No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL &
AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, ET AL.,

Respondents.

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

BRIEF OF THE RETAIL LITIGATION CENTER, INC., RESTAURANT LAW CENTER, FOOD INDUSTRY ASSOCIATION, NATIONAL RETAIL FEDERATION, AND AFFORDABLE FOOD FOR ALL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. provides courts with the perspective of the retail industry on important legal issues affecting its members, and on potential industry-wide consequences of significant court cases. Since its founding in 2010, the Retail Litigation Center has participated as an *amicus* in more than 150 cases of importance to retailers. Its *amicus* briefs have been favorably cited by multiple courts, including this Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The Retail Litigation Center is dedicated to representing the Nation's retail industry in the courts. Its member retailers employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16

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[1] No party or counsel for any party authored any part of this brief nor made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided consent to the filing of this *amicus* brief.

million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. Through *amicus* participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's *amicus* briefs have been cited favorably by state and federal courts.

The Food Industry Association works with and on behalf of the entire food industry to advance a safer, healthier, and more efficient consumer food supply. The Food Industry Association brings together a wide range of members across the value chain—from retailers who sell to consumers, to producers who supply the food, as well as the wide variety of companies providing critical services—to amplify the collective work of the industry. The Food Industry Association's membership includes nearly 1,000 supermarket member companies that collectively operate almost 33,000 food retail outlets and employ approximately 6 million workers. The Food Industry Association is a champion for the food industry and the issues that make a difference to our members' fundamental mission of feeding and enriching society.

The National Retail Federation is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from every corner of the United States. Retail is by far the largest private-sector employer in the United States. It

supports 1 in 4 jobs—roughly 52 million American workers—and contributed $3.9 trillion to annual GDP. The National Retail Federation regularly files *amicus* briefs in cases that raise issues of substantial importance to the retail industry.

Affordable Food For All is a diverse coalition of stakeholders working to ensure equitable access to safe and affordable food nationwide. It focuses on supporting continuity in the food supply chain by promoting and advocating for policies that ensure health and safety at every step—from farmers and food processors, to restaurants, grocers, and consumers. Affordable Food For All recognizes that the continuity of the food supply chain is of critical importance to American consumer welfare because disruptions to food supply can have outsized effects on consumer budgets—meaning less money to spend on rent, utilities, and other necessities. Such disruptions to consumer budgets have a disproportionate impact on low-income households.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision to insulate California's Proposition 12 from judicial scrutiny neglects the concerns of the Framers that were a motivating force behind the Constitution's ratification. By allowing schemes like Proposition 12, the panel's decision threatens to upend interstate supply chains on which every American consumer relies for the efficient delivery of affordable goods, and also to intrude on the sovereignty of States other than

California to regulate farming and other commercial activities within their own territory.

During the Articles of Confederation era, the founding generation watched with growing concern as the States' regulatory "interference with the arteries of commerce was cutting off the very lifeblood of the nation." Max Farrand, The Framing of the Constitution of the United States 7 (1913). They decried the fact that the United States "have not secured even our domestic traffic that passes from state to state . . . contrary to the policy of every nation on earth." 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 80-81 (Jonathan Elliot ed., 1836) (statement of T. Dawes).

These concerns mounted as attempts to "exercise [a power over national commerce] separately, by the States, . . . not only proved abortive, but engendered rival, conflicting and angry regulations." James Madison, Preface to Debate in the Convention of 1787, *in* 3 *The Records of the Federal Convention of 1787*, at 547 (Max Farrand ed., rev. ed. 1937) ("Records"). Worried that the "interfering and unneighborly regulations of some States" if allowed to "multipl[y] and extend[]" might become "serious sources of animosity and discord," The Federalist No. 22 (A. Hamilton), the Framers crafted the Constitution's Commerce Clause, which they "intended [to operate] as a negative and preventive provision ag[ain]st injustice among the States themselves," Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *in* 3 *Records*, *supra*, at 478.

California's Proposition 12 constitutes precisely the sort of worrisome state legislation that threatens an "interference with the arteries of commerce" that might engender "animosity and discord" among the several States. Proposition 12 would force in-state businesses to require out-of-state-businesses in their supply chains to conform their operations to California law—in this instance, by requiring farms in other States to house sows in accordance with California's dictates—despite the fact that California lacks a "legitimate interest[]" in "enact[ing] such a policy for the entire Nation." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-71 (1996). On the facts alleged below (which are accepted as true in the case's current posture), the resulting burden on out-of-state farmers includes an estimated $293,894,455 to $347,733,205 in capital expenditures to update sow-housing facilities, creating costs that would cascade throughout the interstate pork supply chain and ultimately be borne by American consumers nationwide, including and perhaps especially by those who can least afford to pay them.

Proposition 12, moreover, imposes these and other burdens in a manner that intrudes on the sovereignty of other States. It obstructs the ability of elected officials in other States such as Iowa, where farmers raise one-third of the Nation's pigs, from determining whether and how to regulate farms and pig farmers within their borders, even if Iowa voters would prefer to make a different choice than California in that regard. And Proposition 12 does so notwithstanding that it was "absolutely incomprehensible" to the Framers that "trade . . . within [a State's] legislative jurisdiction, can be regulated by an external

authority, without . . . intruding on the [State's] internal rights of legislation." The Federalist No. 42 (J. Madison).

The Ninth Circuit nevertheless ruled that petitioners' complaint challenging the constitutionality of Proposition 12 should be dismissed, reasoning that the burdens to interstate commerce flowing from Proposition 12 were constitutionally non-cognizable, Pet. App. 19a-20a; that it was irrelevant that Proposition 12 as alleged furthered *no* legitimate interest of California's, *ibid.*; and that the Constitution's crucial guardrail against "the projection of one state regulatory regime into the jurisdiction of another State," *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989), should be cast aside as "overbroad," Pet. App. 7a.

The Ninth Circuit's decision to insulate California's Proposition 12 from judicial scrutiny creates a significant risk of interference not only to the supply chain of petitioners' pork products, but also for the supply chains of innumerable other retail products and restaurant ingredients.

For the vast majority of retail products and restaurant ingredients, the supply chain required for them to reach a store's shelf, diner's plate, or resident's doorstep involves many, many steps that can, and often do, all occur in different States. Those steps vary depending on the item but often include, and are not limited to: production of component parts or the farming of ingredient foodstuffs; separate processing of those parts and ingredients; combining them (while often shipping between States during

various steps); packaging final products or foods; and shipping to regional distribution centers before ever entering the multiple States where they may be sold to the businesses that offer them to end consumers. Many thousands of businesses throughout the United States are involved in such supply chains for just *one* product or another—such as the approximately 5,000 individual U.S. farmers involved in producing peanuts and the 9,000 different domestic suppliers in 36 different States that produce parts for computers. And each American retailer or restaurant may sell numerous products and ingredients—sometimes well over 100,000 different products.

If a single State—like California—can force in-state businesses to require out-of-state-businesses in their supply chains to conform their operations to California law, out-of-state businesses will bear massive communication, coordination, indemnification, implementation and compliance costs. Simultaneous, overlapping state regulation of commercial transactions in a particular State could also ensue—as any single State would gain the ability to regulate, in effect, how businesses in other States must manufacture certain products merely because of the potential that, at some much later point, and perhaps unbeknownst at the outset, that product may enter the regulating State for sale.

Declining efficiency inevitably increases costs that will be spread across the supply chain, including to consumers whose access to affordable food and other consumer products will be impaired. And the more that consumers need to spend to feed their families,

the less they will have to spend on rent, utilities, and other necessities.

Laws like California's Proposition 12 therefore must be subject to judicial scrutiny and the Ninth Circuit's ruling dismissing petitioners' challenge to that statute cannot stand.

ARGUMENT

I. California's Proposition 12 and Similar Laws Threaten To Upend the Supply Chains that Run Throughout the Fifty States on which Every American Consumer Relies for Essential Goods.

The interstate supply chain is critical to the Nation's economy. It is a complex but efficient system. It operates smoothly behind the scenes and has been designed as a massive interconnected web to supply consumers with a previously unimaginable number and variation of products at affordable prices. It becomes visible only when obstacles arise that thwart its efficacy.

Proposition 12 is one such obstacle that would undermine one particular supply chain for pork products. But more broadly, the precedent it would set of allowing each State to pick off the products of greatest interest to that State would have staggering implications.

A. The Typical Retailer Receives Thousands of Products Through Different Supply Chains, Each of which Involves Multiple Upstream Businesses in Other States and Commerce Between Those Other States.

American restaurants and retailers, including general merchandisers and grocers,[2] rely on multiple complex supply chains for the myriad goods on their tables and shelves and home-delivery distribution centers. Because American consumers rely on these businesses for so many essential goods, supply chain disruptions can cause serious problems in daily life for consumers across the economic spectrum—as the COVID-19 pandemic made abundantly clear.[3]

Retailers and restaurants strive to make shopping and dining experiences seamless and reliable for consumers by maintaining shelves stocked with current products and fresh food menu offerings. All of those goods come through some type of supply chain and may be processed in multiple States before landing on a diner's plate or a store's shelf.

Retailers in the United States can carry a head-spinning array of products. As just a few examples,

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[2] This brief uses the term "retailers" to refer to all businesses that sell products directly to consumers, including restaurants, general merchandisers, grocers, and many of *Amici*'s members and the businesses they represent.

[3] *See, e.g.*, Peter S. Goodman, *How the Supply Chain Broke, and Why It Won't be Fixed Anytime Soon*, N.Y. Times (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/business/shortages-supply-chain.html.

the typical Walmart brick-and-mortar store stocks well north of 100,000 items.[4] A typical Lowe's hardware store stocks 35,000 items and hundreds of thousands of additional items are available online.[5] And in 2020, the average supermarket carried 31,119 different items.[6]

On retail shelves, these many thousands of products can each bring with them their own supply chain variation involving many steps and numerous businesses that operate throughout multiple States. A manufacturer—responsible for only a small number of products carried by several different retailers—might work directly with as many as 500 to 1,500 suppliers.[7] And for each of the suppliers with whom manufacturers directly transact for particular component parts or materials, there are frequently as many as seventeen additional suppliers further upstream.[8] As a result, it is not uncommon for

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[4] Walmart, Inc., *Our Retail Divisions* (Jan. 6, 2005), https://corporate.walmart.com/newsroom/2005/01/06/our-retail-divisions.

[5] Lowe's, *Investor Fact Sheet* (Jan. 31, 2020), https://corporate.lowes.com/sites/lowes-corp/files/pdf/lowes-fact-sheet-final.pdf.

[6] The Food Industry Association, *Supermarket Facts*, https://www.fmi.org/our-research/supermarket-facts (last visited June 16, 2022).

[7] *See* McKinsey Global Institute, Risk, Resilience, and Rebalancing in Global Value Chains 34 (2020), *available for download at* https://www.mckinsey.com/business-functions/operations/our-insights/risk-resilience-and-rebalancing-in-global-value-chains.

[8] *Id.* at 40.

companies to have as many as 4,000, 12,000, or even 18,000 suppliers behind their products.[9]

Restaurants confront supply chains that are similarly complex: even basic, domestically-sourced foods move through multi-stepped, interstate supply chains. Consider the peanut: approximately 5,000 peanut farmers located throughout multiple States produce raw peanuts.[10] Farmers ship their peanuts across state lines to a network of buying points where they are inspected, dried, graded, and prepared for storage.[11] Peanuts might be stored for months before being sent to a sheller for further processing.[12] From the sheller, peanuts might move into storage again and then on to blanching facilities.[13] Most peanuts are grown by farmers located in eight southern States, but the manufacturing of peanut products involves businesses nationwide—necessitating criss-crossing shipments of peanuts among the fifty States.[14] Ultimately, the processed nuts and peanut products are shipped to national distributors before eventually arriving in a diner's Kung Pao chicken, in a jar of

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[9] *Id.* at 34, 40, 46.

[10] *See* Patrick Archer, Overview of the Peanut Industry Supply Chain, *in Peanuts: Genetics, Processing, and Utilization* 257 (Thomas Stalker & Richard Wilson, eds., 2016).

[11] *See id.* at 260.

[12] *Id.* at 261.

[13] *Ibid.*

[14] *See id.* at 257, 262.

peanut butter for a 4th grader's lunch, or in a paper bag at a World Series ballpark.

For a restaurant that might use peanuts (or other foodstuffs) as ingredients in their cooking, baking, and general dish preparations, the picture is yet more complicated. U.S. restaurants use an estimated 15,000 distribution centers located in every State throughout the Nation to acquire ingredients.[15] These wholesale distributors, in turn, might purchase a product from any of thousands of intermediate packers and suppliers located in other States.[16] On the level of individual restaurants, one member of *amicus* Restaurant Law Center purchases more than 150 food products from roughly 125 suppliers (many of whom have their own suppliers further up the chain), as well as more than 200 non-food items from roughly 25 different suppliers.

The supply chains behind durable consumer goods are similarly complicated. One member of *amicus* Retail Litigation Center indicates that a computer manufacturer's supply chain can involve parts from

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[15] International Foodservice Distributors Association, A Comprehensive Economic Impact Study of the U.S. Foodservice Distribution Industry 6 (Aug. 2018), *available for download at* https://www.ifdaonline.org/news-insights/research-insights/reports/foodservice-distribution-industry-economic-impact.

[16] *See, e.g.*, Sysco Corporation, Annual Report (Form 10-K), at 3 (Aug. 30, 2021), https://investors.sysco.com/~/media/Files/S/Sysco-IR/documents/annual-reports/Sysco_2020-Annual-Report_Web%20_FINAL.pdf.

9,000 different domestic suppliers located in 36 different States. One component in computers, the semiconductor chip, is also a component of a multitude of other durable goods including cars, construction equipment, cash registers, and refrigerators. Semiconductor chips are assembled through a process that requires large numbers of specialized materials. For example, the machines used in a type of semiconductor manufacturing known as extreme ultra-violet lithography can contain as many as 100,000 distinct parts from 5,000 global suppliers.[17]

Because semiconductors are often inserted into a wide range of durable consumer goods, minor disruptions to any one of these supply chains can snowball into major disruptions to the national economy. For example, industry estimates indicate that a 100 million dollar disruption to the supply of C_4F_6 (Hexafluorobutadiene) gas—a crucial component in the early production processes for semiconductor chips—would lead to downstream damage totaling 18 *billion* dollars.[18]

The countless complex, interwoven supply chains that comprise interstate commerce's arteries across

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[17] Boston Consulting Group & Semiconductor Industry Association, Strengthening the Global Semiconductor Supply Chain in an Uncertain Era 29-30 (Apr. 2021), https://www.semiconductors.org/wp-content/uploads/2021/05/BCG-x-SIA-Strengthening-the-Global-Semiconductor-Value-Chain-April-2021_1.pdf.

[18] *Id*. at 41.

many States employ a significant percentage of the Nation's workforce. More than 5 million workers are engaged in wholesaling in the United States; another 1.7 million work in warehousing and storage; and 1.5 million more truck cargo to retail shelves, restaurant kitchens, and beyond.[19] Mainline retailers directly employ nearly 16 million retail workers in their stores and retail supports 1 in 4 jobs—roughly 52 million American workers—and contributes $3.9 trillion to annual GDP.[20]

The ultimate beneficiaries of smooth and efficient supply chains are, of course, the 330 million Americans who all rely on retailers and restaurants for goods and services for their daily necessities. On the average day, these consumers purchase upwards of $2 billion of products from grocery store shelves,[21] and in the course of a year, they make over 120 billion distinct purchases on credit and debit cards.[22]

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[19] *See* Bureau of Labor Statistics, *Wholesale Trade*, https://www.bls.gov/iag/tgs/iag42.htm; *Warehousing and Storage*, https://www.bls.gov/iag/tgs/iag493.htm; *Truck Transportation*, https://www.bls.gov/iag/tgs/iag484.htm (last visited June 16, 2022).

[20] *See* National Retail Federation, *Economy: Retail Jobs*, https://nrf.com/insights/economy/about-retail-jobs (last visited June 16, 2022).

[21] United States Census Bureau, *U.S. Retail Sales Top $5,570 Billion* (Jan. 13, 2022), https://www.census.gov/newsroom/press-releases/2022/annual-retail-trade-survey.html.

[22] Board of Governors of the Federal Reserve System, Developments in Noncash Payments for 2019 and 2020: Findings from the Federal Reserve Payments Study 18 (Dec. 2021), https://www.federalreserve.gov/publications/files/developments-in-noncash-payments-for-2019-and-2020-20211222.pdf.

B. The Efficacy of Supply Chains Across States Could Be Destroyed by Schemes Like Proposition 12.

Schemes like California's Proposition 12 risk placing extraordinary burdens on interstate supply chains. The economic damage that may ensue is difficult to exaggerate if single States can project their regulatory preferences abroad by forcing in-state businesses to require out-of-state businesses throughout their supply chains to conform to the regulating State's laws.

In-state businesses would be burdened by necessary communications of their regulating State's parochial laws to all of their supply chain partners and both in-state and out-of-state businesses would be burdened by the follow-on implementation and compliance certifications. Out-of-state businesses would bear the costs of changing their operations to conform to the regulating State's scheme if the products they manufacture, process, assemble, or ship may ultimately end up in the regulating State (even if that destination is unknown at the outset). And the interstate exchange of goods in the affected supply chains would be burdened by any attempts to differentiate shipments or components based on the State of destination.

These burdens would increase exponentially based on the number of products a retailer sells, the number of businesses in the supply chains behind those products, and the number of supply chains each manufacturer engages with for the creation and distribution of its products. As explained above, it is

not uncommon for dozens, hundreds, or even thousands of businesses to be involved in the supply chain for a product. Moreover, American retailers and restaurants may each sell thousands of individual products (such as the hundreds of thousands at Lowe's or Walmart and the more than 30,000 items at the average supermarket).

Thus, even if a few of the very largest pork sellers can meet Propoposition 12's standards for this one type of product, the precedent of allowing each State to pick off the products it would like to regulate nationally would have staggering implications for the overall supply chain. The notion that restaurants and retailers with hundreds of thousands of items could be forced into a compliance regime for a single State's provincial law imposing requirements on thousands of suppliers geographically dispersed across the fifty States is dizzying. And these burdens would further multiply by the number of States that enact their own requirements for other products or production methods.

Efforts to address these burdens through indemnification agreements or by hiring third-party monitors would necessitate a massive level of coordination and communication across innumerable actors. Moreover, indemnification or monitoring efforts would not come cheap—costs could skyrocket because of potential liability if certifications prove inaccurate and because the assuring party will *itself* find it difficult to require compliance with the regulating State's standards of *still more* businesses further upstream in a given product's supply chain.

Increased operating costs and reduced supply from these burdens would accrue throughout the various steps of supply chains and inevitably lead to fewer goods and higher prices for all Americans. The ensuing disruption would have an especially adverse impact on Americans with tighter household budgets and could affect their ability to pay for rent, utilities, and other necessities. For example, independent analyses reflect that a 10% reduction in supply would lead to 12% higher prices for pork products in some major cities,[23] and that a 1% increase in the price of pork would produce a $3 million dollar consumer loss for persons in the Washington, D.C. metropolitan area alone. [24] That attendant reduction in consumer purchasing power would be disproportionately borne by low-income households ($50,000 or less), which consume more pork on a per capita basis than other groups.[25]

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[23] Glynn T. Tonsor & Jayson L. Lusk, Kansas State University Agricultural Economics, Consumer Sensitivity to Pork Prices 39 (Mar. 5, 2021), https://www.agmanager.info/livestock-meat/meat-demand/meat-demand-research-studies/consumer-sensitivity-pork-prices-comparison.

[24] *Id.* at 41-42.

[25] *Id.* at 35-37.

II. The Ninth Circuit's Opinion is Contrary to Established Constitutional Doctrine and Would Damage the Nation's Supply Chains.

A. The Ninth Circuit Would Unconstitutionally Allow a Single State to Impose Massive Costs on Interstate Commerce Without a Legitimate Local Public Interest, Undermining Critical Protection of Supply Chains.

The Ninth Circuit erred in failing to conclude that Proposition 12, as alleged, imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits" obtained in pursuit of "a legitimate local public interest." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

1. This Court has for centuries read the "words of the Commerce Clause" to set forth "a restriction on permissible state regulation," *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979), in no small part because state laws unduly burdening interstate commerce are precisely what prompted "Virginia [to] initiate[] the movement which ultimately produced the Constitution," *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (Jackson, J.).

The Framers roundly condemned the "practice of many States in restricting the commercial intercourse with other states." James Madison, Vices of the Political System of the United States, *in* 2 *Writings of James Madison* 361, 363 (Gaillard Hunt ed., 1901)

("Vices"). [26] They expected the ratification of the Constitution's Commerce Clause to remedy that evil. *See generally* The Federalist No. 22 (A. Hamilton).

At the same time, recognizing that the Commerce Clause did not eliminate the "acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824) (opinion of Marshall, J.), this Court has, appropriately, drawn a "line . . . between the municipal powers" or police powers that States as sovereigns are entitled to exercise within their territory "and the commercial powers" that Article I, § 8 grants *only* to Congress, *id.* at 238 (opinion of Johnson, J.).

"This distinction . . . is one deeply rooted in both our history and law." *H. P. Hood*, 336 U.S. at 533. It is one thing for a "State to shelter its people from menaces to their health or safety . . ., even when those dangers emanate from interstate commerce." *Ibid.* But States stray beyond the bounds of that power—and into terrain delegated exclusively to Congress—when they "retard, burden, or constrict the flow of [interstate] commerce" in the name of interests *other* than the health, safety, and welfare of their own citizens. *Ibid.*; *see also* Barry Friedman & Daniel T.

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[26] *See* Brannon P. Denning, *Confederation Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 46–48, 59–66 (2005) (cataloging state regulations that burdened interstate commerce prior to ratification); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol'y 849, 855–59 (2002) (similar).

Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1917-38 (2011) (identifying how this Court's Commerce Clause jurisprudence has historically recognized that "the states retained their police powers" but simultaneously prevented States from assuming Congress's power to regulate interstate commerce).

2. In *Pike v. Bruce Church*, this Court synthesized its longstanding commerce-clause cases and explained that a state law violates the Commerce Clause if it imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits" obtained in pursuit of a "legitimate *local* public interest." 397 U.S. at 142 (emphasis added). And, because regulation of interstate commerce to further *national* interests is Congress's concern, *see* U.S. Const. art. I § 8, cl. 3, a State's legitimate local interest must focus on state residents. *See*, *e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (plurality opinion) ("[T]he State has no legitimate interest in protecting nonresident[s]"); *BMW*, 517 U.S. at 568-71 (explaining that "a State's legitimate interests" would not include attempting to "enact . . . a policy for the entire Nation").

Pike's test thus achieves a basic objective of the Commerce Clause and the Constitution writ large by maintaining the authority of a State to exercise power over commerce in its territory while also preventing a State from unduly burdening the "national market for goods and services." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

3. Far from a permissible, limited exercise of state power, California's Proposition 12 represents an "injurious impediment[] to the intercourse between different" States of precisely the sort that the Framers crafted the Commerce Clause to address. The Federalist No. 22 (A. Hamilton); *see also Granholm v. Heald*, 544 U.S. 460, 472 (2005).

Petitioners plausibly alleged that California's Proposition 12 advances *no* legitimate local public interest, which should have defeated dismissal of their complaint. The asserted objective of Proposition 12 is "to prevent animal cruelty by phasing out" what California has determined to be "extreme methods of farm animal confinement." Pet. App. 37a, § 2 (Proposition 12). But a separate provision, unchallenged here, prohibits such confinement (as California defines it) by pig farmers located *in* California. *See* Cal. Health & Saf. Code § 25590(a). And to the extent Proposition 12 seeks to shape the behavior of out-of-state farmers, California lacks a "legitimate interest" in doing so. *BMW*, 517 U.S. at 568-71; *Edgar*, 457 U.S. at 644.

Petitioners also plausibly alleged that Proposition 12 would burden interstate commerce in a manner "clearly excessive" to its (nonexistent) local benefit. *Pike*, 397 U.S. at 142. As the Ninth Circuit acknowledged, Plaintiff "plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide." Pet. App. 20a. The alleged resulting cost increases, which would ultimately be borne by all American consumers (not just Californians), include "an estimated $293,894,455 to

$347,733,205" in capital expenditures by pork producers. Pet. App. 214a, ¶ 342.

The Ninth Circuit incorrectly concluded that there was *no* cognizable burden on interstate commerce. Pet. App. 19-20a. Characterizing the entirety of the alleged burden as "compliance costs," the panel below held that—as a matter of law—"laws that increase compliance costs . . . do not constitute a significant burden on interstate commerce." Pet. App. 17a.

Both in demanding "a significant burden" on interstate commerce, and again in casting aside bona fide so-called "compliance costs," the Ninth Circuit erected artificial barriers totally outside this Court's *Pike* jurisprudence.

Not only does this Court employ no threshold "significant burden" test, *see*, *e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (applying *Pike* and assessing State's local interests notwithstanding that "[t]he burden imposed on interstate commerce . . . is relatively minor"), this Court regularly considers increased compliance costs in the *Pike* context. In *Clover Leaf Creamery*, this Court assessed whether "the inconvenience of having to conform to different packaging requirements" outweighed a local interest in prohibiting milk retailers from selling their products in nonreturnable plastics. *Ibid*. Equally, in *Pike* itself, the relevant burden on interstate commerce was reducible to compliance costs: a one-time $200,000 capital expenditure to construct a compliant cantaloupe packing facility. *Pike*, 397 U.S. at 140. Rather than lump such hardships into an inexplicably non-

cognizable "compliance costs" category, as the Ninth Circuit's doctrine would, this Court has done what *Pike*'s constitutional protection demands: analyze the burden on interstate commerce (including the costs to businesses engaged in such commerce of coming into compliance with the regulating State's demands) in view of the asserted local interest.

The Ninth Circuit also erred in declining to determine whether a "legitimate local public interest" is furthered by Proposition 12. *See* Pet. App. 18-19a. Its failure to even *attempt* to identify a legitimate local interest furthered by Proposition 12 is again inconsistent with this Court's jurisprudence. This Court has often struck down regulations that burdened interstate commerce after determining the local interests involved were insubstantial. In *Pike*, this Court characterized the local interests as "tenuous" before determining that a $200,000 impact on one producer was an unconstitutional burden on interstate commerce. 397 U.S. at 145. Similarly, when a Mississippi law governing milk imports was defended on the ground that it advanced a local health interest that this Court found to "border[] on the frivolous," this Court did not hesitate to strike down the statute. *Great Atl. & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 375-76 (1976).

The Ninth Circuit's failure to assess whether Proposition 12 advances a legitimate local public interest also meant that court could not determine, as *Pike* requires, whether the State's legitimate interests (if any) "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. For example, if a State is concerned about the "risk of

food-borne illness" from particular foodstuffs, Pet. App. 37a § 2 (Proposition 12),[27] testing and inspection of goods entering the State may be able to address that concern—and in a manner that is far less burdensome than forcing in-state businesses to require their out-of-state supply chain partners to conform to California regulatory dictates that are far attenuated from bona fide food safety measures (such as proper food handling).

4. The Ninth Circuit's disregard for *Pike* risks upending the efficacy of supply chains and is of great concern to businesses from corner grocers to hardware stores and from food pantries to white tablecloth restaurants. If left undisturbed, courts would be excused from reviewing even State laws that advance *no* legitimate local public interests while forcing in-state businesses to require their out-of-state business partners to comply with the regulating State's law. If States may enact such laws free of judicial scrutiny, it could no longer be said that "[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, . . . and no foreign state will by customs duties *or regulations* exclude them." *H.P. Hood*, 336 U.S. at 539 (emphasis added).

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[27] The parties dispute whether California waived any argument to the effect that reducing the "risk of food-borne illness" is a legitimate local public interest that Proposition 12 advances.

B. The Ninth Circuit's Approach Unconstitutionally Allows a Single State to Regulate Commerce that Occurs Wholly Within Other States, Interfering with State Sovereignty and Undermining Interstate Supply Chains.

The Ninth Circuit also erred in failing to conclude that Proposition 12 unconstitutionally regulates commerce occurring wholly outside the boundaries of California.

1. This Court has long made clear that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). The Constitution's "territorial limitations on the power of the respective States" are necessary precisely because "[t]he sovereignty of each State implies a limitation on the sovereignty of all its sister States." *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S.Ct. 1773, 1780 (2017) (quotations omitted). The solicitude for each State's sovereignty thus makes it impermissible for a "single State . . . [to] impose its own policy choice on neighboring States." *BMW*, 517 U.S. at 571.

The Constitution's protection of State sovereignty from the intrusive regulations of other States is a structural one—*i.e.*, it is part of the "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (quoting *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting)). As

this Court has explained, "it would be impossible to permit the statutes of [a single State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *see also* The Federalist No. 22 (A. Hamilton) (describing Framers' concern that "interfering and unneighborly regulations" of States could become "serious sources of animosity and discord" between States).

In line with this constitutional framework, this Court has explained that a state statute that in "practical effect" "directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). The prohibition against States controlling commerce wholly in other States is necessary to safeguard "the autonomy of the individual States within their respective spheres." *Ibid.*; *see also*, *e.g.*, *BMW*, 517 U.S. at 571 ("[O]ne State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States" (citation omitted)).

2. The Constitution's protection of State sovereignty is of critical importance to American retailers of all kinds and the consumers that they serve across the Nation. Already, "[i]ndividual

businesses necessarily are subject to the dual sovereignty of the government of the Nation and of the State in which they reside." *FERC v. Mississippi*, 456 U.S. 742, 767 (1982) (alterations omitted) (quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845 (1976)). But if forty-nine *other* States could *also* "control[] commerce occurring wholly outside the[ir] boundaries," *Healy*, 491 U.S. at 336, American business might well grind to a halt.

Legato Vapors, LLC v. Cook, 847 F.3d 825 (7th Cir. 2017), illustrates the regulatory cacophony that could ensue. There, the court confronted an Indiana law dictating for manufacturers that sold certain products (vapor pens and liquids used in e-cigarettes) in Indiana "the design and operation of *out-of-state* production facilities, including requirements for sinks, cleaning products, and even the details of contracts with outside security firms and the qualifications of those firms' personnel." *Id.* at 827. The Seventh Circuit recognized that forcing out-of-state manufacturers to abide by the laws of their own resident State *as well as* the laws of other States (like Indiana) posed a "clear risk of multiple and inconsistent regulations." *Id.* at 837; *see also id.* at 835 ("Of the many requirements [in Indiana's law], there are countless possible variations. That one [S]tate might demand double-basin steel sinks and another demand single-basin porcelain sinks [be used in cleaning the manufacturers' facilities] is just one example"). The Seventh Circuit thus invalidated Indiana's law based on this Court's repeated admonitions that "a state may not impose its laws on commerce in and between other states." *Id.* at 831.

3. Much like the Indiana law invalidated in *Legato Vapors*, Proposition 12 imposes California's regulatory standards on out-of-state businesses and threatens "to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337.

California consumes 13% of U.S.-produced pork, Pet. App. 9a; while 99.87% of pork consumed in California comes from farms outside of California, Pet. App. 80a, 150a-151a. At present, hardly any commercially-bred sows in the United States are housed in accordance with California's Proposition 12. Pet. App. 151a, 185a-186a, 204a. But if a California business sells pork that was raised by a farmer in a different State in a manner that does not accord with California's Proposition 12, the California business commits *a crime* punishable by a $1,000 fine or a 180-day prison sentence (and is also subject to a civil action for damages). Cal. Health & Saf. Code § 25993(b).

Proposition 12 provides that California businesses can shift the burden of compliance onto interstate suppliers by allowing "written certification [of compliance] by the supplier" to serve as a defense to a violation. *Id.* § 25993.1. California's proposed implementing regulations would require all distributors that ship pork to California, whether in-state or out-of-state businesses, to maintain records that document "the identification, source, supplier, transfer of ownership, transportation, storage, segregation, handling, packaging, distribution, and sale" of covered pork. Cal. Dep't of Food and Agric.,

Proposed Regulations, Animal Confinement, Proposed Second Modified Text, §§ 1322(b), 1322.5(b) (proposed June 9, 2022) (to be codified at 3 Cal. Code Regs. § 1320 *et seq.*). Out-of-state businesses must also allow California inspectors into their facilities. *Id.* § 1322.3. Similarly detailed requirements apply up and down the supply chain regardless of whether a business is in-state or out-of-state. *See id.* § 1322.8(b) (end users), § 1326.2 (producers). While Proposition 12 envisions retailers shifting this massive burden onto out-of-state businesses in the supply chain, that is cold comfort even for sophisticated retailers who understand the impact this will have especially on their smallest suppliers and, ultimately, on the customers whom all retailers serve.

The Ninth Circuit acknowledged that petitioners plausibly alleged that under Proposition 12, "all or most" of the non-California farmers that produce 99.87% of the pork consumed in California "will be forced to comply with California's requirements" "given the interconnected nature of the nationwide pork industry." Pet. App. 9a. It also acknowledged that the costs imposed by California's law "would mostly fall on non-California transactions, because 87% of the pork produced in the country is consumed outside California." Pet. App. 9a.

Proposition 12 would thus require farmers in many different States to raise their sows according to California's animal-confinement standards so that their pork products would be eligible for sale in California down the supply chain. A State like Iowa,

where farmers raise one-third of the Nation's pigs,[28] will suddenly discover that farms in Alvord, Independence, and Washington, Iowa are controlled by California, a State that contains almost no pig farms and in which Iowa pig farmers have no political say-so. In consequence, unless Iowa regulates its own farms even *more* onerously than California, Iowa and its voters are effectively powerless to determine the level of regulation appropriate for farms on Iowa's soil—and California can thereby "curtail or prohibit [other] States' prerogatives to make legislative choices respecting subjects the States may consider important." *FERC*, 456 U.S. at 767.

4. Allowing regulations that interfere with the sovereignty of other States would also "tend[] to beget retaliating regulations," Madison, *Vices*, *supra* at 363, and "give[] occasions of dissatisfaction between the States," The Federalist No. 22 (A. Hamilton).

California's newfound ability to regulate pig farms and farmers in other States could prompt other States to impose arduous standards on agricultural industries concentrated in California. The potential for mischief would hardly be limited to disagreements between States over the best farming practices. Labor laws might become another battleground, as some States demand that all goods sold within their borders be manufactured by workers paid at a preferred minimum wage, while other States insist that all

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[28] *See* Iowa Pork Producers Ass'n, *Iowa Pork Facts*, https://www.iowapork.org/news-from-the-iowa-pork-producers-association/iowa-pork-facts/ (last visited June 16, 2022).

goods sold in their territory be produced by workers with right-to-work protections.

If each State began enacting its own versions of Proposition 12 to project their provincial standards into other States, the regulatory thicket facing supply chain businesses—including farmers, wholesalers, distributors, general merchandisers, restaurants, retailers, and grocers—would be practically unnavigable. *See Healy*, 491 U.S. at 336 (noting that a court should consider "what effect would arise if not one, but many or every, State adopted similar legislation"). At worst, retailers and restaurants (or businesses further up supply chains) transacting within a single State could find those transactions simultaneously controlled by fifty States' competing and potentially conflicting regulatory regimes. At "best," a race to the regulatory top would take place, and the single State with the most onerous regulatory preferences would promulgate the de facto law of all fifty States. The threat is not just theoretical. Massachusetts in 2016 passed a law similar to California's in operation, but containing Massachusetts' own preferred sow-housing standard, which is scheduled to take effect in August 2022. *See* 2016 Mass. Acts Ch. 333 §§ 3-6 (requiring Massachusetts businesses, on pain of a civil fine, to ensure that *any* farmers supplying them with pork products house sows in accord with Massachusetts' sow-housing standards).

The millions of workers involved in the Nation's retail and restaurant supply chains would be caught in the middle. And their industries would be subject to an impossible choice: attempt to segregate products

to meet the regulatory requirements of up to fifty sub-national markets (which would require sacrificing scale-based efficiencies), or work to ensure that all business operations comport with the regulatory dictates that might be imposed by any single State. Either choice threatens to produce the very "economic Balkanization . . . among the States" that the Framers hoped to prevent at the Philadelphia Convention. *Hughes*, 441 U.S. at 325.

5. Rather than rule that Proposition 12, as alleged, unconstitutionally controls commerce wholly within other States, the Ninth Circuit declared that this Court's *Healy* line of cases amount to "overbroad . . . dicta" that "cannot mean what [they] appear[] to say." Pet. App. 7a. The Ninth Circuit suggested that States *can* enact intrusive laws that interfere with other States' sovereignty, that threaten retaliation by other States, and that lead to competing and simultaneous regulation—so long as those laws are not "price control or price affirmation statutes." Pet. App. 8a (quoting *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)).

That "price-control-only" rationale is not supported by *Walsh*. The *Walsh* Court addressed the constitutionality of a Maine statute designed to reduce prescription drug prices that the challenger sought to analogize to the price control laws invalidated in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and *Healy*, 491 U.S. 324.[29] This Court rejected the comparison of the Maine statute to the

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[29] *See* Br. of Pet'r, *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 2002 WL 31120844, at *28-31 (U.S. filed Sept. 20, 2002).

laws invalidated in those cases, concluding that the Maine statute did not "regulate the price of any out-of-state transaction" and thus was "unlike the price control or price affirmation statutes" invalidated in *Baldwin* and *Healy*. *Walsh*, 538 U.S. at 669 (quotation omitted). In so concluding, *Walsh* merely rejected the comparison presented by the petitioner; the *Walsh* Court did not suggest that price control or price affirmation laws are the *only* kind of state laws that can impermissibly intrude on the sovereignty of other States.

The Ninth Circuit acknowledged that a "broader understanding" of the Constitution's State sovereignty protections might apply beyond that specific context. Pet. App. 9a-10a. But whatever the precise contours of such constitutional protection of State sovereignty, the Ninth Circuit decreed that it could never cover "state laws that regulate only . . . the sale of [a] product in the state" as any "effect" such laws might have on commerce in other States would be "indirect" rather than "direct." Pet. App. 10a.

None of this Court's precedents support the Ninth Circuit's head-in-the-sand conclusion. This Court's doctrine calls for a court to evaluate the "practical effect" of state laws to determine whether they have an impermissible effect in how they "interact with the legitimate regulatory regimes of other States." *Healy*, 491 U.S. at 336. Thus, state laws may be struck down as overly intrusive of other States' sovereignty even if their practical effects on commerce wholly within these other States are the result of "regulat[ion] by indirection." *Baldwin*, 294 U.S. at 524; *see also, e.g.*,

Brown-Foreman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583 (1986) (the fact that New York's liquor law was "addressed only to sales of liquor in New York is *irrelevant* if the 'practical effect' of the law is to control prices in other states" (emphasis added)).

The fact that Proposition 12's penalties are nominally triggered by sales in California does not insulate that law from scrutiny. Indeed, a scheme akin to Proposition 12 appears to be exactly what this Court had in mind when it explained that "States and localities may not attach restrictions to . . . imports to control commerce in other States," as "[t]o do so would extend . . . police power beyond . . . jurisdictional bounds." *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 393 (1994) (citing *Baldwin*, 294 U.S. at 524); *see also Baldwin*, 294 U.S. at 524 (States cannot "condition importation [of goods] upon proof of a satisfactory wage scale" paid in other States to the workers who produce them).

6. Invalidating California's Proposition 12 would not require, as the Ninth Circuit suggested, an "overbroad" or boundless understanding of the Constitution's structural protection of State sovereignty. Pet. App. 7a. State laws imposing only *de minimis* burdens on commerce occurring in other States could hardly be said to undermine "the legitimate regulatory regimes of other States." *Healy*, 491 U.S. at 336. And state laws, like Proposition 12, that in practical effect impose their burdens *almost entirely* on wholly out-of-state businesses that lack a voice in the regulating State's political process may be properly treated as more intrusive and thus subject to

greater judicial scrutiny. *Compare Healy*, 491 U.S. at 336 (explaining that this constitutional protection is concerned with "the autonomy of the individual States within their respective spheres"), *with West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) ("'[T]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse'" (quoting *Clover Leaf Creamery*, 449 U.S. at 473 n.17)).

The Constitution's concern for State sovereignty ultimately demands that other States be precluded from "impos[ing] [their] own policy choices on neighboring States." *BMW*, 517 U.S. at 568-72. Because that is precisely what California's Proposition 12 aims to do—decide for the Nation how farms and farmers in the other forty-nine States must be regulated—that law cannot stand.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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