

No. 21-468

In The
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, *et al.*,
Petitioners,

v.

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

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

**BRIEF OF THE CANADIAN PORK COUNCIL,
OPORMEX, AND THE ILLINOIS PORK
PRODUCERS ASSOCIATION AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*¹

Amicus Curiae the Canadian Pork Council is a not-for-profit federation of nine provincial pork-industry associations representing 7,000 farms in Canada. Its mission is to advance, promote, and protect the excellence of Canadian pork production through effective advocacy, programs, and communication. Canada is the third-largest pork exporter in the world, and Canadian farmers export to the United States significant quantities of finished pork products and live hogs.

Amicus Curiae Unificación Nacional Porcícola, A.C., known commercially as OPORMEX, is a trade organization representing Mexican pork producers. Its mission is to contribute to making quality pork products available to consumers in Mexico and throughout the world with safety, added value, and sustainability.

Amicus Curiae the Illinois Pork Producers Association is an agricultural trade association representing more than 1,600 pork producers throughout Illinois who collectively employ more than 57,000 Illinois citizens, contribute more than \$13.8 billion to the Illinois economy through hog production and processing, and have various upstream and downstream business partners, including other farms and enterprises. Its mission is to provide producers with services that enhance profitability and consumer preference for pork. Each year, independent Illinois pork producers import

¹ All parties received timely notice and consented to the filing of this brief. No party wrote any portion of this brief, and no person or entity other than the *amici curiae* listed above made any monetary contribution toward this brief.

more than 100,000 head of feeder hogs born on sow farms in Canada.

California's Proposition 12 regulates the housing space that farmers must provide for sows bred for pork production. It forces the pork producers represented by the *Amici Curiae* to either (i) endure significant up-front costs and operational disruptions and ongoing expenses and compliance obligations to comply with Proposition 12, or (ii) lose the opportunity to sell pork and hogs in California and, for Canadian and Mexican producers, the United States. The *Amici Curiae* have a significant interest in protecting their members from Proposition 12's devastating consequences to their livelihoods.

SUMMARY OF ARGUMENT

California's Proposition 12 applies only to pork products sold within the State, but what it regulates is *not* conditions at the point of sale. Proposition 12's tentacles spread far beyond California, reaching across the United States' borders into Canada and Mexico and requiring hog farmers there to follow California's stringent animal-welfare standards.

Proposition 12's disruptive effect on foreign trade is among its constitutional defects. "Foreign commerce is pre-eminently a matter of national concern," and in matters of "foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 448 (1979) (quoting *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)). This "need for federal uniformity is no less paramount in ascertaining the neg-

ative implications of Congress' power to regulate Commerce with foreign Nations under the Commerce Clause." *Id.* at 449. Thus, "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (plurality).

A searching look at Proposition 12 reveals that the law impermissibly regulates interstate and foreign commerce, in violation of the dormant Commerce Clause. As the Canadian Government explained to California, Proposition 12 would have "detrimental impacts on the integrated North American market"—especially if other States follow suit and implement their own animal-welfare requirements. App. 2a.

First, Proposition 12 regulates commerce occurring wholly in Canada and Mexico. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). The pork industries in those countries deeply intertwine with the United States' supply chain and share similar structures. Like farmers in the United States, Canadian and Mexican hog farmers often specialize in one phase of the highly segmented production process—whether it be sow farms, nursery barns, finishing farms, or slaughter and processing plants. *See Pet'rs Br.* 11-12. As in the United States, it also is nearly impossible to trace a particular pork product back through the supply chain to the original breeder sow. *See id.* at 12. Thus, to comply with Proposition 12, Canadian and Mexican sow farmers would need to reconfigure housing facilities for *all* breeder sows—even for sows whose offspring would never touch California—or implement onerous segregation practices. *See id.* at 14-16. So they too must then open their doors to certification and auditing by California officials.

California's sole justification for Proposition 12 is animal welfare. But animal welfare is no more subject to a uniform international standard set by a single State than many other crucial subjects of legislation. Mexico and Canada attend to animal welfare and have their own criteria for the care and handling of pigs—criteria that, in many respects, take a more holistic approach than California, and conflict with Proposition 12's housing-space requirements. California's extraterritorial regulation of Mexican and Canadian sow farms would thwart those nations' own considered choices about how to protect animal welfare.

Second, Proposition 12 fails the balancing test of *Pike v. Bruce Church* because it would impose burdens on foreign commerce that clearly exceed any putative local benefits. For those pork producers who are able to meet California's stringent housing-space requirements, a substantial capital investment would be required. And many small pork producers would be unable to comply, and would either shutter their doors or halt exporting to the United States rather than undertake a substantial overhaul of their production facilities.

Third, Proposition 12 impermissibly frustrates federal trade with Canada and Mexico. It interferes with the United States' obligations under the U.S.–Mexico–Canada Free Trade Agreement by imposing regulatory measures on Canada and Mexico that lack scientific support and that restrict trade more than necessary. And it has already offended Canada, one of the United States' most important trading partners.

For each of these reasons, this Court should reverse.

ARGUMENT**PROPOSITION 12 VIOLATES THE
COMMERCE CLAUSE****A. Proposition 12 violates the Commerce
Clause because it controls conduct within
Canada and Mexico.**

A State “statute that 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*, 491 U.S. at 336. That is so “regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Id.* To determine whether a regulation exceeds the enacting State’s authority, the “critical inquiry” is whether the regulation’s “practical effect” would be “to control conduct beyond the boundaries of the State.” *Id.*

Proposition 12 controls conduct occurring far beyond California’s borders. It dictates housing-space requirements for breeding sows, even though “99.87% of the pork consumed” in California “comes from hogs born on farms outside the State.” Pet’rs Br. 8. The sow farmers whose conduct California’s far-reaching law would control are located not only in other States, but in Canada and Mexico too. *See* Cal. Health & Safety Code § 25992 (no exceptions for out-of-State or foreign producers). California’s regulation reaches across foreign borders into other nations, and would disrupt an integrated North American industry.

Proposition 12 impermissibly attempts to control conduct occurring wholly within Canada and Mexico in three main ways.

1. Canadian and Mexican producers would be forced to comply with Proposition 12’s strict housing-space requirements even for sows with no connection to California.

As in the United States, the pork production industry in Canada and Mexico is highly segmented. The industry includes (i) sow farms where breeder pigs are raised; (ii) nursery barns that house weaned piglets until they reach a certain weight; (iii) finishing farms where larger pigs—known at this stage as “feeder pigs”—reach their market weight; and (iv) slaughter, processing, and packing facilities.

The North American pork industry is integrated at all stages of this segmented process. Last year alone, Canada exported close to 5 million feeder pigs, more than 1.5 million market hogs, and more than 1.4 million metric tons of finish pork products to the United States.² Similarly, in 2021, Mexico exported more than 80,000 tons of pork products to the United States.

Yet many pigs and pork products exported by Canada and Mexico never enter California. And Canadian exporters generally cannot control where the pork products made from their exported hogs are distributed and sold.

² See *Livestock Exported to the United States*, Statistics Canada, [https://agriculture.canada.ca/en/market-information-system/rp/index-eng.cfm?action=gR&r=191&signature=0515177AD607D9565B612C32CEB31847&pdctc=&pTpl=1#wb-cont;Pork exports by month](https://agriculture.canada.ca/en/market-information-system/rp/index-eng.cfm?action=gR&r=191&signature=0515177AD607D9565B612C32CEB31847&pdctc=&pTpl=1#wb-cont;Pork%20exports%20by%20month), Statistics Canada, <https://agriculture.canada.ca/en/agriculture-and-agri-food-canada/canadas-agriculture-sectors/animal-industry/red-meat-and-livestock-market-information/trade/red-meat-exports-month>.

Proposition 12 would require U.S. farmers, packers, and distributors who want to preserve the ability to sell pork products in California—and still source pigs from Canada—to trace those pigs back to a particular breeding sow. That process would be impracticable at best and impossible at worst, given the number of transactions between the sow farmer and the consumer, and the number of industry participants involved—from sow farmer to nursery to finisher to packer to distributor to retailer to consumer.

Proposition 12's inevitable effect, then, would be to require that *all* hogs and processed pork products exported to the United States be traced to sows housed in compliance with Proposition 12—whether or not those hogs or the resulting pork products ever enter California.

What's more, Proposition 12 would dictate the housing requirements for breeding sows used to produce pork products that *never even reach the United States*—let alone California. As in the U.S. market, Canadian and Mexican packers process hogs received from different sources into different cuts of pork to be sold in Canada or Mexico, the United States, and other foreign markets. It is impossible to trace every pork product to a particular sow housed in a particular way. To preserve their ability to ship pork products into the U.S., packers and processors would need to ensure that *all* products come from breeder sows that comply with Proposition 12. It is inevitable that some of that pork would be sold in Mexico and Canada or exported to other foreign markets.

These effects also hurt the ability of Mexico and Canada—and the United States—to trade in *other* foreign markets. As Canada has warned, Proposition

12’s “additional costs and disruptions to the integrated North American market will make the United States and Canada less competitive relative to other nations and trading blocs.” App. 2a.

2. Proposition 12’s implementing regulations would force Canadian and Mexican producers to comply with California’s intrusive inspection, recordkeeping, and auditing requirements.

The California Department of Food and Agriculture (“CDFA”) promulgates rules and regulations implementing Proposition 12. *See* Cal. Health & Safety Code § 25993(a). Even if it were possible to draft rules that would advance California’s legitimate interests without directly regulating business elsewhere, California has not even tried. Instead, the CDFA’s draft rules³ confirm Proposition 12’s extraordinary extra-terrestrial reach.

The draft rules provide that “*any out-of-state* pork producer that is keeping, maintaining, confining, and/or housing a breeding pig for purposes of producing whole pork meat, from the breeding pig or its immediate offspring, for human food for commercial sale in California, shall hold a valid certification issued pursuant to [the draft rules] as a certified operation.” Draft Rules art. 3 § 1322.1(b) (emphasis added). The rules expressly apply to operations both “domestic or foreign.” *Id.* § 1326.9(a).

To “receive or maintain certification,” producers who maintain breeding sows *anywhere in the world*

³ Second 15-Day Notice of Modified Text Relating to Animal Confinement (June 9, 2022), https://www.cdfa.ca.gov/ahfss/pdfs/regulations/AnimalCare-Second_15-day_Comment_Period_Documents.pdf (“Draft Rules”).

must permit “on-site inspections” by a “certifying agent,” by “representatives” of California’s Department of Food and Agriculture, or both, *id.* § 1326.1(a), and must permit inspectors to “access . . . pastures, fields, structures, and houses where covered animals and covered animal products may be kept, produced, processed, handled, stored or transported,” *id.* § 1326.1(a)(3).

Sow farmers also “must maintain records concerning the production and distribution of covered animals and/or covered products.” *Id.* § 1326.2(a). The record-keeping requirements are onerous: For every sow “identified or represented as compliant with” Proposition 12, the producer must document, among other things:

- “all covered animal and/or covered product transactions for the preceding two-year period”;
- “the production, processing, handling, packaging, storage, transportation, or sale of covered animals or covered products”;
- and “the size of the certified operation, the quantity of covered animals and/or covered products produced or processed from each facility or farm unit in the certified operation, the number of covered animal enclosures for each facility or farm unit, the size of each enclosure, the number of covered animals housed in each enclosure, and the dates of stocking, harvest and production.”

Id. § 1326.2(b)(4)-(6).

On top of all that, sow farmers must permit the CDFA (or its certifying agents) to inspect and audit those records “at the discretion of the certifying agent

or the Department.” *Id.* § 1326.2(c). That audit may happen “by on-site inspection,” “email, phone, teleconference, or any combination thereof.” *Id.* In other words, Proposition 12 requires hog farmers to open their doors and records to agents of the State of California, no matter their location. A more invasive and far-reaching animal-welfare regulation is hard to imagine.

Proposition 12’s complex certification, recordkeeping, inspection, and audit requirements would apply to sows housed by foreign producers on foreign soil—even if those particular sows and their offspring never produce meat sold in California. And, if this Court were to uphold Proposition 12, other States could follow suit, forcing Canadian and Mexican sow farmers to navigate an ever-growing thicket of stringent, State-imposed recordkeeping requirements.

3. Proposition 12 would interfere with the legitimate regulatory regimes in Canada and Mexico.

“[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Healy*, 491 U.S. at 336-37. Therefore, when considering whether a statute has an impermissible extraterritorial reach, this Court evaluates “how the challenged statute may interact with the legitimate regulatory regimes of other States.” *Id.* at 336.

For years, Mexico and Canada have regulated animal welfare in their countries without dictates from California. In Mexico, the Federal Animal Health Act of 2007 empowers the Secretariat of Agriculture, Livestock, Rural Development, Fisheries and Food to safeguard the health and welfare of

animals used in farming. *See Animal Protection Index (API) 2020: Mexico*, World Animal Protection, http://api.worldanimalprotection.org/sites/default/files/api_2020_-_mexico_0.pdf. The Secretariat sets measures of good husbandry practices and promulgates rules for ensuring animal welfare—a concept that to Mexico means providing comfort, peace, protection, and security for animals during breeding, husbandry, use, transportation, and slaughter. *See id.* With Proposition 12, however, California would scrap Mexico’s legitimate, existing regulatory scheme to replace it with California’s preferences.

It would do the same in Canada. Canada is every bit as concerned about animal welfare as California. But Canada seeks to promote that welfare by different *means*. Unlike California, Canada has determined that “focusing solely on [the] one area [of housing] may lead to poor welfare in other aspects of the animal’s well-being.” App. 2a. By projecting California’s animal-welfare regulations onto Canadian pork producers, Proposition 12 tries to interfere with Canada’s sovereign, well-established, and scientifically backed regulatory regime for the handling of pigs within Canada.

In 2014, Canada’s National Farm Animal Care Council (NFACC) promulgated the Code of Practice for the Care and Handling of Pigs. *See Code of Practice for the Care and Handling of Pigs* (2014), NFACC, <https://www.nfacc.ca/codes-of-practice/pigs#Various> (“Code”). The Code contains highly specific requirements for the housing, care, and handling of pigs. *See id.* § 1.2 & App.B. Canada considers the Code’s “holistic approach” to the care and handling of farm animals

“to be the best way to ensure the comfort and well-being of animals.” App. 1a. It believes that “welfare is more complex than just housing and an animal’s physical accommodation.” App. 1a. The Code includes guidelines for determining individual stall sizes for gestating gilts and sows, and recommends minimum floor-space allowances for gilts and sows housed in groups. *See Code* § 1.2 & App.B.

The NFACC Code, though originally adopted by a non-governmental organization, has the force of law. Five Canadian Provinces have directly incorporated the Code into their animal care regulations through legislation.⁴ The remaining Provinces have adopted animal-welfare regulations incorporating similar generally accepted industry practices.⁵

The Code is also imposed indirectly across Canada through the Canadian Ractopamine-Free Pork Certification Program.⁶ That program requires producers

⁴ *See* Manitoba Animal Care Regulation, M.R. 126/98 (Can.); New Brunswick General Regulation—Society for the Prevention of Cruelty to Animals Act, N.B.R. 2000-4 (Can.); Newfoundland and Labrador Animal Health Protection Regulations, NLR 35/12 (Can.), Section 4(e); Prince Edward Island Animal Welfare Act Animal Protection Regulations, P.E.I.R. EC71/90 {rev} by EC510/17/17 (Can.); Saskatchewan Animal Protection Regulations, R.R.S 2018, c A-21.2 Reg 1 (Can.).

⁵ *See* Alberta Animal Protection Act, R.S.A. 2000, c A-41 (Can.); British Columbia Prevention of Cruelty to Animals Act, R.S.B.C. 1996, c 322 (Can.); Quebec Animal Welfare and Safety Act, C.Q.L.R. c B-3.1 (Can.); Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c O.36 (Can.).

⁶ *See* Annex T: Canadian Ractopamine-Free Pork Certification Program (CRFPCP), Canadian Food Inspection Agency, <https://inspection.canada.ca/exporting-foodplants-or-animals/food-exports/food-specific-export-requirements/meat/crfpcp/eng/1434119937443/1434120400252>.

to participate in the Canadian Pork Council’s animal-care program known as PigCARE, which incorporates the Code. *See PigCare*, Canadian Pork Council, <http://www.cpc-ccp.com/pigcare>. Because many countries—including the United States—require Ractopamine-Free Certification, all of Canada’s federally inspected pork processors participate in PigCARE and require their suppliers of pigs to do so. In short, the Code applies essentially to all Canadian producers that export hogs or pork products to the United States.

Proposition 12 would interfere with Canada’s well-established animal-welfare regime and impose California’s conflicting view of the best animal-welfare practices on pork producers regulated by different sovereigns. The Code expressly permits farmers to house sows in group pens with between 19 and 26 square feet per sow, depending on the feeding system, flooring, and group size. *See Code* § 1.2 & App.B. The Code also permits farmers to house sows in individual breeding pens during the transition period between weaning a litter through rebreeding. *Id.* § 1.1.2-1.1.4. By contrast, Proposition 12 prohibits producers from confining a sow with less than 24 square feet of usable space per animal—even during that same transition period. *See Cal. Health & Safety Code* § 25991(e)(3); *id.* § 25992.

Proposition 12 thrusts on Canadian and Mexican producers “inconsistent legislation arising from the projection of” California’s “regulatory regime into the jurisdiction” of foreign nations. *Healy*, 491 U.S. at 337. It thus controls conduct beyond California’s boundaries and exceeds the inherent limits of California’s authority. *See id.* at 336-37.

B. Proposition 12 violates the Commerce Clause because it impermissibly burdens commerce with Canada and Mexico.

Proposition 12 also fails the balancing test of *Pike v. Bruce Church*. Even when a “statute regulates even-handedly” (which we will assume in this section, without conceding, that Proposition 12 does), the question under *Pike* is whether the “burden imposed on [interstate or foreign] commerce is clearly excessive in relation to the putative local benefits.” 397 U.S. 137, 142 (1970).

This Court has never addressed how to apply the *Pike* balancing test when a state regulation burdens foreign commerce together with interstate commerce. Several courts of appeals have held that the traditional *Pike* analysis applies. *See Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41, 46 (1st Cir. 2005) (“[A]lthough the language of dormant Commerce Clause jurisprudence most often concerns interstate commerce, essentially the same doctrine applies to international commerce.”); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014-16 (9th Cir. 1994) (applying *Pike* to analyze burden on foreign commerce). If anything, “a more searching review” must be undertaken of state laws that burden international as well as interstate commerce. *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 912 (3d Cir. 1990) (citing *Japan Line, Ltd.*, 441 U.S. at 446); *Piazza’s Seafood World, LLC v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006) (holding that, in the Foreign Commerce Clause context, additional “considerations come into play” beyond the traditional *Pike* test).

Proposition 12 attempts to impose considerable burdens on foreign commerce. It would require Canadian and Mexican producers who want to continue exporting pigs and pork products to the United States to spend millions in upfront capital costs, implement labor-intensive production practices, comply with new and onerous recordkeeping requirements, and—in a particular affront to foreign sovereignty—undergo regular on-site inspections and audits by California bureaucrats. *See* § I.A, *supra*. For those pork producers able to meet Proposition 12’s excessive requirements, the Canadian Pork Council estimates that converting housing pens and barns alone would cost Canadian pork producers between USD\$200,000 and USD\$600,000 per 1,000 breeding pigs. Br. of Canadian Pork Council (Oct. 29, 2021), App. 2a.

In reality, though, small pork producers would be *unable* to meet Proposition 12’s mandates due to the operational burdens and steep costs required. Small, independent sow farmers are less likely to have access to the kind of capital needed to reconfigure their sow housing facilities. And the need to document the housing conditions of the sow that each hog came from would burden independent nurseries and finishing farms. Proposition 12 would clobber pig farmers in rural parts of Canada and Mexico, all because California thinks it knows better how to protect animal welfare than other responsible officials throughout North America.

Respondents asserted in their brief in opposition that large suppliers like Tyson Foods—one of the largest food companies in the United States—would have little difficulty complying with Proposition 12. BIO 18-19. But Tyson Foods hardly represents the

rural pig farmers and small businesses that fill Mexico's and Canada's pork industries. In Mexico, approximately 20-30% of the country's pork output comes from "rustic production systems," which involve "keeping animals in small extensions of land in or near the housing yard." Losada-Espinosa, N., *et al.*, *The Welfare of Pigs in Rustic and Technified Production Systems . . .*, VETERINARIA MÉXICO OA, Vol. 4, No. 4 (2017), at 2, <https://veterinariamexico.fmvz.unam.mx/index.php/vet/article/view/521/528>. In Canada, the average number of pigs per farm in 2021 was 1,851. See *Hog Farm Data*, Statistics Canada, <https://www.cpc-ccp.com/file.aspx?id=bff3d735-e80f-4024-9151-fce2cb4d0ce5>. In some Provinces, the typical farm is even smaller. For instance, British Columbia reported 770 active farms with an average of only 112 pigs per farm—a far cry from a major food giant. *Id.*

Further down the supply chain, Canada also expects that Canadian packers and processors that source pigs from multiple farmers would need to segregate Proposition 12-compliant pork from pork that complies with Canada's different scheme for protecting animal welfare. Br. of Canadian Pork Council (Oct. 29, 2021), App. 2a-3a. The additional operational costs of segregating California-compliant pigs at nurseries, finishing farms, and processing plants would be substantial.

Indeed, the Canadian and Mexican pork industries witnessed comparable segregation costs first-hand when the United States—at the federal level, where proper regulations belong—implemented mandatory "country-of-origin" (COOL) labeling requirements for

pork and beef products in 2008.⁷ To comply with the COOL regulations, foreign-born pigs had to be separated from domestic-born pigs (and further segregated based on the location where they were raised), generating substantial production costs throughout the supply chain.

Those costs and operational burdens would harm not only producers in Canada and Mexico, but also producers in the United States. Proposition 12 would force producers to pass California-only compliance costs along to their customers in the United States. It would force other producers—particularly those small, independent farmers in Mexico and Canada who lack the resources necessary to overhaul production to comply with Proposition 12—out of business. In combination, Proposition 12 would increase the cost and reduce the supply of Canadian and Mexican pork, hurting (among many others) farmers in Illinois and other States whose businesses depend on importing hogs from Canada.

At just one State's insistence, Proposition 12 would impose vast burdens throughout the North American supply chain. And those burdens would fall almost entirely on sow and hog farmers *outside* California, in other States and in other countries. Californians consume 13% of the pork eaten in the United States, yet California has only about 0.133% of the national

⁷ Although the COOL regulations had the virtue of being imposed at the federal level rather than by a single State with global ambitions, they had the fatal defect of violating the United States' treaty obligations. *See* pp. 20-21, *infra*. California seems to hold the bizarre belief that the Commerce Clause allows a State to frustrate the United States' treaty obligations in a way that the federal government could not.

breeding-pig herd. Pet’rs Br. 8. As a result, Californians import more than 99% of the pork they consume. *Id.*

The disproportionate burdens on international commerce that Proposition 12 would impose far exceed any putative local benefits. California’s justification for Proposition 12 is “to prevent animal cruelty by phasing out extreme methods of farm animal confinement.” Pet. App. 37a. But virtually every sow that Proposition 12 affects is housed outside California, and many are regulated by regimes that protect animal safety by following a different philosophy. California’s arrogant notion that it knows better than other States and nations how to protect animals is a far cry from a *local* benefit that could justify Proposition 12’s extreme burdens on interstate and foreign commerce. States may not cite out-of-state concerns to justify “restrictions to exports or imports” that “control commerce in other states.” *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994). “To do so would extend the [State’s] police power beyond its jurisdictional bounds.” *Id.*

C. Proposition 12 violates the Commerce Clause because it frustrates federal trade policy with Canada and Mexico.

“It is crucial to the efficient execution of the Nation’s foreign policy that ‘the Federal Government speak with one voice when regulating commercial relations with foreign governments.’” *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 100 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)) (citing *Japan Line, Ltd.*, 441 U.S. at 451) (alteration adopted). One way a state law can violate the Commerce Clause is by “impair[ing] federal uniformity in an area where

federal uniformity is essential” or “prevent[ing] this Nation from ‘speaking with one voice’ in regulating foreign trade.” *Japan Line*, 441 U.S. at 448, 452.

Proposition 12 impermissibly frustrates federal trade policy with Canada and Mexico—an area where federal uniformity is essential. The United States’ trade agreements reflect a clear policy of free and open trade in North America.

The U.S.-Mexico-Canada Free Trade Agreement incorporates the substantive obligations of the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (“TBT Agreement”). *See* Agreement Between the United States of America, the United Mexican States, and Canada (July 1, 2020), Ch. 11, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>. The TBT Agreement requires that a member state’s regulatory measures affecting trade not discriminate, not restrict trade more than necessary, support a legitimate objective, and have scientific support. *See id.* arts. 2.1, 2.2, and 3.

Proposition 12 violates those treaty obligations. To begin, it lacks scientific support. California’s own notice of its proposed regulation to implement Proposition 12 acknowledges that “[t]here are no quantitative studies that document or measure the effect of purchasing . . . whole pork meat from farms [*sic*] animals not confined in a cruel manner for people in California.” Proposed Regulations—Animal Confinement, CDFA, at 12, https://www.cdfa.ca.gov/ahfss/pdfs/regulations/AnimalConfinement1stNoticePropReg_05252021.pdf. The notice also states that “[t]his proposal does not directly impact human health and welfare of

California residents, worker safety, or the State's environment." *Id.* at 6, 12. And California acknowledged that Proposition 12's space requirements "are not . . . accepted as standards within the scientific community to reduce human food-borne illness" or "other human or safety concerns," or "drawn from specific industry standards." Pet. App. 75a-76a.

Proposition 12 is also more trade-restrictive than necessary to further California's stated goal of "pre-vent[ing] animal cruelty." Pet. App. 37a. Canada is a world leader in its balanced approach to animal welfare; its animal-welfare regulations were developed with input from a broad group of stakeholders. Rather than supplant those guidelines with its own, California could allow for an equivalency arrangement with Canada, stating that compliance with the Code of Practice constitutes compliance with Proposition 12. But California has chosen conflict over comity: bullying Canadian and Mexican producers to disregard their own national standards, upend their production streams, and incur significant costs, all to continue trading with one populous State.

Congress repealed a federal statute that imposed similarly burdensome requirements on the trade of pork products between U.S., Canada, and Mexico. The mandatory country-of-origin labeling law required that labels for pork and beef products state the country in which the animal was born, raised, and slaughtered. As discussed above, that requirement saddled meat processors and their supply chains with extraordinary economic burdens arising from the necessity to segregate animals imported from Canada and Mexico.

The WTO Appellate Body found the U.S. law inconsistent with U.S. trade obligations. *See* Appellate Body Reports, United States–Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/AB/R, WT/DS386/AB/R (adopted July 23, 2012); Decisions by the Arbitrator, United States–Certain Country of Origin Labelling (COOL) Requirements, Recourse to Article 22.6 of the DSU by the United States, WT/DS384/ARB, WT/DS386/ARB (Dec. 7, 2015). The WTO later authorized Canada and Mexico to impose trade sanctions on the United States to compensate for the violation, but Congress repealed the law before the sanctions were imposed. Consolidated Appropriations Act 2016, Public Law No. 114-113, § 759 (Dec. 18, 2015). But now California’s Proposition 12 would similarly disrupt the integrated North American pork industry and substantially burden free trade among the United States, Canada, and Mexico.

California’s legislation has “offend[ed] [the United States’] foreign trading partners.” *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983). Indeed, the Canadian Department of Agriculture and Agri-Food has written to United States officials to raise concerns with Proposition 12. *See* App. 1a-4a. The Canadian Government explained that Proposition 12 “will have detrimental impacts on the integrated North American market, increasing costs and reducing efficiencies across the industry, which risks exacerbating food price inflation for consumers.” App. 2a. Canada cited Proposition 12’s “severe negative impacts on thousands of producers outside of California, and even outside of the United States of America.” App. 2a-3a. And Canada urged “the United States to ensure that all animal-welfare legislation

operates within the . . . international trade obligations of the United States under its free trade agreements.” App. 3a.

As the most populous U.S. State, California has the economic might to force those who want to access that large market to bend to its will. But economic might is not constitutional power. California’s egregious overreach passes no conceivable balancing test. This Court should recognize its unconstitutionality.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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June 17, 2022

Counsel for Amici Curiae

APPENDIX

APPENDIX A

Government of Canada Gouvernement du Canada

April 26, 2022

Dr. Julie Callahan
Assistant USTR for Agricultural Affairs and
Commodity Policy
United States Trade Representative

Jason Hafemeister
Acting Deputy Under Secretary for Trade and
Foreign Agricultural Affairs
United States Department of [*sic*]

Re: Proposition 12 in California

Dear Dr. Callahan and Mr. Hafemeister,

In light of the decision by the U.S. Supreme Court on March 28, 2022, to grant *certiorari* to the case brought by the National Pork Production Council and the American Farm Bureau Federation against California's Proposition 12, Canada would like to take this opportunity to raise its concerns with this legislation.

The Government of Canada and Canadian farmers take animal welfare seriously. In fact, our commitment to the welfare of farmed animals is evidenced by the development of Canada's Comprehensive Codes of Practice for the care and handling of farm animals that takes into account a full suite of measures to ensure the safety and comfort of farm animals. Canada considers this holistic approach to be the best way to ensure the comfort and well-being of animals. In scientific and industry expert circles, it has long been acknowledged that welfare is more complex than just housing and an animal's physical accommodation. In

fact, focusing solely on that one area may lead to poor welfare in other aspects of the animal's well-being (e.g., being free from hunger, thirst, malnutrition, pain, injury or distress).

Canada is concerned about the patchwork of legislation and regulations that is being enacted by several U.S. states, including in the large California market, which differs slightly each from the other, both in housing requirements as well as certification requirements. The various legislation, regulations and standards in the various states will have detrimental impacts on the integrated North American market, increasing costs and reducing efficiencies across the industry, which risks exacerbating food price inflation for consumers. Not only will this impact negatively on the profitability and viability of the sector as well as affordability for consumers, but Canada is also concerned that these additional costs and disruptions to the integrated North American market will make the United States and Canada less competitive relative to other nations and trading blocs. A single, federal measure could better facilitate market integration and efficiencies, while pursuing the same policy objective.

Canada is also concerned about the impact and precedent of legislation such as Proposition 12 that takes such a prescriptive approach to one element of animal care, which will have severe negative impacts outside the state creating the legislation. According to California's own statistics, the implementing regulations will apply to zero veal producers and an extremely small number of pork and liquid egg producers within California. However, it will have severe negative impacts on thousands of producers outside of

California, and even outside of the United States of America.

Canada continues to urge the United States to ensure that all animal welfare legislation operates within the parameters of the international trade obligations of the United States under its free trade agreements. Canada would also like to highlight that if California considers any flexibility in the operation of its Proposition 12 implementing regulations that any such flexibility must apply equally to foreign and domestic actors.

Thank you for the opportunity to note our concerns with Proposition 12 in California. If you have any questions, please direct them to the Canadian Embassy in Washington, D.C.

Thank you,

Michelle Cooper

/s/ Michelle Cooper

Director General, Market Access Secretariat

Agriculture & Agri-Food Canada

Digitally signed by Cooper, Michelle

Date: 2022.04.27

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Doug Forsyth

/s/ Doug Forsyth

Director General, Market Access

Global Affairs Canada

Digitally signed by Forsyth, Doug

Date: 2022.04.26

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CC: Nadia Bourély, Minister Counsellor (Economic and Trade Policy), Embassy of Canada in Washington, D.C.

Rana Sarkar, Consul General, Consulate of Canada in San Francisco

Ethan Holmes, Director of Private Sector Engagement, United States Trade Representative