON: -- turn on the
12 effect? It doesn't -- the effect is identical
13 in both places in terms of the, you know, burden
14 on the people who would otherwise sell into the
15 state, but that's not the critical piece of
16 this?

17 MR. KNEEDLER: Right. In the -- in
18 the total ban, it's an incidental effect on
19 out-of-state people. On the -- where the law
20 itself turns on the -- the -- the fact, the
21 manner in which it was produced out of state,
22 then that is -- that brings interstate commerce
23 into it, and that -- that raises the Pike issue.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Yes. Excuse me,
3 Chief.

4 Mr. Kneedler, this law applies to pork
5 that is shipped into the United States from
6 Canada and Mexico, doesn't it?

7 MR. KNEEDLER: Yes.

8 JUSTICE ALITO: Does the United States
9 have any position on whether regulating that is
10 consistent with federal treaty law?

11 MR. KNEEDLER: I --

12 JUSTICE ALITO: Is that consistent
13 with NAFTA?

14 MR. KNEEDLER: I -- I don't know the
15 answer to that. I don't know that the
16 government has taken a position on that, but --
17 but NAFTA and other trade agreements are
18 examples of concerns about trade restrictions
19 that are not price-based. And so we think the
20 -- the Commerce Clause also should not be
21 price-based for similar reasons.

22 JUSTICE ALITO: Well, I know this is
23 unfair, so you can just tell me that it's --
24 it's not within the arguments presented to us,
25 but could California ban the importation from

1 Mexico or Canada of any products that were not
2 produced in a factory that complies with U.S.
3 environmental laws?

4 As I said, it's --

5 MR. KNEEDLER: I --

6 JUSTICE ALITO: -- you can just --

7 MR. KNEEDLER: -- I -- no, I -- I -- I -- I
8 don't think so. I mean, that would -- that
9 would raise questions under the Foreign Commerce
10 Clause and the -- and -- and some of the issues
11 that this Court has considered before with
12 respect to a state regulating with respect to
13 things that -- that happen in a foreign country.

14 That -- there's an additional concern
15 under our constitutional structure for that sort
16 of thing.

17 JUSTICE ALITO: So, if -- if the
18 Dormant Commerce Clause applies to foreign
19 commerce, do you think there should be a
20 heightened standard? Would it be tougher to --
21 for a state to satisfy a -- to -- to survive a
22 Dormant Commerce Clause challenge when the
23 challenge concerns international commerce?

24 MR. KNEEDLER: I -- I think there may
25 well be. In fact, if -- if a -- if a state law

1 is expressly directed at interstate commerce,
2 then, you know, it's singling out foreign -- not
3 interstate -- foreign commerce. It's singling
4 out foreign commerce for special treatment,
5 which I think, under the Constitution and under
6 the framers' intent, would be a -- would be a --

7 JUSTICE ALITO: All right. Thank you.

8 MR. KNEEDLER: -- serious problem.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor?

11 JUSTICE SOTOMAYOR: Mr. Kneedler, if
12 Petitioner did not claim that there were these
13 unique tracing and separation problems, already
14 could do the tracing, could do the separation,
15 would you still say that there was a substantial
16 burden on interstate commerce? And if so --

17 MR. KNEEDLER: Yes. Our --

18 JUSTICE SOTOMAYOR: -- why?

19 MR. KNEEDLER: -- our position does
20 not turn on -- does not turn on whether a
21 product can be traced. Our position turns on
22 the fact that the conduct on the farm would have
23 to be changed to comply --

24 JUSTICE SOTOMAYOR: Is that because --

25 MR. KNEEDLER: -- which would in turn

1 have costs. But --

2 JUSTICE SOTOMAYOR: Well, so any cost
3 is a substantial burden on interstate commerce?

4 MR. KNEEDLER: No. I mean, under --
5 under Pike balancing, if there is a
6 substantiated legitimate local public interest,
7 that -- that would prevail unless --

8 JUSTICE SOTOMAYOR: So whether --

9 MR. KNEEDLER: -- it's greatly
10 exceeded --

11 JUSTICE SOTOMAYOR: So you are going
12 -- you're asking us to do what Justice Gorsuch
13 said, give moral objection zero or maybe .5
14 importance, and a dollar increase in production,
15 the balance then goes against the law?

16 MR. KNEEDLER: Well, I -- I think
17 there would probably be a -- you wouldn't -- you
18 wouldn't have to get there because, if the
19 burden is trivial, the case -- the suit wouldn't
20 be brought, but it -- but it wouldn't be --

21 JUSTICE SOTOMAYOR: Has there ever --

22 MR. KNEEDLER: -- it may not be a
23 cognizable claim in that situation.

24 JUSTICE SOTOMAYOR: Any of our cases
25 in Pike, even in extraterritoriality, can you

1 point to one where just increased cost has
2 created an objectionable interstate burden?

3 MR. KNEEDLER: Well, the Court in Pike
4 itself discussed the fact that the -- that the
5 requirement there would effectively impose a
6 requirement on the company to build a warehouse
7 for \$200,000 in Arizona in order to be able to
8 ship its cantaloupes out of -- out of state.

9 And there have been other situations,
10 some of the other -- I think Kassel, several
11 other cases have focused on costs.

12 JUSTICE SOTOMAYOR: So give me that --
13 give me that line. Explain it to me. How much
14 cost?

15 MR. KNEEDLER: I think it -- I think
16 it's difficult to quantify, but let -- let me
17 make a -- an important antecedent point. Costs
18 are a manifestation of the burdens on interstate
19 commerce.

20 But, when California law requires a
21 foreign producer to change its operation because
22 California disagrees with the way it's done,
23 that is itself a burden on interstate commerce.
24 It will, in turn, cost a lot of money, but --
25 but in terms of regulating interstate commerce,

1 you --

2 JUSTICE SOTOMAYOR: So why do we let
3 consumer demand do it?

4 MR. KNEEDLER: I'm sorry?

5 JUSTICE SOTOMAYOR: Why do we let
6 consumer demand do it? I mean, consumer demand
7 is requiring changes in production.

8 MR. KNEEDLER: Well, as I say, the --
9 the -- the -- the state -- producers can
10 voluntarily do that. They can ship their
11 product into California. And, as I say, USDA --

12 JUSTICE SOTOMAYOR: They can -- they
13 can voluntarily do that even under the state
14 regulation. They can choose to or not choose
15 to.

16 MR. KNEEDLER: Yes. But -- but -- but
17 I --

18 JUSTICE SOTOMAYOR: They can forego
19 the California market or they can stay in it.

20 MR. KNEEDLER: But I -- but I -- I --
21 I think that that's -- that would prove far too
22 much because, what -- if you have a trade
23 barrier preventing the shipment of a product
24 from one state to another, the -- the -- the
25 shipper in the other state can always say, I

1 won't ship there. I'll just -- I'll just trade
2 elsewhere.

3 That's not an answer to the Commerce
4 Clause's concern about a -- about a national
5 economic union, not its concern with
6 balkanization and its respect for horizontal
7 autonomy of -- of the respective states.

8 I also want to point out --

9 JUSTICE SOTOMAYOR: You've answered my
10 question. Thank you.

11 MR. KNEEDLER: Oh, okay.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Mr. Kneedler, maybe
14 I'm misunderstanding, but your argument here
15 today seems stronger than your argument in the
16 briefs, and I just want to say why I think that
17 and -- and have you respond to it.

18 I had understood in your briefs that
19 you were putting a lot of weight on the fact
20 that this is in the pleading stage and you were
21 just saying: Look, the pleading requirements
22 have been satisfied. We should go on and do the
23 hard work at summary judgment or at trial or
24 something.

25 And if I understand your answers to a

1 lot of these questions, I honestly don't
2 understand how you think California could win at
3 summary judgment or at trial.

4 So I guess my question to you is, is
5 that fair? Is your argument basically
6 California can't win and, if not, what it could
7 say to win?

8 MR. KNEEDLER: Well, first of all, our
9 brief made two points about the asserted local
10 interests of California. With respect to the
11 moral interest, we, I think, pretty clearly said
12 that California's moral opposition or
13 philosophical opposition really --

14 JUSTICE KAGAN: Can't count.

15 MR. KNEEDLER: -- can't count.

16 JUSTICE KAGAN: And I guess what --
17 what -- what really led to this question was
18 your answer to Justice Sotomayor when you -- on
19 the one hand, you say the moral can't count.
20 There -- there is then the -- the health. And
21 we haven't really talked about that much.

22 But then, in answering Justice
23 Sotomayor, you said it really doesn't matter if
24 Petitioners are right about the tracing and
25 about, you know, whether they could segregate

1 different kinds of products. That just doesn't
2 matter because there's a sort of per se -- you
3 know, there just -- there's just an effect on
4 production processes. I suppose this gets into
5 Justice Barrett's comment that it's -- it's just
6 getting to sound a lot more per se.

7 MR. KNEEDLER: No, I -- I didn't mean
8 to say that costs are irrelevant. I think costs
9 are an important factor under -- under Pike
10 balancing, and the costs at least here that are
11 alleged are -- you know, are substantial.

12 But I also think that the -- that
13 the --

14 JUSTICE KAGAN: But the costs that are
15 alleged are substantial because Mr. Bishop has
16 this point about the difficulty of segregation
17 given the nature of the industry.

18 If that turns out not to be true, does
19 California then win? Can California then win?

20 MR. KNEEDLER: I mean, there's still
21 the cost of the individual pork producers having
22 to reconfigure their farms. And so the ability
23 to trace is only part of the -- part of the
24 question.

25 But -- and that there's allegations

1 and -- and declarations supporting the complaint
2 that explain what would be entailed in expanding
3 to 24 square feet or -- or pen -- group pens
4 rather than individual pens.

5 The -- the -- the adverse effects that
6 may have on both the productivity and health of
7 the sows, I mean, there are a lot of competing
8 considerations.

9 JUSTICE KAGAN: Would it be fair to
10 say that you think California should lose this
11 case?

12 MR. KNEEDLER: No, we have not taken a
13 position on whether their health and safety
14 rationale would -- would prevail. But the fact
15 that California has not relied on that and --
16 and the plausible allegations we think in the
17 complaint do -- do require that the plaintiffs
18 be given a chance to prove their case.

19 But -- but this statute is also
20 unusual in that it is trying to project
21 California's law into other states, which, for
22 example, Carbone, not just Baldwin, said was a
23 problem.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: Mr. Kneedler, you --
3 you place a lot of stress on the fact that there
4 would be increased cost to certain producers out
5 of state.

6 But what if all of those costs are
7 borne by California consumers who are willing to
8 pay a higher price for a certain kind of
9 product, pork products produced in compliance
10 with their laws?

11 Is there any reason -- would -- would
12 that pose a problem under your theory? Let's
13 say all of the costs are borne by California
14 consumers.

15 MR. KNEEDLER: I -- I -- I don't think
16 -- excuse me. I don't think in the main that
17 the Pike analysis would -- would turn on how the
18 costs played out. I mean, for example, you
19 could have a --

20 JUSTICE GORSUCH: So -- so, if that's
21 the case, then -- then this is really an
22 argument about protecting certain modes of
23 production by certain manufacturers out of state
24 rather than letting the market play out. Even
25 if some other persons might come into the market

1 or might already be in the market who are happy
2 to participate in California's system and
3 fulfill that need at a higher price, we still
4 have an interstate commerce problem?

5 MR. KNEEDLER: Well, the first point I
6 wanted to make is a tariff might increase the
7 cost, and consumers in California might be
8 willing to pay it, but that doesn't render it
9 okay under the Commerce Clause.

10 JUSTICE GORSUCH: Okay. All right.

11 MR. KNEEDLER: But --

12 JUSTICE GORSUCH: No, I just want to
13 understand your argument. So even if California
14 consumers pay all of the cost of this law, all
15 of it, it's still a problem?

16 MR. KNEEDLER: Yes, because --
17 because, again, California is -- in -- in this
18 instance --

19 JUSTICE GORSUCH: Okay.

20 MR. KNEEDLER: -- is regulating
21 conduct outside the state.

22 JUSTICE GORSUCH: And I want to pick
23 up on that, all right, and the moral objection.
24 You keep coming to the idea that they're trying
25 to regulate something outside of the state.

1 But, as I understand California's
2 position charitably, it's that Californians,
3 63 percent of them, voted to -- for this law.
4 They don't wish to have California be complicit,
5 even indirectly, in the -- in -- in livestock
6 practices that they find abhorrent, wherever
7 they occur, in California or anywhere else.

8 Why isn't that a correct understanding
9 of California's asserted moral interest and why
10 isn't that an in-state moral interest?

11 MR. KNEEDLER: First of all, it's
12 individuals who ordinarily have moral objections
13 to start with.

14 JUSTICE GORSUCH: Oh, no, I thought --
15 well, hold on. Hold on.

16 MR. KNEEDLER: And a state can --

17 JUSTICE GORSUCH: Do -- can states --

18 MR. KNEEDLER: A state -- a state --

19 JUSTICE GORSUCH: Okay. All right.

20 MR. KNEEDLER: -- a state --

21 JUSTICE GORSUCH: So let's put that
22 aside then.

23 MR. KNEEDLER: But -- but a -- a state
24 can enact a law regulating conduct within the
25 state on the basis of morals.

1 JUSTICE GORSUCH: So we can put that
2 aside.

3 MR. KNEEDLER: But -- but, when it
4 comes to conduct outside the state, that would
5 open a -- a -- a huge invitation and -- and --
6 and I think greatly undermine the Commerce
7 Clause because a lot of regulation can be
8 described --

9 JUSTICE GORSUCH: So, if all pig
10 producers --

11 MR. KNEEDLER: -- as based on morals.

12 JUSTICE GORSUCH: -- were in
13 California, this law would be okay. It's just
14 because pig producers are by and large mostly
15 out of state that it poses a problem?

16 MR. KNEEDLER: Well, California has
17 independently imposed a -- a ban on pork
18 production under these standards within the
19 state.

20 JUSTICE GORSUCH: I'm asking -- I'm --
21 I understand that. But answer my question if
22 you will. If pork producers were in state, this
23 law would be okay. It's just because they're
24 out of state that it poses a problem?

25 MR. KNEEDLER: Yes.

1 JUSTICE GORSUCH: Okay.

2 MR. KNEEDLER: And --

3 JUSTICE GORSUCH: But -- but, if
4 that's the case, again, why -- why is it
5 uncharitable -- why isn't it uncharitable to
6 suggest that they're trying to regulate
7 out-of-state conduct when they may just be
8 saying we don't wish to participate in this at
9 all wherever it occurs --

10 MR. KNEEDLER: Oh, I -- I -- I -- I --
11 I --

12 JUSTICE GORSUCH: -- whether it's
13 slavery or horse meat or pig production?

14 MR. KNEEDLER: -- I -- I think that
15 is -- you know, I think that is their asserted
16 interest in the end. What I'm saying is that --
17 that the Commerce Clause and -- and our system
18 of horizontal federalism generally can really
19 not allow for that because it would -- it would
20 -- it would create the very balkanization of not
21 just commercial regulation but retaliatory
22 non-commercial regulation between the states as
23 one state tries to limit sales, and sales are a
24 way of -- of -- of regulating, prohibiting sales
25 is a way of regulating, by -- by prohibiting

1 sales in the state of anything that comes from a
2 state where it was produced in a way they don't
3 agree with.

4 Produced by union labor, produced by
5 non-union labor, produced -- not paying a
6 sufficient minimum wage, not paying enough for
7 milk, as in Baldwin, not disposing of their
8 waste in a -- in a way that the enacting state
9 finds -- finds reasonable, all those could be
10 described in moral terms.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: Two questions.
14 One, the flip side of Justice Thomas's question.
15 If Congress and the President agreed with
16 California's moral judgment, could they pass a
17 law regulating how pigs are housed, at least
18 pigs that are involved in the interstate market?

19 MR. KNEEDLER: Sure. Yes. I mean,
20 that would -- they could definitely do that.

21 JUSTICE KAVANAUGH: And, second, you
22 said this law is unusual. Can you elaborate on
23 that? How unusual is it? And from the
24 perspective of the United States, is it
25 concerned about how usual it will become if

1 California's law is upheld here?

2 MR. KNEEDLER: Yes, it -- as I was
3 just explaining, I think there would be a
4 concern about inviting state laws regulating
5 conduct in another state. And the fact that
6 it's done through sales as opposed to an
7 outright prohibition -- I mean, this Court made
8 a similar point in the -- in the National Meat
9 Association case 10 years ago, the preemption
10 case, where the Court said California could not
11 implement its preferred policies with respect to
12 pork coming out of slaughterhouses by making
13 their regulation on sales rather than a -- than
14 a prohibition.

15 So the sales that -- the local sales
16 can't be enough to justify the action. So what
17 we have here is basically an attempt by
18 California to regulate what is happening in
19 other states. And, as I said, it -- that --
20 that is a -- a proposition that once -- once
21 unleashed would be -- would be difficult to
22 contain.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: Just one question,
2 Mr. Kneedler.

3 I asked Mr. Bishop how many laws this
4 might affect if -- if we said that it was not
5 permissible. So, if this fails either the
6 extraterritoriality principle or Pike balancing,
7 how many other laws would fall, that it might
8 affect? And he said California's -- as I
9 understood him to say, California's is
10 essentially an outlier. States haven't tried to
11 do this.

12 You were talking about what might
13 happen in the future if we allowed California to
14 do it, opening up a can of worms of retaliation.

15 What about the question I asked Mr.
16 Bishop? Are there other laws like this? Is it
17 really the case -- you know, Justice Kagan was
18 giving the example of the -- the pesticide and
19 the firewood -- treatment of firewood. I mean,
20 are -- would we have to worry about calling into
21 question a lot of laws that are pretty common?

22 MR. KNEEDLER: No, I -- I -- I don't
23 think so. With respect to the specific
24 conduct -- context here, there are states that
25 ban raising pigs that are using gestation pens,

1 let's say. Most of those are just limited to
2 the state where the pigs are being raised.
3 Massachusetts also has an extra ban.

4 But, in -- in -- in other cases, for
5 example, in the -- in the firewood case, the
6 state has a legitimate interest, unlike here, we
7 think on the moral basis, has a legitimate
8 interest in protecting against the entry of
9 firewood if there -- if there are pests in there
10 that might infect local --

11 JUSTICE BARRETT: Because all the
12 cases that you're aware of or that would be
13 normal rest on safety and health rationales
14 rather than morals legislation, that this really
15 is --

16 MR. KNEEDLER: Right. That they --

17 JUSTICE BARRETT: -- a unique effort
18 in the moralist context?

19 MR. KNEEDLER: Right. Yes. They --
20 they -- they would be judged under Pike -- under
21 Pike balancing, and -- and if there is a
22 legitimate state interest and there was not a
23 less in -- invasive way to -- to control the
24 problem, then the -- the state -- state may well
25 be able to do that.

1 But there may be other ways to protect
2 against the entry of injurious products in --
3 into the state, but that would -- that -- that's
4 what Pike balancing is for and the way we think
5 the Court should decide the case.

6 CHIEF JUSTICE ROBERTS: Justice
7 Jackson?

8 JUSTICE JACKSON: Yes. Mr. Kneedler,
9 you've said a couple of times that the Commerce
10 Clause cannot allow for what it is that
11 California is doing in this situation, and that
12 sounds pretty categorical to me.

13 And I know that you have been trying
14 to disclaim any reliance on the sort of
15 extraterritoriality principle, that you say we
16 should proceed under Pike balancing. But -- but
17 I also hear you making a claim that sounds to me
18 like an extraterritoriality principle, and can I
19 just focus your attention on that for a second?

20 I think that the Petitioners have
21 actually introduced two different kinds of
22 extraterritoriality principle. In their briefs,
23 they say that the rule should be that a state
24 may not enact laws that have the practical
25 effect of controlling conduct. And I worried

1 about that when I read the brief because, to the
2 extent we're talking about effect, then it
3 introduces all kinds of questions, how much, how
4 significant, and it doesn't sound like a
5 bright-line rule anymore to me.

6 But here today the Petitioners kind of
7 move away a little bit from the controlling
8 effect idea, and they say the per se rule should
9 be essentially focused on the nature of the
10 regulation, that the state law that conditions
11 sales on out-of-state businesses operating in a
12 certain way is the principle. And that's the
13 one that you seem to be agreeing with.

14 To the extent that you say that the
15 problem is that a state who has a morality
16 interest can't have a morality interest that is
17 directed at the manner in which another state is
18 conducting its business or other businesses are
19 operating, why isn't that the same thing that
20 the Petitioners are saying with respect to their
21 extraterritoriality principle and, therefore,
22 doesn't the government agree with them?

23 MR. KNEEDLER: Well, with respect to a
24 regulation like this -- and when I said what --
25 what -- allowing California to do what it's

1 doing would be a serious problem, I was focusing
2 on the -- on the moral justification, which is
3 -- which is a philosophic or a political
4 disagreement with what's happening in another
5 state, which we think is not, to use the
6 language of Pike, a legitimate local public
7 interest of California.

8 JUSTICE JACKSON: But isn't that the
9 same thing he's saying when he says --

10 MR. KNEEDLER: Well, this is a place
11 --

12 JUSTICE JACKSON: -- it's conditioning
13 -- yeah.

14 MR. KNEEDLER: -- this is a place
15 where I think that the two arguments might
16 converge.

17 JUSTICE JACKSON: Okay.

18 MR. KNEEDLER: And -- and, in fact, in
19 -- in this Court's decision in Wayfair, the
20 Court said that the Commerce Clause has two
21 principal prohibitions, a prohibition against
22 discrimination and a prohibition against undue
23 burdens, oh, and these are subject to exceptions
24 and variations.

25 So the extraterritoriality principle,

1 as it becomes stronger in a case like this,
2 putting health and safety to one side, could be
3 seen as an independent argument, which is the
4 way Petitioners are presenting it, and -- and
5 you could read language in Baldwin or Healy to
6 say that, or -- or simply a particularly strong
7 version of Pike balancing where you're -- where
8 you're comparing the effect on interstate
9 commerce to what, under this rationale, is an
10 insubstantial or nonexistent in-state interest.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 General Mongan.

14 ORAL ARGUMENT OF MICHAEL J. MONGAN
15 ON BEHALF OF THE STATE RESPONDENTS

16 MR. MONGAN: Mr. Chief Justice, and
17 may it please the Court:

18 Proposition 12 bars the in-state sale
19 of certain pork products. California voters
20 chose to pay higher prices to serve their local
21 interest in refusing to provide a market to
22 products they viewed as morally objectionable
23 and potentially unsafe.

24 The Commerce Clause does not prohibit
25 that choice. Prop 12 is not protectionist or

1 discriminatory. It doesn't implicate the rule
2 in Baldwin and Healy because it doesn't control
3 prices in other states. And it doesn't violate
4 the general principle against regulating wholly
5 extraterritorial commerce.

6 That principle has not been understood
7 to bar states from setting standards for how the
8 goods sold within their borders are manufactured
9 or produced. States routinely enact that kind
10 of law. And, Justice Barrett, at least 24
11 states have done so to serve local moral
12 interests. Sales restrictions often have
13 upstream out-of-state effects, but they're
14 permissible as long as the condition on in-state
15 sales focuses on the actual process for
16 producing the goods sold in the regulating
17 state.

18 In this case, Prop 12's sow housing
19 restrictions are tied to the production process
20 for California-bound pork. They only address
21 the particular breeding sows that are literally
22 the mechanism for creating that pork. And the
23 market already treats that aspect of the
24 production process as a basis for
25 differentiating between products. That's why

1 stores sell crate-free pork.

2 Prop 12 places no restrictions on how
3 out-of-state businesses produce pork for sale in
4 other states, and Petitioners' own allegations
5 show that producers can continue selling pork to
6 other states using different production methods.

7 If Petitioners think Prop 12 raises
8 policy concerns, the solution the framers
9 provided was for them to ask Congress to
10 regulate under the express terms of the Commerce
11 Clause, not for courts to expand the Dormant
12 Commerce Clause.

13 JUSTICE THOMAS: Mr. Mongan, does it
14 matter whether or not you focus directly on the
15 upstream effects, that that's the point of the
16 legislation, as opposed to a collateral effect
17 of your legislation?

18 MR. MONGAN: Your Honor, what matters
19 is whether the state is regulating with respect
20 to the goods sold within its borders and setting
21 production standards, manufacturing standards
22 for those goods.

23 JUSTICE THOMAS: So it doesn't matter
24 that the purpose could be to have the upstream
25 effect?

1 MR. MONGAN: Well, Your Honor, I
2 think, in -- in this case, and -- and what will
3 often be the case, is that these laws are
4 motivated by in-state local interests. And,
5 here, there is two interests that were reflected
6 in the ballot materials. One of them is a -- a
7 local interest and the state not wanting its
8 stores and markets to be complicit in selling a
9 product that a substantial majority of the
10 voters view as immoral, and many consumers and
11 retailers as well, as evidenced by the shift to
12 crate-free pork.

13 JUSTICE THOMAS: How far would you
14 carry that? Could you -- other than beyond the
15 health and safety concerns that you might have
16 here, you'd say moral concerns.

17 Could it extend to a state that has,
18 for example, different political views on
19 certain issues that are important to your
20 voters?

21 MR. MONGAN: I -- I don't think so,
22 Your Honor, if I'm understanding the
23 hypothetical correctly.

24 So, for example, if a state were to
25 bar the importation of goods from another state

1 because that state has a particular policy, that
2 would be a facially discriminatory law. It
3 would be equivalent to an embargo. And that's a
4 paradigmatic Dormant Commerce Clause problem.

5 It's quite different from a neutral
6 in-state sales restriction of the type which is
7 quite common across the country that allows all
8 producers to freely compete so long as they
9 produce goods that satisfy the --

10 JUSTICE KAGAN: But, Mr. Mongan --

11 MR. MONGAN: -- the relevant
12 standards.

13 JUSTICE KAGAN: -- a lot of policy
14 disputes can be incorporated into laws like
15 yours. So Mr. Kneedler gave examples of a few.

16 You know, one, California can do laws
17 that you have to be pro-labor. And Texas can do
18 laws saying -- pro-labor union. And Texas can
19 do laws that say you have to be anti-labor
20 union, you know, close shop, open shop. You
21 could -- you could have states making
22 immigration policy, essentially, through these
23 laws.

24 You could have states doing a wide
25 variety of things through the mechanism of

1 saying, well, unless you comply, you can't sell
2 goods in our market.

3 And, you know, we live in a divided
4 country, and the -- the -- the balkanization
5 that the framers were concerned about is surely
6 present today. And I think that the -- the --
7 the -- the -- the real power of Mr. Kneedler's
8 examples were, you know, do we want to live in a
9 world where we're constantly at each others'
10 throats and, you know, Texas is at war with
11 California and California at war with Texas?

12 MR. MONGAN: Right, I -- I certainly
13 understand the concern, Your Honor. I think
14 that there is and should be a constitutional
15 check on that, which is that a state regulation
16 of a product has to be sufficiently tied to the
17 actual process of producing that product.

18 And I think a lot of the hypotheticals
19 that my friend pointed to that you've just
20 recited, in addition to likely having some
21 preemption problems, which I'm happy to speak
22 to, but also deal with an in-state sales
23 condition that is not sufficiently tied to
24 production.

25 JUSTICE BARRETT: But where does that

1 come from? I mean, you -- you're saying that in
2 response to Justice Kagan, you've said a couple
3 times that -- you've emphasized that this
4 restriction on how the pork -- how the pigs are
5 raised is tied to the product itself, but why is
6 that necessary?

7 I mean, you know, your friend on the
8 other side said, well, you know, you could have
9 things that tied -- tied the availability of the
10 market to the production of certain health
11 services.

12 So could you have California pass a
13 law that said we're not going to buy any pork
14 from companies that don't require all their
15 employees to be vaccinated or from corporations
16 that don't fund gender-affirming surgery or that
17 sort of thing?

18 What -- what's the importance and
19 where does it come from of this tie to the
20 product itself?

21 MR. MONGAN: So, Your Honor, as to
22 those hypotheticals, and then if I can get back
23 to the first part of the question, I think those
24 would be problematic because what you have there
25 is a condition on in-state sales that's focused

1 on a general company-wide policy with respect to
2 all of that company's activities wherever it
3 does business, including the production of
4 products for totally different states. It's not
5 focused on production of the goods that are
6 coming into the regulating state.

7 I think that this is a principle that
8 the lower courts have recognized in cases like
9 Legato Vapors, that when you condition the sale
10 of a product coming in on that type of wholly
11 unrelated restriction, then you're not really
12 regulating the product. You are -- it's
13 tantamount to a regulation of a wholly
14 out-of-state activity.

15 And there's some support for this as
16 well in -- in the Brown-Forman decision that was
17 obviously focused on price controls, but the
18 Court made clear you can't condition the
19 privilege of selling liquor into New York on a
20 restriction on how liquor is sold in
21 out-of-state sales to consumers out of state and
22 it'll be consumed out of state.

23 JUSTICE BARRETT: But couldn't
24 Californians have a moral interest in saying
25 they don't want to be complicit and open their

1 supermarket shelves to the wares of a company
2 that mistreats its employees, for example, by
3 not providing certain forms of healthcare?

4 MR. MONGAN: So I -- I -- I certainly
5 could imagine a state articulating that type of
6 moral interest, but I don't think that stating
7 the moral interest is the end of the
8 constitutional analysis.

9 Of course, there can be all sorts of
10 constitutional checks on in-state sales
11 restrictions under the Supremacy Clause or the
12 First or Second or Fourteenth Amendment, and for
13 purposes of the Commerce Clause or -- or -- or a
14 general principle against regulating wholly
15 extraterritorial activity, I think the line I've
16 described is a -- is a sensible one because, on
17 the one hand, states have to be able to regulate
18 the products coming into their borders, but, on
19 the other hand, I think we would all recognize
20 that it would be problematic if states can
21 condition the sales of those products on
22 restrictions of wholly unrelated out-of-state
23 purchasers.

24 JUSTICE ALITO: What about --

25 JUSTICE KAVANAUGH: I mean, wholly

1 unrelated is doing a ton of work in your answers
2 to Justice Barrett. So what about a law that
3 says you can't sell fruit in our state if it's
4 produced -- handled by people who are not in the
5 country legally? Is that state law permissible?
6 And if not, how is it different from this law?

7 MR. MONGAN: So I -- I want to get to
8 the constitutional question. I think there
9 would be an important threshold question there
10 of INA preemption, and that does underscore --

11 JUSTICE KAVANAUGH: Put that aside.

12 MR. MONGAN: Right, Your Honor.

13 JUSTICE KAVANAUGH: Put that aside
14 because I can flip it to any number of other, as
15 Justice Kagan said, social issues if you want me
16 to.

17 MR. MONGAN: I certainly understand
18 that. So, if the question is, you know, could
19 you adopt a regulation that says the particular
20 goods that are coming into this state have to be
21 produced by a -- you know, or -- or -- or have
22 to be worked on by people who are lawfully
23 documented individuals, I -- I don't think I see
24 a Dormant Commerce Clause problem there.

25 I'm not sure that it's different from

1 some other restrictions that have been on the --
2 the books with respect to, for example, the sale
3 of goods produced by child labor.

4 Now I'm sure there's a lot of people
5 in California who might not be happy with that
6 law, but I think --

7 JUSTICE KAVANAUGH: And so minimum
8 wage, same answer?

9 MR. MONGAN: No, I -- I would give a
10 somewhat different answer on -- on the minimum
11 wage question. The hypothetical that my friend
12 raised in -- in his brief I think would be
13 pretty plainly invalid under the rule in Baldwin
14 and Healy because what you really have there is
15 a law seeking to control the -- to limit the
16 price of labor inputs in out-of-state
17 transactions and tie it to the price of labor
18 inputs in in-state transactions, and that's the
19 type of dynamic where --

20 JUSTICE KAVANAUGH: Union membership?

21 MR. MONGAN: Pardon?

22 JUSTICE KAVANAUGH: Union membership?

23 MR. MONGAN: So, again, I think a
24 court would ask there: Is there a sufficient
25 nexus between that and the actual production

1 process for a particular good? And I suspect
2 that that would be a hard law for a state to
3 defend because a court would note that this --

4 JUSTICE KAVANAUGH: The word
5 "complicity" can do a ton of work, and that
6 word's been used quite a bit here.

7 MR. MONGAN: So -- so I understand
8 that, but I think that the important analytical
9 point there from my perspective is that -- that
10 that goes to the moral interest that's
11 articulated but that that's not the end of the
12 analysis.

13 And I think, certainly, with respect
14 to Prop 12, I -- I -- I -- I recognize that
15 there are some tough line-drawing exercises with
16 respect to some of these borderline
17 hypotheticals. You don't have them with respect
18 to Prop 12.

19 And I think this is a sensible and
20 necessary line to sort of differentiate between
21 the situations where states are directly setting
22 standards for products coming into their borders
23 and the -- the more -- much more problematic
24 scenarios that my friends are pointing to.

25 JUSTICE ALITO: I -- I don't

1 understand the distinction that you're drawing.
2 Could you try to just -- maybe it's just not
3 getting through to me -- explain it to me?

4 What is the difference?

5 MR. MONGAN: So --

6 JUSTICE ALITO: A state says, we don't
7 want a particular product to come into our
8 borders because we think it was produced in an
9 immoral way.

10 MR. MONGAN: So -- so, Your Honor,
11 perhaps --

12 JUSTICE ALITO: Why doesn't that apply
13 equally to a -- a law that says you can't bring
14 any products into our state if they were
15 produced by employees who did not have the right
16 to work, the right to -- not to join a union?

17 MR. MONGAN: So -- so, Your Honor,
18 perhaps I can answer by pointing to some of the
19 concrete examples that Justice Barrett was
20 asking about because there are a number of -- of
21 these morals-focused laws and they're not just
22 the categorical bans like on horse meat and
23 ivory.

24 JUSTICE ALITO: No, it would help me
25 more if you could state the principle rather

1 than giving me examples.

2 MR. MONGAN: Right. I -- I -- I think
3 that the principle is that it -- it should be
4 uncontroversial that a state may regulate the
5 products sold within their borders --

6 JUSTICE ALITO: Right.

7 MR. MONGAN: -- and that that extends
8 -- and it does in many different examples -- to
9 the packaging, production process, the -- the
10 manufacturing process for those goods.

11 I -- I think that it is sensible to
12 draw a line of the type that the Seventh Circuit
13 drew in Legato Vapors if you're conditioning
14 in-state sales on restrictions that are much
15 more attenuated from the actual production
16 process. And I think the union hypotheticals,
17 for example, that goes to a general matter of
18 the relations between labor and employees and --
19 and -- and not to the particulars of how a
20 product --

21 JUSTICE ALITO: More -- more
22 attenuated?

23 MR. MONGAN: -- is produced.

24 JUSTICE ALITO: What does that mean?
25 How do you draw -- how do you know when it

1 becomes too -- too attenuated?

2 MR. MONGAN: Well, I think a court
3 would look to whether it is -- the regulation is
4 actually geared to the mechanics of the
5 production process or whether it is addressing,
6 for example, some general corporate policy that
7 applies, you know, much more broadly and is
8 several steps removed from the production
9 process. So --

10 JUSTICE KAGAN: And why is that the
11 relevant inquiry? I mean, even if we could
12 figure out which falls on which side, why is
13 that the relevant inquiry?

14 MR. MONGAN: I -- I think it's a
15 relevant inquiry, Your Honor, because the -- the
16 Court has recognized that there is, whether it's
17 under the Commerce Clause or otherwise, a
18 general principle against states regulating
19 wholly extraterritorial commerce.

20 And I would submit that I think a lot
21 of the troubling hypotheticals are scenarios
22 where, yes, there is a regulation of a -- a
23 good, but the actual condition that's placed as
24 a restriction on the in-state sale of that good
25 is going to some activity that is fairly under

1 --

2 JUSTICE KAGAN: You're basically
3 saying that the way we should think about this
4 is to use an anti-leveraging principle, that a
5 state can't use its power as a consumer or as --
6 you know, as a market to leverage policy views
7 that are unconnected with the marketing of a
8 product?

9 MR. MONGAN: I -- I -- I think I would
10 describe it as a -- as a principle that focuses
11 on the -- the particular production process for
12 -- for a product. And, yes, that would be the
13 concern motivating that principle.

14 CHIEF JUSTICE ROBERTS: Would --

15 MR. MONGAN: But, Your Honor --

16 CHIEF JUSTICE ROBERTS: I'm sorry, go
17 ahead.

18 MR. MONGAN: Oh. Well, I just wanted
19 to make the point that this is not unique to
20 California. I -- I would point the Court to
21 Professor Snead's amicus brief, where he
22 discusses this type of interest, including with
23 respect to morals-based policies, such as the
24 law that Arizona and seven other states have
25 banning the sale of eggs from hens that don't

1 have enough space, or Louisiana's law --

2 CHIEF JUSTICE ROBERTS: Right. You've
3 been talking about -- as -- as if the morals
4 aspect was the significant part of the inquiry.
5 But wouldn't your case be a lot harder if there
6 were a non-de minimis number of pork producers
7 in California?

8 MR. MONGAN: Your Honor, I guess -- is
9 the question going to the -- to potential
10 concerns about discrimination?

11 CHIEF JUSTICE ROBERTS: Well, many of
12 our cases can arguably be distinguished on the
13 ground that they were concerned with
14 protectionism.

15 MR. MONGAN: Right. Right.

16 CHIEF JUSTICE ROBERTS: And if there
17 are pork producers in California who are going
18 to be subject to this law, it's a way for
19 California to make sure those producers aren't
20 undermined by producers who don't have to comply
21 with it.

22 MR. MONGAN: That's -- that's right,
23 Your Honor. And the core focus of this doctrine
24 is on protectionism. And so I -- I think, in a
25 situation like that, although the law is

1 facially neutral, a court would look to the
2 particular circumstances to see if there's
3 discriminatory effects of the type the Court
4 found in Hunt. Of course, my friends have
5 disclaimed any protectionism or discrimination
6 claim here, and I don't see how that would be
7 viable under the particular circumstances.

8 And as to extraterritoriality
9 considerations, I think that the Court has made
10 quite clear that in cases like Exxon and Walsh,
11 the fact that a state is regulating even with
12 respect to an industry that doesn't have a
13 presence in that state is not a Dormant Commerce
14 Clause problem.

15 CHIEF JUSTICE ROBERTS: Well, how do
16 we decide -- you keep emphasizing the number of
17 people in California who voted in favor of the
18 referendum. What if there are a substantial
19 number who voted for moral reasons and a
20 substantial number who voted for economic
21 reasons? How should we analyze that? Or, you
22 know, obviously, what if we can't tell?

23 MR. MONGAN: Well, I -- I certainly
24 understand that. That's a common problem with
25 looking at the purposes of legislation.

1 I -- I think, in this case, it is
2 clear on the face of the statute and in the
3 ballot materials, which under California law is
4 powerful evidence of voter intent, that there
5 are these two rationales that -- that we have
6 discussed.

7 CHIEF JUSTICE ROBERTS: So if it's --
8 you analyze a situation where you can't tell the
9 basis for the reason, and as we've been
10 discussing, you think it may be more vulnerable
11 if it's a protectionist reason rather than a
12 moral reason.

13 How do we parse that -- that statute?

14 MR. MONGAN: So, Your Honor, I think
15 that's one of the challenges that the Court has
16 wrestled with in the Dormant Commerce Clause
17 arena, and, obviously, focusing on legislative
18 purpose is -- is perhaps more disfavored now
19 than it once was in some of the earlier cases.
20 But, if you look at a case like Hunt, it's
21 looking at objective manifestations of
22 protectionism. You have a situation where there
23 are out-of-state competitors who have
24 established a competitive advantage, and the
25 features of the statute is meant to neutralize

1 that advantage. But we don't have anything like
2 that here, Your Honor.

3 JUSTICE JACKSON: But how -- how --
4 how does the principle that you articulate
5 relate to the concerns of the Dormant Commerce
6 Clause? I mean, I had understood that part of
7 the concern was that when states do the kind of
8 thing that you're talking about, even if they
9 are doing so to protect the products in -- for a
10 moral reason that are being sold into the state,
11 it still has a significant impact on interstate
12 commerce and that that's really what the
13 Constitution cares about.

14 So I'm -- I'm a little worried about
15 the line that you draw between conditions --
16 between the types of conditions, conditions that
17 are related to the product versus conditions
18 that aren't, as it relates to the purposes of
19 the Dormant Commerce Clause.

20 MR. MONGAN: So -- so two points, Your
21 Honor. I mean, I think my friend spoke about
22 the history, the framing history, of the -- the
23 Commerce Clause. I think the concern there was
24 very clearly with discriminatory, facially
25 discriminatory statutes like embargoes and

1 customs duties and the like. That's the type of
2 dynamic described by the narrow rule in Baldwin
3 and Healy. And we don't have anything like that
4 here.

5 The line that I have been describing,
6 I think, is a reflection of the general
7 principle against regulating wholly
8 extraterritorial conduct. The plurality in
9 Edgar pointed to that as a Commerce Clause
10 principle, and a number of lower courts,
11 including our own circuit, have applied it as
12 such. And -- and it's a means of
13 differentiating between the large number of
14 valid in-state sales restrictions and some of
15 the more problematic hypotheticals that we have
16 -- that we have heard today.

17 JUSTICE JACKSON: So you're suggesting
18 that it's only impermissible if it's wholly
19 extraterritorial as identified by it being a
20 condition that is not related at all to the
21 actual product that's coming into the state? Is
22 that the line that you're --

23 MR. MONGAN: Your Honor, I -- I think
24 that's about right. I mean, I'd point the
25 Court, for example, to the Legato Vapors case

1 that -- that my friend referenced in the Seventh
2 Circuit. So there you have an in-state sale
3 condition on vaping products, but the feature
4 that most concerned the Seventh Circuit was that
5 it was requiring out-of-state manufacturers to
6 enter into a particular security contract with a
7 particular private term for a -- a firm for a
8 five-year term.

9 And the court had no difficulty saying
10 that's not really regulating the product that's
11 sold in the state. It's tantamount to a -- to a
12 regulate of -- regulation of something that is
13 wholly out of state.

14 JUSTICE JACKSON: And it doesn't
15 matter at all to you whether the state's attempt
16 to advance its interest with respect to this
17 product affects the entire market, reshapes the
18 way -- I mean, I think --

19 MR. MONGAN: Right.

20 JUSTICE JACKSON: -- the problem that
21 I'm having a little bit with -- with your side
22 of this case is that we're only at the motion to
23 dismiss stage. I know that there are likely to
24 be some disputes about the extent to which this
25 ultimately does impact, and how much, the -- the

1 -- the market, but at this stage, it seems to me
2 that the Court has to accept that the regulation
3 at issue here is going to have this substantial
4 impact on the operation of this market, and you
5 seem to be indicating that that's not a viable
6 thing from the standpoint of analyzing whether
7 there is some sort of interstate commerce
8 problem.

9 MR. MONGAN: Your Honor, if I -- if I
10 could spend a moment on that --

11 JUSTICE JACKSON: Yes.

12 MR. MONGAN: -- because I think this
13 is very important and we've heard some rhetoric
14 today. We are at the motion to dismiss stage,
15 and we do have to focus on the specific
16 complaint allegations.

17 Those allegations acknowledge at
18 paragraph 58 that producers are free to choose
19 whether or not they shift to this production
20 method. They've identified in their
21 declarations eight of their own members who have
22 definitively announced they're not shifting.

23 The allegations, paragraphs 297 to
24 299, and the declaration acknowledge that
25 segregation and tracing is available. And if

1 you can segregate and trace, that means that you
2 can pass along the increased costs of production
3 to the end California --

4 JUSTICE JACKSON: Right. They're
5 available, but that's not the way the market is
6 right now according to the complaint, and so
7 some changes are going to have to be made. And
8 I guess I'm just wondering why it isn't
9 plausible to believe that the changes that are
10 going to be made would be a burden on the
11 industry?

12 MR. MONGAN: Well, Your Honor, I don't
13 even think that that is consistent with the
14 allegation in the declarations. They have
15 acknowledged that this can be done and is being
16 done. I'd point you to Pet. App. 287a. This is
17 a declaration from one of their members talking
18 about how he currently segregates: "My hogs are
19 marked with my farm identification number that
20 permits them to be segregated from other
21 product." That's for producing crate-free pork.
22 And he's told in his contract with the end
23 supplier that he's going to be paid a price per
24 unit.

25 JUSTICE JACKSON: Right, but you're

1 going to the evidence. I thought we were at the
2 motion to dismiss stage.

3 MR. MONGAN: Well, I think --

4 JUSTICE JACKSON: I mean, I understand
5 that there might be declarations that say
6 something different, but we're supposed to be
7 confined to the corners of the complaint with
8 respect to what is happening in this industry.

9 MR. MONGAN: I -- I certainly
10 understand and agree with that, Your Honor, but
11 I think even within the corners of the
12 complaint, the declarations attached to the
13 complaint, paragraphs 297 to 299, acknowledge
14 that this is feasible and available.

15 And it's evident in the market, which
16 is why we have crate-free pork and organic pork
17 available in -- in grocery stores. And they
18 acknowledge the crate-free pork part of the --
19 of the industry.

20 So I don't -- I think the burden
21 ultimately here is one that will fall on
22 California consumers, and that's not a burden
23 that should weigh heavily, if at all, in any
24 Pike balancing.

25 JUSTICE ALITO: Suppose the

1 pork-producing states and pork-consuming states
2 get mad at you because of this and they decide,
3 okay, fine, turnaround is fair play, so we're
4 going to adopt regulations concerning the
5 production of agricultural products that are
6 produced almost exclusively in California.

7 Would that be okay? For example,
8 could a state say, we're really concerned about
9 water shortages, so we're going to prohibit the
10 shipment through our territory or the sale
11 within our borders of any almonds where the
12 trees are irrigated? Could they do that?

13 MR. MONGAN: Your Honor, if it's
14 focused on the sale within their borders, I
15 think that the logical conclusion of our
16 position is that they could do that. And I -- I
17 think that there's likely to be political checks
18 for that type of -- of law if it raises concerns
19 in the marketplace.

20 I mean, one thing is, if you adopt a
21 regulation that is just too burdensome to comply
22 with, then the industry will stop serving a
23 state and the state has to decide do we want our
24 regulation or do we want pork.

25 JUSTICE ALITO: Are you unconcerned

1 about all this? Is California unconcerned about
2 all this because it is such a giant, you can
3 wield this power, Wyoming couldn't do it, most
4 other states couldn't do it, but you can do it?
5 You can bully the other states, and so you're
6 not really that concerned about retaliation? Is
7 that part of your position?

8 MR. MONGAN: No, Your Honor, that's
9 certainly not how I would put it. I think that
10 this is a concern held by California and many
11 other states, including states who are
12 pork-producing, like Michigan and Illinois, who
13 filed an amicus brief on our side, and it goes
14 to core features of state sovereign authority to
15 control the -- the products that are sold within
16 our borders.

17 JUSTICE ALITO: One of the arguments
18 I -- I'd like you to respond to this that's made
19 by Petitioner and some of -- some of their
20 amici, is that big companies can comply with
21 this, no problem, but what this is going to do
22 is shut out of the market all the small
23 companies.

24 MR. MONGAN: So, Your Honor, if I can
25 offer a formal response to that focused on the

1 -- the complaint and -- and then a -- a more
2 practical response.

3 They have alleged that. I think what
4 this Court made clear in the Exxon case is that
5 that type of concern is not the type of burden
6 that the Dormant Commerce Clause is concerned
7 with. It goes to the -- the nature of -- of
8 delivery and -- and the methods of operation in
9 an industry.

10 I think that the practical response is
11 that's actually not what we're seeing and that
12 -- that smaller pork producers can choose
13 whether to get a substantial premium for
14 producing this type of specialty product or
15 crate-free pork or continue producing for other
16 states, 49 other states, exactly as many of
17 their own members, as the complaint
18 acknowledges, have decided to do.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas?

21 Justice Kagan?

22 Justice Gorsuch?

23 JUSTICE KAVANAUGH: Do you accept Pike
24 as a precedent of this Court, or are you asking
25 for it to be overruled?

1 MR. MONGAN: We are not asking it to
2 be overruled, Your Honor. It -- we --

3 JUSTICE KAVANAUGH: That's -- thank
4 you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 Justice Jackson?

8 Thank you, counsel.

9 Mr. Lamken.

10 ORAL ARGUMENT OF JEFFREY A. LAMKEN
11 ON BEHALF OF THE HUMANE SOCIETY OF THE UNITED STATES,
12 ET AL., RESPONDENTS

13 MR. LAMKEN: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 Proposition 12 -- excuse me, the
16 Dormant Commerce Clause's dormant aspect focused
17 on protectionism, discrimination, interferences
18 with the instrumentalities of interstate
19 commerce. Proposition 12 concededly is none of
20 those things.

21 It prohibits the sale within
22 California of pork that Californians find
23 immoral and unsafe regardless of where it
24 originates.

25 Proposition 12 reflects a moral

1 tradition that has been respected for millennia
2 that consuming meat that is a product of animal
3 cruelty is itself immoral. California chose to
4 rid its markets of those -- some of those
5 immoral products, and the framers did not sub
6 silentio prohibit states from banning immoral
7 products by hiding in -- hiding that
8 revolutionary limit in a negative implication in
9 a clause that simply is an affirmative grant of
10 authority to Congress, nor do they impose more
11 demanding health and safety proof requirements.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Counsel, how broadly
14 would you define "immoral"?

15 MR. LAMKEN: So, Your Honor, I think,
16 when it comes to the product, you would look at
17 the closeness of the relationship between the --
18 the -- the regulation and the product itself.

19 In this case, it is very closely
20 bound. You can look at three considerations in
21 particular. First, the market distinguishes
22 between these products. They distinguish -- and
23 -- and regulators as well -- between
24 crate-raised pork that's inhumane and a humanely
25 raised pork.

1 JUSTICE THOMAS: No, I mean the term,
2 a definition of the term "immoral," of the word
3 "immoral."

4 MR. LAMKEN: Yeah. So I think, in
5 general, that would be my second consideration,
6 is you -- one of the things you might look at is
7 looking at whether this is a traditional basis
8 for regulation, you would -- if it's something
9 that distinguishes a product from being moral
10 versus immoral.

11 And, here, it's historically bound.
12 The major religions, humanity has recognized for
13 millennia that products can be immoral because
14 they are a product of animal cruelty, in
15 particular, for -- in particular food.

16 And so that is one of the features we
17 do. But we'd also look at whether the market
18 recognizes things as distinct products based on
19 their morality. And the market here and
20 regulators here distinguish inhumanely raised
21 crated-pork from humanely raised pork.
22 Companies look at it. You have companies like
23 -- from Burger King to Whole Foods make that
24 distinction. Regulators make the distinction.

25 The USDA's FSIS regulates labels.

1 JUSTICE JACKSON: But you're
2 suggesting --

3 MR. LAMKEN: It excludes --

4 JUSTICE JACKSON: -- you're suggesting
5 as though that distinction is universally held,
6 and if it were, I would think the market would
7 have already accounted for it everywhere.

8 The problem as I hear your other
9 friend saying is that Iowa, for example,
10 disagrees. Iowa does not believe that its porks
11 are being held -- and I'm saying this
12 hypothetically, I don't know what Iowa actually
13 believes -- but assume we have a state that --
14 that -- that thinks it's not immoral to hold
15 their sows in a particular way.

16 To what extent does California get to
17 control what Iowa does with respect to the
18 housing of its pork?

19 MR. LAMKEN: It does not. But the
20 question in this case is, who decides the pork
21 that appears on California grocery shelves
22 that's purchased and consumed by Californians?
23 To say that when another state has a lesser
24 standard, it decides what appears on California
25 grocery shelves --

1 JUSTICE JACKSON: But why can't -- why
2 can't California solve for its morality issue in
3 a different way, in a less burden -- if we
4 assume that it's really going to create a burden
5 to allow California to ban all Iowa pork on the
6 grounds that California disagrees with how Iowa
7 produces pork, why shouldn't the balance to the
8 extent we're making one be to simply allow
9 California to express its morality interest
10 through a less burdensome means, like
11 segregating Iowa's pork when it comes in,
12 putting a big label over it that says this is
13 immorally produced or whatever, and that won't
14 hurt Iowa as much? Why can't we say that that's
15 the way this should be?

16 MR. LAMKEN: So I should be clear that
17 if it were a distinction between Iowa pork and
18 other pork, that would be discriminatory. You
19 don't get to distinguish based on the origin in
20 a state, but distinguish between crate-free pork
21 and immoral inhumane pork.

22 JUSTICE JACKSON: All right, fine.
23 Whatever -- whatever the distinction is, the
24 question is, why does California get to ban it?
25 When it has all of the implications on commerce

1 with respect to the supply chain upstream, why
2 isn't the -- the solution that California just
3 gets to announce?

4 MR. LAMKEN: Yes. So I think
5 there's two -- the answer is in two parts. The
6 first is that California has an interest in
7 banning immoral products from its own markets.
8 And it doesn't serve that interest to say, well,
9 we'll put labels on it because it doesn't ban it
10 from the market. It's still in --

11 JUSTICE JACKSON: But wait, why does
12 it ban it? Isn't that just not trusting
13 California consumers? If they -- if they agree,
14 right, there was a problem earlier about, like,
15 how do we know how many consumers agree or
16 disagree with the morality interest, wouldn't it
17 best be served and we would know based on
18 labeling it, and if it doesn't get sold, then
19 there we are?

20 MR. LAMKEN: Well, it still leaves
21 California's markets available for products that
22 California has deemed immoral. But it also
23 doesn't serve California's other interest, which
24 is ensuring that all Californians have access to
25 morally acceptable pork even if they don't have

1 the resources, they don't have the luxury of
2 studying labels or going to the Whole Foods
3 market on La Cienega. This ensures that all
4 pork in California meets a certain level of
5 moral acceptability --

6 JUSTICE BARRETT: Mr. Lamken, can I
7 ask you about that moral -- I'm sorry to
8 interrupt. I see your time's running out. You
9 told Justice Thomas that the definition of
10 "moral" -- and so you're -- you're saying to
11 Justice Jackson things about, you know,
12 California's moral interest.

13 You told Justice Thomas that your
14 definition of morality would be rooted in
15 cultural traditions and that sort of thing.

16 Is your suggestion that states can
17 only regulate based on morals -- that sounds a
18 lot like the substantive Due Process Clause,
19 right? They're supported by the history and
20 traditions of the American people but that other
21 kinds of morals legislation that were maybe more
22 edgy or new would not be a permissible basis?

23 MR. LAMKEN: No, Your Honor. But I
24 think when you're asking -- and I think this is
25 the nexus question that the Court was asking

1 about. When you're asking is California
2 regulating the product that's being sold in
3 California, or is it so divorced from the nature
4 of the product, its regulation, that what it's
5 doing is reaching across state lines and
6 attempting to control something that's wholly
7 out of state, which, mind you, I don't think
8 it's a Dormant Commerce Clause because -- issue
9 because it extends beyond commerce. California,
10 for example, couldn't regulate high school
11 curriculum in Texas, even though it has nothing
12 to do with commerce.

13 But, when you're making that
14 distinction, you would look at the closeness of
15 the fit between, is this product somehow
16 immoral? And things you would look at in
17 deciding whether it affects the morality of the
18 product is, one, you would look at is this a
19 market and a regulatory distinction that's
20 regulated? Which is precisely the case here.
21 You would look at, is this a distinction that's
22 historically recognized? And this is a deeply
23 rooted historical distinction that we understand
24 that our food can be moral or immoral based on
25 whether it's the product of animal cruelty.

1 And, third, you might look at whether
2 or not this is a common feature through state
3 law generally. And, for example, here, nine
4 states, from Louisiana to Nevada to Virginia,
5 ban the in-state sale of cosmetics that are
6 tested on animals. Congress --

7 JUSTICE ALITO: Now I don't -- I don't
8 understand the distinction you're drawing
9 between regulations that go to the nature of the
10 product and regulations that control the way in
11 which the product is -- is produced.

12 Put aside the -- the health issues,
13 the safety issues. Let's assume for the sake of
14 argument that -- that pork produced in the way
15 it's mostly produced is just as safe as pork
16 produced in accordance with California
17 regulations.

18 If you analyze the pork -- you have
19 two pork chops. One is -- one, you know, made
20 one -- produced one way. One is produced the
21 other way. The product is exactly the same.

22 MR. LAMKEN: Your Honor, that -- how
23 the product is produced and whether it's done in
24 a humane fashion does distinguish the products.
25 Consumers recognize it as a difference. The

1 United States of America recognizes it a
2 difference. For example, it bans blood
3 diamonds, conflict diamonds, but not ordinary
4 diamonds. We can -- we ban things that are made
5 by slave --

6 JUSTICE ALITO: No, I --

7 MR. LAMKEN: -- enslaved people but
8 not others.

9 JUSTICE ALITO: -- I understand all of
10 that. I just don't understand how you're going
11 to draw a distinction between --

12 MR. LAMKEN: I --

13 JUSTICE ALITO: -- between the
14 California law and, for example, a law that says
15 you can't sell a product in our state if it was
16 produced by -- by workers who did not have the
17 right to work.

18 MR. LAMKEN: Yeah, and I -- and I
19 think the answer -- you draw the line on this.
20 You'd look at, for example, the right to work
21 example. You'd first ask, do consumers, do
22 regulators look at that as a typical distinction
23 that makes one product different from another?
24 They typically don't.

25 The next question is, do you -- is

1 this something with a deep historical tradition
2 that you would recognize that it somehow infects
3 the product and makes the product itself
4 immoral? That's not going to happen with --

5 JUSTICE ALITO: It seems to me --

6 MR. LAMKEN: And third --

7 JUSTICE ALITO: -- you're asking for a
8 categorization of moral objection, so the old
9 ones -- you know, the old ones are okay, but new
10 ones are not really?

11 MR. LAMKEN: You'd also look at how
12 often it happens, whether it's regular in the
13 law that that type of category occurs. And as I
14 pointed out, nine states deal with animal --
15 animal testing. Congress distinguishes. Eight
16 states ban eggs from caged hens. Nine states
17 ban afforded -- aborted fetal tissue but not
18 fetal tissue that's not from abortions.

19 Look at the alternative here. The
20 alternative is that states cannot ban goods
21 based on their morality. The alternative is, if
22 a state thinks it's ethical to eat pork but
23 unethical to eat inhumanely, cruelly raised
24 pork, it can only ban pork entirely?

25 JUSTICE JACKSON: But why is that --

1 MR. LAMKEN: That is --

2 JUSTICE JACKSON: -- why is that --
3 why is that problematic? I'm just -- I'm just
4 trying to understand how a moral objection gets
5 you all the way to banning. Why wouldn't a
6 state be able to advance its moral interest by
7 identifying those goods and services that don't
8 comport with the state's moral views?

9 I understand health and safety, right,
10 because, if you have a health and safety
11 problem, then the state says we can't let people
12 have access to these goods because it's going to
13 hurt them.

14 But I -- I think you have a different
15 set of issues when you're talking about a moral
16 objection and whether or not it's bad to prevent
17 a state from banning a product on that ground
18 when you have this alternative to --

19 MR. LAMKEN: And I -- I think the
20 answer is the states, just like the United
21 States, are allowed to say certain products have
22 a factor to them that renders them immoral and
23 they will deny the access to that product to
24 their markets.

25 JUSTICE KAGAN: So, in other words, 60

1 --

2 CHIEF JUSTICE ROBERTS: Thank you.

3 I'll get to you in a second.

4 Mr. Lamken, we've heard a lot about
5 morality. I think people in some states, maybe
6 the ones that produce a lot of pork, Iowa or
7 North Carolina or Indiana, may think there's a
8 moral value in providing a low-cost source of
9 protein to people, maybe particularly at times
10 of rising food prices.

11 But, under your analysis, it's
12 California's view of morality that prevails over
13 the views of people in other states because of
14 the market power that they have. So, I mean,
15 isn't that a consideration we should take into
16 effect in --

17 MR. LAMKEN: So --

18 CHIEF JUSTICE ROBERTS: -- analyzing
19 this under the Commerce Clause? If, in fact,
20 moral values are going to be given weight at
21 least as significant as economic ones, why isn't
22 that something that we should be sensitive to
23 under the Commerce Clause?

24 MR. LAMKEN: And each of those states
25 is able to produce pork and consume pork in the

1 fashion they choose. This is a law that
2 addresses only the pork that is consumed in the
3 state of California. There's no --

4 CHIEF JUSTICE ROBERTS: Yeah, but the
5 reality is the reason they have this law is,
6 one, because they don't have pork producers in
7 California. So nobody is going to be hurt from
8 that point of view.

9 And, two, they want to affect conduct
10 in other states. They want pork producers in
11 Iowa and North Carolina and Indiana to have to
12 produce pork the way they want them to, not
13 necessarily even the way they want their own
14 pork producers to produce, because they don't
15 have any pork producers or a de minimis amount.

16 MR. LAMKEN: Your Honor, the -- first,
17 Exxon makes clear that what the Commerce Clause
18 protects -- protects is interstate commerce, not
19 particular methods of production or organization
20 of industry.

21 And that makes sense. As Lopez makes
22 clear, what matters here and what the core of
23 the Commerce Clause is the instrumentalities and
24 the movement of products in interstate commerce.
25 Once you move to protecting the methods of

1 production and the cost of production, you've
2 now moved to affecting commerce in a sort of
3 Wickard versus Filburn kind of way. But that
4 Wickard versus Filburn kind of way just doesn't
5 have a role when it comes to cutting off state
6 authority.

7 And if we do -- if we do otherwise, we
8 start making those judgments, this Court puts
9 itself back in the role that it once took in
10 Lochner of trying to effect and trying to
11 decide, gee, how good is the state's limit, do
12 we agree with the state limits, or is there
13 another state limit? And what California's law
14 does is it controls solely within California.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 MR. LAMKEN: At most 13 percent.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas?

19 Justice Alito?

20 Justice Sotomayor?

21 JUSTICE SOTOMAYOR: Are you giving up
22 on the health and safety aspects of your claim?

23 MR. LAMKEN: Absolutely not, Your
24 Honor.

25 JUSTICE SOTOMAYOR: You spent all of

1 your argument on the moral issue.

2 MR. LAMKEN: That -- that is a -- the
3 -- a product of having 10 minutes, Your Honor.
4 But I think the health and safety, the key point
5 on that is that Petitioners have a burden -- a
6 huge burden under this Court's Maine versus
7 Taylor decision, and that is they have to show
8 that it's not even plausible, that it's not
9 arguable that there's a health and safety
10 interest here.

11 And the complaint doesn't come close
12 to pleading that, because, first, it admits
13 right at the outset, the complaint at the outset
14 admits that there is -- and I'm going to quote
15 if I find it -- that --- this is Pet. App. 228,
16 paragraph 440. It admits that higher stocking
17 density, so this is the intense confinement,
18 correlates with higher salmonella rates for
19 growing pigs.

20 There's no reason to think that's
21 irrational when you move from growing pigs to
22 sows. And the American Health Association and
23 the Physicians Committee explained the -- the
24 mechanism by which this is a huge health impact,
25 which is intense confinement causes stress which

1 has immunosuppressive effects not just for the
2 sows but for the piglets.

3 And is it irrational for California to
4 believe, is it beyond debate, have the facts in
5 the complaint set aside and shown that they're
6 entitled to relief and shown that California
7 just simply has no rational basis here for
8 thinking that this has an effect? It does not
9 come close.

10 There's a burden, a price, under Rule
11 8 to get past the complaint stage, and that is
12 that you have to show you're plausibly entitled
13 to relief. To be entitled to relief here,
14 Petitioners need to show that it's not even
15 arguable that there's a health effect. They do
16 not even come close, Your Honor.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: Mr. Lamken, I -- I
19 guess what troubles me is that this is a
20 pleading stage case. So let's assume that moral
21 interests count in the analysis. Let's just --
22 I'm not saying I'm -- I necessarily think that,
23 but let's assume it.

24 And let's assume that moral interests
25 can extend beyond labeling, that people can say

1 labeling is not enough. We actually want to
2 prevent those miss -- you know, those benighted
3 people from eating this product regardless,
4 whether they know what it is.

5 So moral interests count. Moral
6 interests extend beyond labeling. Still, you
7 have this complaint which alleges -- and then
8 whatever you want to say about the health
9 interests.

10 On the other hand, you have a
11 complaint that alleges great costs to the pork
12 farmers outside of California, almost all of
13 whom are outside of California, and the entire
14 industry. And I take Mr. Mongan's point that
15 the complaint is considerably more nuanced than
16 the briefs in this case, but you could imagine a
17 complaint that basically made the points in the
18 briefs, you could imagine the pork producers
19 amending their complaint to sound more like
20 Mr. Bishop's brief than the complaint that they
21 actually wrote.

22 And in that case, wouldn't we have to
23 say, okay, this is the pleading stage, it goes
24 back, somebody can do Pike balancing, it's very
25 hard, you know, what exactly are we balancing,

1 these incommensurable things? But that's what
2 our doctrine indicates should happen, so
3 somebody should do that balancing.

4 MR. LAMKEN: Right. Your Honor, I
5 think there's two points. The -- the first is
6 that I don't think they could -- well, second
7 point is -- I'm going to come to, which is
8 that's not this complaint, which is what the
9 Court has before it. But before I get to that's
10 not this complaint. Exxon --

11 JUSTICE KAGAN: Let's assume it's not
12 this complaint. Let's assume a better complaint
13 or a -- not a better complaint necessarily.
14 Let's assume a stronger complaint.

15 MR. LAMKEN: Right. So Exxon makes
16 clear the particular structure or methods of
17 operation are not what the Commerce Clause
18 protects. The fact that costs might go up for
19 production is divorced from the essence of the
20 Commerce Clause itself, which is about the
21 interstate movement of goods. Can you have that
22 trade?

23 When you step further away from that
24 and you say I'm worried about how much it costs
25 to make the pork in other states, you've now

1 stepped away from the core of the Commerce
2 Clause, the interstate movement of goods, the
3 channels of commerce, the instrumentalities of
4 commerce that Lopez makes clear, and you're now
5 in the land of, well, this is something that
6 affects commerce, affects commerce in a
7 Wickard/Filburn kind of way.

8 That's just too far to read an
9 implicit negative implication from
10 constitutional text as a limit on what state
11 authority can do. That goes too far. And I
12 think Exxon makes that quite clear.

13 But even apart from that, under
14 Twombly, the -- the allegations need to make
15 sense --

16 JUSTICE KAGAN: I guess what strikes
17 me about this case, Mr. Lamken, is that both
18 sides want to exclude things from the Pike
19 analysis, right? Mr. Bishop wants to exclude
20 all moral interests, as does Mr. Kneedler. And
21 you want to exclude a world of economic harms
22 because you think that that's not really what
23 the Commerce Clause is all about.

24 And isn't Pike just saying you get to
25 throw them all in the mix and it's really hard,

1 but somebody has to make the judgment and it
2 hasn't been made yet in this case?

3 MR. LAMKEN: No, Your Honor, I think
4 Exxon made that judgment, that you don't say,
5 well, gee, it's going to be very expensive to
6 force everybody who is out of -- in Exxon, all
7 the burdens fell on out-of-state refiners. This
8 oh, gee, this is restructuring the operation.
9 No, Maryland gets to make the determination that
10 it does not want refiners to be operating gas
11 stations.

12 Likewise here, California gets to make
13 the judgment as to what's sold within the state.
14 It may drive up costs for Californians. It may
15 mean that pork farmers serving Californians pay
16 more or cost -- it costs more for them. But
17 that's simply an affecting commerce type of
18 thing. That's not an interstate commerce
19 problem. It's an affecting commerce problem,
20 and I don't think courts should be in the middle
21 of making that sort of determination from a
22 negative implication from an affirmative grant
23 of authority to Congress.

24 But here, under Twombly, even if you
25 just look at Twombly, Twombly says your

1 rationale needs to make -- your theory needs to
2 make economic sense. It has to comport with
3 common economic understanding.

4 And with California being 13 percent
5 of the market, it does not comport with common
6 economic understanding that somehow the whole
7 market is going to be shifted, as opposed to
8 some producers serving California and some
9 producers choosing to serve the other 87 --

10 JUSTICE KAGAN: Thank you.

11 MR. LAMKEN: -- percent of the market.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 Justice Kavanaugh?

15 Justice Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: Can I just get a
18 quick clarification of the burdens at this
19 stage, sort of piggybacking on what Justice
20 Kagan said.

21 I understood you to say that the
22 complaint has to show that it is not plausible
23 that California has a health and safety concern
24 under these circumstances. I -- I didn't think
25 that that's what was going on. I thought the

1 complaint had to show that it is plausible that
2 the burden outweighs any possible health
3 interest that California has.

4 MR. LAMKEN: Well, certainly, when
5 you're looking at -- I think the government's
6 argument here was that there's simply no health
7 and safety interest, that the complaint is
8 sufficient to show that. And I don't think
9 that's true.

10 The standard under --

11 JUSTICE JACKSON: Assume they -- isn't
12 the -- isn't the -- the only thing that they
13 have to show is, under Pike balancing, whatever
14 the burdens are that they allege, plausibly
15 outweigh whatever benefits or interests that
16 California might have?

17 MR. LAMKEN: Okay, but once you have a
18 health and safety interest, they must show facts
19 that plausibly show that California does not
20 have a legitimate health and safety interest,
21 that it's not even arguable.

22 California is not required to wait for
23 people to get sick, die, or end up in the
24 hospital before it regulates. Maine versus
25 Taylor is very clear about that.

1 JUSTICE JACKSON: All right. Thank
2 you.

3 MR. LAMKEN: And that was just as
4 discriminatory.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. LAMKEN: Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Mr. Bishop,
9 rebuttal.

10 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP
11 ON BEHALF OF THE PETITIONERS

12 MR. BISHOP: Just very, very short,
13 Your Honor. I've heard a lot about Exxon, but
14 Exxon is solely about in-state restrictions. It
15 had absolutely nothing to do with this case.

16 Now I don't think that General
17 Mongan's attempt to distinguish Prop 12 from
18 other policy-directed conditions on sale works
19 at all. I heard nothing that distinguishes Prop
20 12 from a law that says you cannot sell any food
21 in this state unless it's produced by workers
22 paid our minimum wage, offered certain medical
23 care, who can belong to unions.

24 Those are all conditions directly
25 related to the production of the product, which

1 occurs out of state. And I heard no definition
2 of attenuated conditions that is workable.

3 And what I ask the Court to focus on
4 is what our nation's interstate market looks
5 like if California can condition sales on its
6 moral or policy views and every other state can
7 do the same.

8 We'll be back to the pre-convention
9 picture where you have balkanized markets and
10 discord among the states, probably a lot worse
11 now than in pre-convention times given the
12 political differences among us.

13 And that destroys the twin purposes of
14 the Commerce Clause, which this Court said in
15 Healy are to maintain the national economic
16 union and preserve the territorial sovereignty
17 of the states. We will not have a national
18 economic union if California can impose its
19 moral views this way.

20 And just one -- one final point. I
21 heard a lot of fighting the complaint. We have
22 a 450-paragraph complaint, supported by
23 declarations, that says that there are immense
24 costs involved for the industry, immense harm to
25 pigs that will result from complying with --

1 with -- with Prop 12 and no safety benefit.

2 I have a dozen pork farmers in the
3 court today who would testify at trial that they
4 are being forced by distributors and packers and
5 retailers to comply with Prop 12 in a way that
6 they think kills pigs, that harms their workers,
7 that makes it extremely difficult for them to --
8 to -- to operate their farms in the way that
9 they think is efficient and safe for -- for
10 workers and pigs. And we are -- believe we're
11 entitled to a trial to show that.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 12:15 p.m., the case
16 was submitted.)

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