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.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether California's Proposition 12, which attempts to regulate pork production outside California by prohibiting the in-state sale of pork meat that is traceable to a breeding pig that California considers to have been confined in a "cruel manner," Cal. Health & Safety Code § 25990(b) (West Supp. 2022), unduly restricts interstate commerce in violation of the Commerce Clause of the Federal Constitution.

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INTEREST OF THE UNITED STATES

This case concerns a California statute that seeks to change certain industry-standard hog-farming practices on farms outside California based on asserted animal-welfare and health-and-safety concerns. The United States has a substantial interest in this Court's resolution of the question presented, particularly in light of the federal government's statutory responsibilities to guard against disease in livestock in interstate commerce, see Animal Health Protection Act, 7 U.S.C. 8301 *et seq.*, and to oversee the safety of meat produced for human consumption throughout the Nation, see Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.* In

addition, the United States has a substantial interest in ensuring the free flow of interstate commerce.

STATEMENT

1. The Commerce Clause empowers Congress to "regulate Commerce * * * among the several States." U.S. Const. Art. I, § 8, Cl. 3. "Although the Commerce Clause is written as an affirmative grant of authority to Congress," this Court has long held that it also "imposes limitations on the States." *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018). "Th[at] interpretation, generally known as 'the dormant Commerce Clause,'" traces its "roots" to Chief Justice Marshall's opinion in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and it has "played an important role in the economic history of our Nation." *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2459-2460 (2019).

This Court has interpreted the Commerce Clause to provide that "state regulations may not discriminate against interstate commerce" or "impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2091. State laws must instead "regulate even-handedly to effectuate a legitimate local public interest." *Ibid.* (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)) (brackets omitted). If a law does so, then it generally "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Ibid.* (quoting *Pike*, 397 U.S. at 142). Those general principles are "subject to exceptions and variations," *ibid.*, one of which is that a State may not "'project[] its legislation' into other States, and directly regulate[] commerce therein," *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 584 (1986) (quoting *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)). Those rules help avoid

the sort of "rivalries and reprisals that were meant to be averted by [the Framers' plan] subjecting commerce between the states to the power of the nation." *Baldwin*, 294 U.S. at 522.

2. In 2018, California voters enacted Proposition 12, Cal. Health & Safety Code § 25990 *et seq.* (West. Supp. 2022), by ballot initiative. Pet. App. 2a. The stated "purpose" of the measure is "to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers[] and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." *Id.* at 37a.

Proposition 12 forbids "farm owner[s] or operator[s] within" California from knowingly confining any "covered animal"—defined as "any calf raised for veal, breeding pig, or egg-laying hen," Cal. Health & Safety Code § 25991(f) (West Supp. 2022)—"in a cruel manner," *id.* § 25990(a). An animal is considered "[c]onfined in a cruel manner" if it is prevented "from lying down, standing up, fully extending [its] limbs, or turning around freely." *Id.* § 25991(e)(1). Proposition 12 also specifies that breeding pigs must have at least 24 square feet of usable floor space per animal. *Id.* § 25991(e)(3).[1]

In addition, and most relevant here, Proposition 12 prohibits any "business owner or operator" from selling "within the state" "[w]hole pork meat" that the person "knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner." Cal. Health & Safety Code § 25990(b)(2) (West Supp. 2022); see *id.* § 25991(u) (de-

[1] Proposition 12 has various narrow exceptions not relevant here. See Cal. Health & Safety Code § 25992 (West Supp. 2022).

fining "[w]hole pork meat"). Through that sales restriction, California bars the importation of pork meat derived from a hog that is the offspring of a breeding pig housed out of state unless that breeding pig was confined according to California's standards.

A violation of Proposition 12 is a crime in California, and the measure is also enforceable through private civil lawsuits. See Cal. Health & Safety Code § 25993(b) (West Supp. 2022); Cal. Bus. & Prof. Code § 17200 (West Supp. 2022).

The California Department of Food and Agriculture has proposed regulations to implement Proposition 12's animal-confinement requirements. Pet. Reply App. 1a-104a; see Cal. Health & Safety Code § 25993(a) (West Supp. 2022). The proposed regulations would require any "out-of-state pork producer" raising "a breeding pig" or "its immediate offspring" for "purposes of producing whole pork meat * * * for commercial sale in California" to be certified by the State. Pet. Reply App. 14a. To obtain the certification, a pork producer must "[a]llow on-site inspections," at least annually and at such other times as California's inspectors choose, to "pastures, fields, structures, and houses where covered animals * * * may be kept." *Id.* at 32a-33a. Pork producers must also maintain records "in sufficient detail to document" compliance with Proposition 12's requirements, subject to audit and inspection at California's "discretion." *Id.* at 34a-35a.

The California Department of Food and Agriculture has stated in its regulatory analysis that, notwithstanding Proposition 12's asserted concern for consumer "health and safety," Pet. App. 37a, the "[a]nimal confinement space allowances * * * are not based in specific peer-reviewed published scientific literature or

accepted as standards within the scientific community to reduce human food-borne illness * * * or other human or safety concerns," *id.* at 75a-76a. The agency has described Proposition 12 as "not primarily written with the concern or benefit of" human health and safety, and instead as a measure "to prevent cruel confinement of covered animals." *Id.* at 76a.

3. Petitioners are two industry groups that represent farmers and pork producers. Pet. App. 22a. They contend that Proposition 12 violates the Commerce Clause by "regulating pork producers and the pork market outside" California and "plac[ing] excessive burdens on interstate commerce without advancing any legitimate local interest." *Id.* at 230a-232a.

a. Petitioners' complaint contains detailed allegations, supported by affidavits, describing Proposition 12's adverse impact on the interstate pork market. Pet. App. 147a-351a. Because this case comes to this Court on appeal from respondents' successful motions to dismiss for failure to state a claim for relief and for judgment on the pleadings, *id.* at 22a, petitioners' factual allegations must be taken as true at this stage. See *id.* at 4a; see also *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679 (2009).

i. *The Pork Production Process*. Petitioners allege that the pork industry generally employs a segmented production model to promote hog health and achieve economies of scale. Pet. App. 180a-184a. Only a small percentage of hogs stay on the same farm throughout the production process. *Id.* at 184a. Instead, most farms hold hogs only for a specific phase of production, and hogs move to other farms as they develop. *Id.* at 183a-184a. Farms send finished hogs to packers, which

slaughter and butcher the animals and sell the meat to wholesalers or large retailers. *Id.* at 181a.

Pursuant to federal law, the Animal and Plant Health Inspection Service (APHIS), a component of the United States Department of Agriculture (USDA), regulates livestock in interstate commerce "to prevent the introduction or dissemination of any pest or disease." 7 U.S.C. 8305. APHIS has adopted several regulations to prevent hogs from developing diseases that can be passed to humans. See, *e.g.*, 9 C.F.R. Parts 71, 77-78, 85, 166. Another USDA component, the Food Safety and Inspection Service (FSIS), protects "the health and welfare of consumers * * * by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. 602. To fulfill that responsibility, FSIS inspectors examine covered live animals (including hogs) before slaughter for signs of disease, 21 U.S.C. 603(a), and then inspect "carcasses and parts" to ensure they are fit for use as human food, 21 U.S.C. 604. See 9 C.F.R. Parts 309-310; *National Meat Ass'n* v. *Harris*, 565 U.S. 452, 455-458 (2012). Neither APHIS nor FSIS has set minimum-square-feet confinement standards for hogs to protect human or animal health.

ii. *Proposition 12's Impact*. Petitioners allege that Proposition 12 overwhelmingly regulates farms outside of California because only a very small percentage of the hogs slaughtered annually for pork meat throughout the United States are located in California; pork production is instead concentrated in the Midwest and North Carolina. Pet. App. 148a.

Petitioners also allege that "[o]nly a miniscule portion of sows [*i.e.*, breeding pigs] in the U.S. are housed in compliance with all of Proposition 12's require-

ments," which, petitioners maintain, are "inconsistent with industry practices and standards, generations of producer experience, scientific research, and the standards set by other states." Pet App. 152a. According to petitioners, approximately 72% of pork producers house sows throughout gestation in individual stalls of approximately 14 square feet per sow. *Id.* at 185a, 204a. Individual stalls enable sows to avoid aggression or injury from other sows and provide each sow with individual access to food and water without competition. *Id.* at 185a. The stalls prevent sows from turning around as an animal-health and sanitation measure. See *ibid.* The remaining pork producers use group housing and generally provide 16 to 18 square feet per sow. *Id.* at 186a. Neither practice complies with Proposition 12's confinement requirements. *Id.* at 204a.

Petitioners further allege that, in the course of the pork industry's segmented production model, a single hog might be cut into several different cuts of meat, combined with products from hogs raised by different producers, and then shipped to market. Pet. App. 177a, 182a. Petitioners allege that this model makes it difficult to trace pork throughout the supply chain. *Id.* at 181a-182a. Due in part to those tracing difficulties, petitioners allege that wholesalers and retailers that sell pork meat in California will insist that all pork meat be produced in compliance with Proposition 12, even meat that is not ultimately sold into California. *Id.* at 206a.

Petitioners also allege that pork producers would "face severe and costly burdens" to comply with Proposition 12, including reducing inventory, modifying or building new housing structures, and implementing new animal-husbandry methods. Pet. App. 207a-210. Petitioners estimate the total cost of compliance with Prop-

osition 12 at $290-$350 million, translating to an increased production cost of 9.2% per hog that would allegedly be passed on to consumers nationwide. *Id.* at 214a-215a. Petitioners further allege that some smaller farms would be unable to meet those costs and would go out of business or be absorbed by larger companies, thereby increasing consolidation in the industry. *Id.* at 209a, 212a-213a.

Petitioners allege that Proposition 12 would yield no discernable benefits for sows or their offspring, and in fact would harm sows. Pet. App. 219a-220a. The statute's requirement that breeding hogs be able to turn around would effectively ban using the breeding stalls "on which the vast majority of producers rely * * * based on generations of experience," *id.* at 211a, which allegedly would "decrease sow welfare during breeding and gestation" in several ways, *id.* at 221a; see *id.* at 219a-225a.

Finally, petitioners allege that, contrary to Proposition 12's stated purpose, the confinement standards for breeding pigs have "no human health benefits." Pet. App. 225a. Proposition 12 applies only to breeding pigs, but, petitioners allege, such pigs generally do not enter the food chain, and when they do, not as "whole pork meat" regulated by the statute. *Id.* at 226a; see *id.* at 180a. Rather, the covered pork products derive from "the *offspring* of sows," and Proposition 12 does not address the confinement or welfare of those animals. *Id.* at 226a-228a. Petitioners allege that "[t]here is no link between Proposition 12's sow housing requirements and food safety or foodborne illness." *Id.* at 229a.

b. After petitioners filed their complaint, various animal-welfare groups that had supported Proposition 12 intervened to defend the measure. See Pet. App. 3a

n1. The district court granted the state respondents' motion to dismiss for failure to state a claim for relief, and the intervenor respondents' motion for judgment on the pleadings. *Id.* at 21a-35a.

4. The court of appeals affirmed. Pet. App. 1a-20a.

The court of appeals first held that petitioners had failed to plausibly allege "that Proposition 12 has an impermissible extraterritorial effect." Pet. App. 6a; see *id.* at 6a-16a. The court recognized that this Court in *Baldwin* and other cases had found state laws inconsistent with the Commerce Clause for attempting to regulate out-of-state commerce. *Id.* at 6a-7a. But the court of appeals observed that it had previously held, based on *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644, 649 (2003), that the extraterritoriality principle in the *Baldwin* line of cases should be interpreted "narrowly" so as not to bar any state law "'that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices.'" Pet. App. 8a (citation omitted). The court then stated that, even assuming the extraterritoriality principle goes beyond "price-control and price-affirmation" statutes, "[a] state law is not impermissibly extraterritorial unless it directly regulates conduct that is wholly out of state." *Id.* at 9a-10a. The court found that Proposition 12 is not impermissibly extraterritorial because it regulates only "in-state sales." *Id.* at 14a.

The court of appeals also held that petitioners had failed to plausibly allege that Proposition 12 violates *Pike* by imposing burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." Pet. App. 16a (quoting 397 U.S. at 142); see *id.* at 16a-19a. The court did not determine whether Proposition 12 advanced any legitimate local interest.

See *id.* at 19a. Instead, the court rested on its conclusion that petitioners had failed to show that "Proposition 12 imposes a substantial burden on interstate commerce." *Ibid.* The court acknowledged that petitioners had "plausibly alleged that Proposition 12 will have dramatic upstream effects" on out-of-state farmers "and require pervasive changes to the pork production industry nationwide." *Id.* at 18a-20a. But the court held that "increased costs" on out-of-state producers and "higher costs to consumers" "do not," as a matter of law, "constitute a substantial burden on interstate commerce." *Id.* at 19a; see *id.* at 17a-18a (citing *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 127 (1978)).

SUMMARY OF ARGUMENT

A. Informed by the Constitution's history, this Court has interpreted the Commerce Clause to forbid state laws that do not "regulate[] even-handedly to effectuate a legitimate local public interest" or that impose "burden[s]" on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court has further observed that States "ha[ve] no power to project [their] legislation" into other States by directly regulating commerce there. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

B. The court of appeals erred in holding that petitioners failed to state a claim that Proposition 12 is unconstitutional under *Pike*. Proposition 12's primary purpose is to prevent what California considers "cruel[]" treatment of animals by "phasing out" hog-farming methods that other States allow. Pet. App. 37a. But California "has no legitimate interest in protecting" the welfare of animals located outside the State. *Edgar* v. *MITE Corp.*, 457 U.S. 624, 644 (1982). Proposition 12's

sales ban is aimed at "cruelty" to animals that occurs entirely outside California and has no impact within California. The State may not "extend [its] police power [over animal welfare] beyond its jurisdictional bounds" by regulating out-of-state activity with no in-state impact based on a philosophical objection. *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994).

California's other asserted justification for Proposition 12 is protecting "the health and safety of California consumers." Pet. App. 37a. But petitioners plausibly allege that Proposition 12 has no genuine health-and-safety justification. And the California Department of Food and Agriculture has stated that Proposition 12's confinement standards are not "accepted as standards within the scientific community to reduce human foodborne illness." *Id.* at 75a-76a.

Petitioners further allege that Proposition 12 will impose hundreds of millions of dollars in costs on out-of-state pork producers and will actually *diminish* sow welfare. If petitioners prove their allegations, then those substantial burdens on interstate commerce are "clearly excessive in relation to" what petitioners allege to be insubstantial or non-existent "local benefits." *Pike*, 397 U.S. at 142.

C. Because petitioners have stated a claim that Proposition 12 does not advance any legitimate in-state interest, this Court need not determine the scope of the *Baldwin* prohibition on extraterritorial regulation or whether Proposition 12 is independently an impermissible extraterritorial regulation. But whatever the scope of *Baldwin* as a distinct line of dormant Commerce Clause jurisprudence, the court of appeals misread this Court's extraterritorial-regulation cases to preclude only state laws that regulate out-of-state prices. The

reasoning of this Court's decisions indicates that the Commerce Clause is broader: States may not "condition importation" of products on such non-price factors as "proof of a satisfactory wage scale in factory or shop[]." *Baldwin*, 294 U.S. at 524. And States may not otherwise regulate out-of-state entities by banning products that pose no threat to public health or safety based on philosophical objections to out-of-state production methods or public policies that have no impact in the regulating State. See, *e.g.*, *C & A Carbone*, 511 U.S. at 393; *Edgar*, 457 U.S. at 642 (plurality opinion).

ARGUMENT

A. The Commerce Clause Prohibits State Laws That Unduly Restrict Interstate Commerce

This Court "ha[s] long held that" the Commerce Clause, in addition to conferring power on Congress, "prohibits state laws that unduly restrict interstate commerce." *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2459 (2019); see *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018). The Court has observed that, "without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Tennessee Wine*, 139 S. Ct. at 2460.

1. The Commerce Clause safeguards a vibrant interstate market and a cooperative Union of sovereign States

The Commerce Clause reflects a "central concern of the Framers": "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Tennessee Wine*, 139

S. Ct. at 2461 (citation omitted). After the Revolution, "States notoriously obstructed the interstate shipment of goods," "'cutting off the very lifeblood of the nation.'" *Id.* at 2460 (citation omitted); see John Fiske, *The Critical Period of American History: 1783-1789*, at 144-147 (1899). The harm to the new Nation was not solely economic: the States' dueling commercial policies prevented "any harmony [or] cooperation for the general welfare" and created a "perpetual source of irritation and jealousy" that "threaten[ed] at once the peace and safety of the Union." 1 Joseph Story, *Commentaries on the Constitution of the United States* §§ 259-260, at 239-240 (1833) (Story's *Commentaries*). As each State "'legislate[d] according to its estimate of its own interests * * * and the local advantages or disadvantages of its position in a political or commercial view,'" the Union "drift[ed] toward anarchy." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533 (1949) (quoting Story's *Commentaries* § 259, at 240).

"[A]ddress[ing] this critical problem" was "an immediate reason for calling the Constitutional Convention." *Tennessee Wine*, 139 S. Ct. at 2460-2461. Once in Philadelphia, the delegates' discussion of the federal power to regulate interstate commerce focused on "the removal of state trade barriers." *Id.* at 2460. "[A]nd when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification." *Ibid.* (citing, *inter alia*, *The Federalist No. 11*, at 88-89 (Hamilton) (Clinton Rossiter ed. 1961)).

That history has informed this Court's decisions interpreting the Commerce Clause to prohibit state regulations that unduly restrict interstate commerce. The Court has derived that interpretation from "the Consti-

tution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy* v. *The Beer Inst., Inc.*, 491 U.S. 324, 335-336 (1989) (footnote omitted). The dormant Commerce Clause thus is grounded in and reinforces the "principles of interstate federalism embodied" throughout the Constitution. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). "[T]he Framers * * * intended that the States retain many essential attributes of sovereignty," and "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States." *Ibid.* Accordingly, States may not transgress "the inherent limits of [their] authority" by attempting to "directly control[ ] commerce occurring wholly outside" their "boundaries." *Healy*, 491 U.S. at 336. This Court's dormant Commerce Clause cases have also considered whether, if "many or every" other State "adopted similar legislation," the result would be "the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.* at 336-337; see, *e.g.*, *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945).

2. States must not excessively burden or directly regulate commerce in other States

This Court has identified "two primary principles that mark the boundaries of a State's authority to regulate interstate commerce." *Wayfair*, 138 S. Ct. at 2090. First, a State "may not discriminate against interstate commerce." *Id.* at 2091. Second, even when a State "regulates even-handedly," this Court's decision in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), holds

that state laws must "effectuate a legitimate local public interest" and must not impose "burden[s]" on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Id.* at 142. The Court in *Pike* held that, "[i]f a legitimate local purpose is found, then the question becomes one of degree." *Ibid.* "[T]he extent of the burden that will be tolerated * * * depend[s] on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Ibid.*

This Court has explained that those "two principles" are "subject to exceptions and variations." *Wayfair*, 138 S. Ct. at 2091. Most relevant here, a State may not "'project[] its legislation' into other States, and directly regulate[] commerce therein." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 584 (1986) (cited in *Wayfair*, 138 S. Ct. at 2091) (brackets altered; citation omitted). The Court described that principle in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935), which invalidated a New York statute prohibiting companies from selling milk in New York unless they paid out-of-state dairy farmers the same price required to be paid to New York dairy farmers. *Id.* at 519, 521-526. The Court held that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521; see *Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.") (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977)); see also *Healy*, 491 U.S. at 333 n.9 (holding that the *Edgar* plurality "significantly illuminate[d] the contours of the

constitutional prohibition on extraterritorial legislation"). The Court has further held that, even if a state regulation is "triggered only by sales" within the State, that "mere fact * * * does not validate the law if it regulates * * * out-of-state transactions." *Brown-Forman*, 476 U.S. at 580; see *Baldwin*, 294 U.S. at 521-522.

While *Baldwin*'s description of impermissible extraterritorial regulation is sometimes treated as a distinct principle under the Commerce Clause, *e.g.*, Pet. App. 6a-16a, this Court has "recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach," *Brown-Forman*, 476 U.S. at 579; see *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 440-441 (1978) ("[E]xperience teaches that no single conceptual approach identifies all of the factors that may bear on" the "distinction between permissible and impermissible impact upon interstate commerce."). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 476 U.S. at 579. Then-Judge Gorsuch aptly analogized this Court's dormant Commerce Clause precedents to antitrust law, with *Pike* as "a kind of 'rule of reason' balancing test providing the background rule of decision," and "more demanding '*per se*' rules applied to discrete subsets of cases where, over time, the Court has developed confidence that the challenged conduct is almost always likely to prove problematic and a more laborious inquiry isn't worth the cost." *Energy & Env't Legal Inst.* v. *Epel*, 793 F.3d 1169, 1172 (10th Cir.), cert. denied, 577 U.S. 1043 (2015).

B. Petitioners Plausibly Allege That Proposition 12 Unduly Restricts Interstate Commerce Under *Pike*

This Court can and should resolve this case by holding that, assuming the facts alleged in petitioners' complaint are true, the court of appeals erred in holding (Pet. App. 16a-19a) that petitioners failed to state a claim that Proposition 12 is unconstitutional under *Pike* because it advances no legitimate in-state interest and imposes substantial burdens on interstate commerce.

1. States must demonstrate a legitimate interest to justify substantial burdens on interstate commerce

Both before and after *Pike*, this Court has found that various state laws violated the Commerce Clause because they burdened interstate commerce without an adequate local justification.

For example, this Court invalidated the Illinois statute regulating corporate takeovers in *Edgar*, which was not limited to offers for entities incorporated in Illinois but extended to any "issuer of securities of which shareholders located in Illinois own 10%," as well as any corporation with "its principal executive office in Illinois" and a certain percentage of its business there. 457 U.S. at 627. The Court held that statute "unconstitutional under the test of *Pike*." *Id.* at 643; see *id.* at 643-646.[2] The Court found that the law's "nationwide reach" imposed a "substantial" burden on interstate securities transactions, *id.* at 643, that "outweigh[ed]" the State's "legitimate local interests" in protecting resident shareholders and regulating Illinois corporations, *id.* at 644. The Court explained that, "[w]hile protecting local in-

[2] A plurality of the Court would have held that the Illinois statute also violated the extraterritoriality principle by "regulat[ing] directly * * * commerce wholly outside the State." *Edgar*, 457 U.S. at 643.

vestors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders" or regulating the "internal affairs" of non-Illinois companies. *Id.* at 644, 646. And in any event, Illinois' protections for in-state shareholders were, "for the most part, speculative." *Id.* at 645.

Other cases reinforce the conclusion that a State must affirmatively establish—not merely recite—a legitimate and substantial local interest to justify burdens on interstate commerce. In *Southern Pacific*, this Court invalidated an Arizona law prohibiting operation of a train with more than 14 passenger or 70 freight cars in the State, 325 U.S. at 763, even though it was "standard [industry] practice" to operate longer trains, *id.* at 771. The Court found "no reasonable relation" between the Arizona law and safety. *Id.* at 775. And the Court determined that the statute would "impose[ ] a serious burden" on interstate commerce, *id.* at 773, because "[i]f one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation," *id.* at 775. The result would be to require that interstate trains "be broken up and reconstituted as they enter each state" to comply with "varying [length] limitations," or else railroads would be forced to "conform to the lowest train limit restriction of any of the states through which its trains pass," thereby enabling that state to control railroad operations "both within and without the regulating state." *Id.* at 773.

The Court similarly struck down an Iowa law prohibiting certain large trucks within the State in *Kassel* v. *Consolidated Freightways Corporation of Delaware*, 450 U.S. 662 (1981). The plurality found that the State had "failed to present any persuasive evidence" that the prohibited larger trucks "are less safe" than others, and

it held that the State could not justify a restriction "out of step with the laws of all" neighboring States with such an "illusory" "safety interest." *Id.* at 671; see *id.* at 681 n.1 (Brennan, J., concurring in the judgment) (stating that an "illusory, insubstantial, or nonexistent" safety rationale cannot support a state regulation burdening interstate commerce).

2. Petitioners plausibly allege that Proposition 12 does not advance a legitimate local interest

In this case, the court of appeals did not determine whether Proposition 12 advances any legitimate local interest. Pet. App. 19a. That was error. Petitioners plausibly allege that Proposition 12's ban on importing out-of-state pork meat that is traceable to animals that were not housed according to California's standards is unconstitutional under *Pike* because it serves no "legitimate local purpose." 397 U.S. at 142. California has no cognizable interest in the welfare of animals located in other States, and petitioners allege that California's asserted health-and-safety concerns are so speculative as to be illusory.

a. California has no legitimate interest in the housing conditions of out-of-state animals

i. Proposition 12's primary "purpose," Pet. App. 37a—and according to the California Department of Food and Agriculture, its only substantial purpose, *id.* at 76a—is "to prevent animal cruelty by phasing out" what California voters deem to be "extreme methods of farm animal confinement," *id.* at 37a. Because Proposition 12 has a distinct provision prohibiting "cruel" confinement of animals on California's (few) hog farms, Cal. Health & Safety Code § 25990(a) (West Supp. 2022), the sales ban in practical operation affects only pork de-

rived from the offspring of sows housed on out-of-state farms. Thus, to the extent that animals are harmed by the hog-farming practices that are the target of the sales ban, that harm occurs wholly outside California, and it is entirely complete long before a cut of pork meat derived from the offspring of a covered sow arrives at the California border for sale in that State.

While California undoubtedly has a valid interest in preventing the cruel treatment of animals located within its territory, see, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 469 (2010), the "State has no legitimate interest in protecting" the welfare of animals when they are located outside the State, *Edgar*, 457 U.S. at 644. The respective "sovereignty of each State" that is "embodied" in our Constitution, *World-Wide Volkswagen*, 444 U.S. at 293, means that voters in pork-producing States must determine what constitutes "cruel" treatment of animals housed in those States—not voters in California. Cf. *Baldwin*, 294 U.S. at 524. California may not "extend [its] police power [over animal welfare] beyond its jurisdictional bounds," *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994), by closing its market to wholesome pork meat—and sending its inspectors to farms in other States—for the purpose of enforcing Californians' judgments about appropriate animal husbandry throughout the Nation. In the court of appeals, respondents cited no precedent of this Court holding that one State's bare philosophical disagreement with the public policy of other States, concerning activities outside the regulating State's borders, qualifies as a legitimate local interest under *Pike*.

California obviously could not directly regulate out-of-state farming operations by imposing penalties or other sanctions; such a law would violate the dormant

Commerce Clause, see *Healy*, 491 U.S. at 336 n.13, and could implicate other constitutional provisions as well, including the Due Process Clause, see *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568-574 (1996). And California's attempt to regulate out-of-state entities without a legitimate in-state justification does not become constitutional simply because the State has structured Proposition 12 as a ban on the in-state sale of pork from the offspring of sows confined in a non-compliant manner. See *Brown-Forman*, 476 U.S. at 580 (state law impermissibly targeting out-of-state transactions was not saved by the fact that it was "triggered only by sales" within the regulating State). This Court invalidated the large-truck regulation in *Kassel* and the train-length regulation in *Southern Pacific* even though both applied only to trucks and trains operating in Iowa and Arizona, respectively. See pp. 18-19, *supra*. Those cases would not have come out differently if Iowa and Arizona had asserted an interest in "phasing out" other States' allowance of larger trucks and longer trains, as Proposition 12 attempts to phase out other States' allowance of industry-standard hog-farm pens. Pet. App. 37a.

ii. California's attempt to regulate out-of-state farms based on a philosophical objection to animal-welfare policy in other States makes Proposition 12 "a very different thing" from state laws that would likely survive *Pike* scrutiny because they are directed toward a legitimate *in-state* interest. *Baldwin*, 294 U.S. at 528; see *Department of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 339 (2008) (observing that States' economic regulations "frequently," "though not always," survive *Pike* scrutiny). Proposition 12's animal-welfare justification is unlike, for example, a requirement that out-of-state businesses adhere "to fitting standards of sanitation before

the products of the farm or factory may be sold in" the State. *Baldwin*, 294 U.S. at 528. Such a law would advance a State's legitimate interest in protecting its own citizens from hazardous products within the State.

Nor is Proposition 12 comparable to state statutes that seek to prevent or limit environmental harm within the regulating State, which have been upheld against dormant Commerce Clause challenges. See, *e.g.*, *Epel*, 793 F.3d at 1170 (Colorado statute requiring electricity generators to ensure that 20% of electricity sold to Colorado consumers comes from renewable sources); *American Fuel & Petrochemical Mfrs.* v. *O'Keeffe*, 903 F.3d 903, 916 (9th Cir. 2018) (Oregon law regulating sale of transportation fuels served "'substantial state interest' in mitigating the environmental effects of greenhouse gas emissions" within Oregon) (citation omitted), cert. denied, 139 S. Ct. 2043 (2019); *Cotto Waxo Co.* v. *Williams*, 46 F.3d 790, 792-794 (8th Cir. 1995) (Minnesota prohibition on in-state sale of petroleum-based sweeping compounds). Even if even-handed environmental laws end up having substantial effects on out-of-state production, those measures legitimately aim to address harm to persons or property *in the State*. See, *e.g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (state law "promoting conservation of energy and other natural resources and easing solid waste disposal problems" served "substantial state interest"); *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (plurality opinion) (waste control ordinance that "finance[d] * * * waste disposal services" and "increase[d] recycling" served legitimate local interest).

iii. At bottom, if California may ban the importation of wholesome pork meat based on philosophical opposition to out-of-state animal-husbandry practices, then "so may all the other[]" States. *Southern Pacific*, 325 U.S. at 775. Other States might well condition in-state sales on even more square feet of space per hog, or on compliance with requirements concerning animals' feed, veterinary care, or virtually any other aspect of animal husbandry. The combined effect of those regulations would be to effectively force the industry to "conform" to whatever State (with market power) is the greatest outlier. *Id.* at 773; cf. *H.P. Hood*, 336 U.S. at 533 (describing how States under the Articles of Confederation legislated according to the "local advantages or disadvantages" or their "political or commercial" "position") (quoting Story's *Commentaries* § 259, at 239-240).

After that, States could invoke their philosophical positions or views of sound public policy to burden interstate commerce in other ways. "The next step [might] be to condition importation upon proof of a satisfactory wage scale" for workers in other States, contrary to the Court's express statement in *Baldwin*. 294 U.S. at 524. Then States might seek to ban the importation of particular out-of-state companies' products as a way of objecting to those companies' business practices anywhere in the world. States' competing "animosities and local prejudices" would create a "perpetual source of irritation and jealousy," Story's *Commentaries* § 260, at 240, and a breakdown in our "national economic union," *Healy*, 491 U.S. at 336.

b. Petitioners plausibly allege that Proposition 12 has no human health-or-safety benefits

California's other asserted justification for Proposition 12 is that the targeted animal-confinement methods "threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." Pet. App. 37a. States have a "legitimate local concern" in protecting the "health" of their citizens within the State—unlike Proposition 12's asserted interest in regulating the welfare of animals located outside the State. *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977). But that legitimate purpose "does not end the inquiry." *Ibid.* A State law directed toward that objective nevertheless violates the Commerce Clause if, at a minimum, its "total effect * * * as a safety measure * * * is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it." *Raymond Motor*, 434 U.S. at 443 (quoting *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)); see *id.* at 447 (finding state regulations unconstitutional based on their "speculative contribution to highway safety"); see also *Great Atl. & Pac. Tea Co.* v. *Cottrell*, 424 U.S. 366, 375 (1976) (State's "contention" that its statute "serves its vital interests in maintaining the State's health standards borders on the frivolous").

i. The United States is critically interested in ensuring that all pork meat offered for sale throughout the Nation is fit for human consumption: USDA is charged by Congress both with preventing disease in livestock and with ensuring that all pork meat is wholesome and not adulterated. See p. 6, *supra*. But USDA, in performing those responsibilities, has not required farms

to provide a particular square footage per hog in order to assure safe pork meat in the national economy. And the California Department of Food and Agriculture itself has observed that Proposition 12's standards "are not based in specific peer-reviewed published scientific literature or accepted as standards within the scientific community to reduce human food-borne illness," Pet. App. 75a, and would "not directly impact human health and welfare of California residents, worker safety, or the State's environment," *id.* at 55a.

The California Department of Food and Agriculture later stated that it has concluded "only that there is not currently a consensus in peer-reviewed published scientific literature that would allow the [agency] to independently confirm" that Proposition 12 has any health-and-safety benefits, but the agency "does not suggest * * * that it was unreasonable for California's voters to pass" Proposition 12 "as a precautionary measure." Pet. Reply App. 74a. Where a State has introduced evidence or otherwise established a concrete basis to substantiate its law, this Court has afforded latitude to guard against "imperfectly understood" risks, even if they "ultimately prove to be negligible." *Maine* v. *Taylor*, 477 U.S. 131, 148 (1986). But the mere "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel*, 450 U.S. at 670 (plurality opinion). And the Court has invalidated other state laws affecting interstate commerce whose asserted health or safety justifications were ultimately found insubstantial. See *id.* at 671; *Raymond Motor*, 434 U.S. at 443; *Southern Pacific*, 325 U.S. at 775.

ii. In any event, whatever may ultimately be proved at trial, petitioners have plausibly alleged at the present

pleading stage that Proposition 12 has no legitimate health-and-safety justification.

Notably, Proposition 12's confinement requirements apply only to "breeding pigs." Cal. Health & Safety Code § 25991(a) and (f) (West Supp. 2022). But petitioners allege that those pigs generally do not enter the food chain, and when they do, not as products subject to the sales ban. Pet. App. 226a. California's sales ban instead applies to pork products derived largely from breeding pigs' offspring, but the ban does not address *those* animals' housing conditions or welfare. Proposition 12 thus regulates pork meat not based on any asserted deficiency in the quality of the meat itself, but instead based on the confinement conditions of the meat-producing animal's mother. That distinguishes Proposition 12 from traditional state statutes that permissibly "regulate the importation of unhealthy [livestock]," "noxious foods," or other products that "are not proper subjects of commerce." *Baldwin*, 294 U.S. at 525; see *Bowman* v. *Chicago & Nw. Ry. Co.*, 125 U.S. 465, 489 (1888) ("Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of * * * cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption.").

Even as to the breeding pigs covered by Proposition 12, petitioners plausibly allege that California's confinement standards do not advance human health and safety. Petitioners explain why, in their view, California's standards are "arbitrary," Pet. App. 219a, and "inconsistent with industry practices and standards, generations of producer experience, [and] scientific research," *id.* at 152a; cf. *Southern Pacific*, 325 U.S. at 771

(observing that Arizona's train-length statute was inconsistent with industry "standard practice"). Petitioners also allege that Proposition 12 may lead to farming practices that decrease sow welfare, Pet. App. 221a, and increase pathogen transmission, *id.* at 229a. And petitioners further allege that there is no link between Proposition 12's housing requirements for breeding pigs and the safety of the pork products from those pigs' offspring. *Id.* at 228a-229a.

3. Petitioners plausibly allege that Proposition 12 substantially burdens interstate commerce

If petitioners succeed in establishing that California's "interest" in Proposition 12 "is minimal at best," *Pike*, 397 U.S. at 146, then their allegations, taken as true, would be sufficient to show that the sales ban's burdens on interstate commerce "outweigh" any putative local benefit, *Edgar*, 457 U.S. at 644.

a. Petitioners allege that Proposition 12's sales ban would require out-of-state farmers to forgo more efficient methods of animal housing and would impose compliance costs of approximately $300 million, resulting "in a 9.2 percent increase in the production cost" of pork that "would be passed on to consumers" nationwide. Pet. App. 9a, 18a. Petitioners further allege that, in light of "the interconnected nature of the nationwide pork industry," such that "[a] single hog is butchered into many different cuts" and "sold throughout the country," "all or most hog farmers will be forced to comply with California's requirements." *Id.* at 9a. Under the proposed implementing regulations, Proposition 12 would also require out-of-state farmers to open their facilities to recurring inspection by California's regulators in order to have access to the California market. Pet. Reply App. 32a-33a.

If petitioners prove those allegations, then they will show that Proposition 12 imposes substantial burdens on interstate commerce. California's attempt to force out-of-state farms to spend significant resources to change their animal-husbandry practices makes Proposition 12 unlike an outright prohibition on certain products that a State deems "not proper subjects of commerce" regardless of how they were produced. *Baldwin*, 294 U.S. at 525; cf. Ga. Code Ann. § 26-2-160 (West 2016) (barring "sale for human consumption [of] any dog meat"). Such blanket bans do not impermissibly affect interstate commerce because they do not "require people or businesses to conduct their out-of-state commerce" "according to [the regulating State's] terms." *Cotto Waxo*, 46 F.3d at 793-794.

The court of appeals dismissed Proposition 12's alleged burdens on the ground that "cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce for purposes of the dormant Commerce Clause." Pet. App. 18a. But this Court has stated that cost increases are not "entirely irrelevant" under *Pike*. *Raymond Motor*, 434 U.S. at 445. To be sure, "higher prices do not render a state regulation impermissible *per se* under the Commerce Clause," *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 416 (1986), and the Clause does not "protect[] the particular structure or methods of operation in a retail market," *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 127 (1978). Increased costs alone thus do not necessarily establish a substantial burden on interstate commerce. But this Court has stated that "[c]ost * * * might be relevant in some cases to the issue of burden on commerce," along with "other factors." *Raymond Motor*, 434 U.S. at 445

n.21 (quoting *Bibb*, 359 U.S. at 526) (brackets in original). And the Court has found that state statues with "nationwide reach" can burden interstate commerce where they "hinder[]" "process[es] which can improve efficiency and competition." *Edgar*, 457 U.S. at 643.

Indeed, the court of appeals' reasoning that costs are irrelevant contradicts *Pike* itself, where this Court held that an Arizona law requiring cantaloupes to be packaged in-state conferred insufficient local benefits to "justify the requirement that the [plaintiff] company build and operate an unneeded $200,000 packing plant in the State." 397 U.S. at 145. And if the court of appeals' view of *Pike* had prevailed, then many other state laws struck down by this Court based on the dormant Commerce Clause would likely have been upheld on the ground that they merely imposed additional costs on out-of-state businesses or merely required less-efficient methods of operation. See, *e.g.*, *Bibb*, 359 U.S. at 525, 527-528 (Illinois statute "severely burden[ed] interstate commerce," including by imposing "substantial" costs on out-of-state carriers and "interfer[ing] with" carriers' more efficient "'interline'" methods of operation); *Southern Pacific*, 325 U.S. at 773 (Arizona law "impose[d] a serious burden on the interstate commerce conducted by" railroads by requiring them to "conform" to whichever state had the shortest train-length limit or else to break up and reconstitute trains for particular States); *Kassel*, 450 U.S. at 674 (plurality opinion) (Iowa law "substantially burden[ed] interstate commerce" by, among other things, "add[ing] about $12.6 million each year to the costs of trucking companies").

b. Proposition 12 also allegedly burdens interstate commerce by imposing regulatory requirements on farmers that may ultimately harm animals' welfare and

consumers' health. Petitioners allege that California's confinement requirements "limit[]" farmers' ability "to make housing adaptations to best address the welfare of their sows." Pet. App. 220a. Petitioners say that Proposition 12's requirement that each sow be able to turn around will result in more group housing for sows, which "decrease[s] sow welfare during breeding and gestation," *id.* at 221a, and "may increase the risk of pathogen transmission among the sows," *id.* at 229a. If petitioners are correct that Proposition 12 "may aggravate, rather than ameliorate," threats to animal welfare and human health in connection with an important consumer food item, then the statute may burden interstate commerce for that reason as well. *Kassel*, 450 U.S. at 674 (plurality opinion); cf. *id.* at 675 (Iowa law burdened interstate commerce by "tend[ing] to *increase* the number of [highway] accidents").

c. The United States takes no position on whether petitioners will ultimately be able to prove that Proposition 12 unduly restricts interstate commerce under *Pike*. At this stage, however, petitioners have plausibly alleged that Proposition 12 will have substantial adverse impacts on the interstate pork market. If petitioners prove those allegations, then those burdens are "clearly excessive in relation to" what petitioners allege to be insubstantial or non-existent "local benefits." *Pike*, 397 U.S. at 142.

C. The Court Of Appeals Erred In Describing This Court's Decisions Concerning Extraterritorial Regulation

Because petitioners plausibly allege that Proposition 12 is impermissible under *Pike* and thus violates one of the "primary principles that mark the boundaries of a State's authority to regulate interstate commerce," *Wayfair*, 138 S. Ct. at 2090, this Court need not deter-

mine whether the statute also violates one of the "variations" of those principles, *id.* at 2091, by impermissibly regulating extraterritorial commerce. Petitioners' showing that California has attempted to regulate out-of-state farms without any legitimate local interest, see Part B.2, *supra*, states a claim that Proposition 12 is unconstitutional regardless of whether *Baldwin* and its progeny are viewed as a distinct strand of Commerce Clause jurisprudence or a particular manifestation of general principles. Cf. *Epel*, 793 F.3d at 1172-1173. But if the Court does reach petitioners' argument that Proposition 12 is an impermissible extraterritorial regulation, the Court should hold that the court of appeals erred in describing this Court's precedents.

1. The court of appeals suggested that "the extraterritoriality principle [from] *Baldwin*, *Brown-Forman*, and *Healy*" may be "narrowly" limited "only to state laws that are 'price control or price affirmation statutes.'" Pet. App. 8a (citation omitted). That was incorrect. Although this Court's three principal cases invalidating state statutes based on the extraterritoriality principle involved laws concerning prices, the reasoning of the Court's decisions indicates that the Commerce Clause concern is broader. In *Baldwin*, the Court observed that the Commerce Clause would preclude a State from "condition[ing] importation" of products on such non-price factors as "proof of a satisfactory wage scale in factory or shop." 294 U.S. at 524. A statute like that would not directly regulate the price of the product that the workers produce, but it would nevertheless "invalid[ly]" attempt to "directly control[] commerce occurring wholly outside the boundaries of" the regulating State without a valid in-state interest, thereby "ex-

ceed[ing] the inherent limits of the enacting State's authority." *Healy*, 491 U.S. at 336.

This Court's extraterritoriality cases thus may be understood to reflect the more general principle that no State may seek to regulate conduct outside its boundaries without a legitimate local interest—a principle that the Framers saw as foundational to a harmonious Union. See *Healy*, 491 U.S. at 336. The Court restated that principle in *C & A Carbone*, in invalidating a municipal ordinance requiring solid waste to be processed at a particular private transfer station before leaving the municipality. 511 U.S. at 387. That statute did not control prices, but the Court held that it could not be justified "as a way to steer solid waste away from out-of-town disposal sites that [the town] might deem harmful to the environment," because the town lacked authority "[t]o extend [its] police power beyond its jurisdictional bounds." *Id.* at 393. Citing *Baldwin*, the Court explained that States and their subdivisions "may not attach restrictions to exports or imports in order to control commerce in other States." *Ibid.* The plurality in *Edgar* similarly reasoned that the Illinois corporate-takeover statute violated the extraterritorial-regulation principle by attempting to regulate commercial securities transactions "wholly outside of the State's borders," 457 U.S. at 642—reasoning that the Court later endorsed in *Healy*, 491 U.S. at 333 n.9.

Contrary to the court of appeals' suggestion (Pet. App. 8a), this Court's decision in *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003), did not cabin *Baldwin*'s extraterritoriality analysis to state laws about prices. *Walsh* held that a Maine statute designed to reduce prescription drug prices was not an impermissible extraterritorial regula-

tion. *Id.* at 669. Addressing the plaintiff's argument that the challenged statute would affect prices in other States, see *id.* at 658, the Court concluded that the statute did not, in fact, regulate out-of-state prices, and the plaintiff's argument based on *Baldwin* and *Healy* failed for that reason, *id.* at 669. The Court did not state that only statutes about price can constitute impermissible extraterritorial regulations.

2. The court of appeals next stated that "state laws that regulate only conduct in the state, including the sale of products in the state, do not have impermissible extraterritorial effects." Pet. App. 10a. But that categorical statement cannot be reconciled with *Brown-Forman*, 476 U.S. at 576, or *Baldwin*, 294 U.S. at 519, both of which involved States' attempted bans on particular in-state sales as a means of targeting out-of-state commerce. The Court in *Brown-Forman* expressly stated that the "mere fact" that a state's law is "triggered only by [in-state] sales * * * does not validate the law" if it attempts to regulate "out-of-state transactions." 476 U.S. at 580.

The court of appeals went on to say that "[a] state law may require out-of-state producers to meet burdensome requirements in order to sell their products in the state without violating the dormant Commerce Clause." Pet. App. 10a. That is true *provided that* the State's law is directed to, and adequately supported by, a legitimate local interest. Many state laws designed to prevent in-state harms can have extraterritorial effects, even substantial effects, and those effects do not themselves render the laws unconstitutional. The Court in *Baldwin* recognized that States may seek to ensure that imported food products are wholesome by prohibiting out-of-state food that was not produced with "necessary

safeguards." 294 U.S. at 524. And as discussed above, States may also regulate sales to prevent other in-state harms, even if doing so has significant effects on out-of-state production. See pp. 21-22, *supra*.

The *Baldwin* Court also held, however, that when a State undertakes regulation of out-of-state commercial activity, it must at least advance a legitimate local interest and demonstrate a basis for its regulation that is not "too remote and indirect." 294 U.S. at 524. Where, as here, a State has regulated out-of-state activity in service of an interest that is *not* a legitimate basis for regulation under our federal system of sovereign States—such as an interest in protecting local markets and merchants or philosophical objection to the public policy of other States—the constitutional concern with impermissible extraterritorial regulation has its greatest force.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for appropriate proceedings.

Respectfully submitted.

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