No. 21-468

In the Supreme Court of the United States

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

v.

KAREN ROSS, *et al.*,
Respondents.

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

BRIEF FOR THE STATE RESPONDENTS

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QUESTION PRESENTED

Whether petitioners stated a claim that Proposition 12's restrictions on in-state sales of certain pork products violate the Commerce Clause of the federal Constitution.

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INTRODUCTION

In 2018, California voters considered an initiative measure restricting the in-state sale of certain pork products. Ballot materials explained that the proposed restrictions would mitigate potential risks of food-borne illnesses and eliminate products from the California marketplace that the proponents viewed as immoral—while also advising voters that the measure would increase the price of pork in California. Voters approved the proposition by a margin of more than three million votes.

Petitioners challenge that policy choice as a violation of the Commerce Clause. Because Congress has not actually asserted its power to enact any statute that would preempt laws like Proposition 12, petitioners rely on the "dormant" Commerce Clause. This Court has emphasized that the central purpose of that doctrine is to prohibit economic protectionism. Here, however, the challenged provision is a neutral in-state sales restriction that applies regardless of whether the products originate in-state or out-of-state, and petitioners rightly concede that it is not protectionist or discriminatory. Pet. Br. 2 n.2.

Instead, petitioners principally argue that Proposition 12 is unconstitutional because of the practical effects it might have on the production costs and commercial choices of out-of-state pork producers. That argument seeks a vast and unwarranted expansion of the holdings of this Court's cases. In a series of decisions bookended by *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), this Court invalidated state laws that controlled the prices paid in out-of-state transactions by linking them to prices paid in in-state transactions. Those laws had the same effect as a tariff or

customs duty—paradigmatic dormant Commerce Clause violations. But Proposition 12 is not a "price control or price affirmation statute[]," and thus does not violate "[t]he rule that was applied in *Baldwin* and *Healy*." *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003). Nor does it "directly regulat[e] transactions which take place . . . wholly outside the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982) (plurality). The only Proposition 12-compliant pork that out-of-state businesses must produce is the pork they choose to supply to California's market; they are free to produce as many other pork products as they want, and to sell them to markets outside of California. Proposition 12 is no different in that respect from other longstanding state sales restrictions that require out-of-state producers to use particular labels or to conform to specific quality or safety standards if they choose to participate in the enacting State's market.

Petitioners' remaining legal theories also fail. In particular, as Judge Ikuta explained for the court below, petitioners have not alleged the type of burden on interstate commerce necessary to support their claim under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Because they have not satisfied that threshold requirement, the courts below properly refused to proceed with judicial interest-balancing or fact-finding under *Pike*.

Petitioners are of course free to take their policy concerns back to the California voters who approved Proposition 12—and who will pay the increased costs resulting from that choice. And if the United States shares those concerns, Congress may choose to exercise its own authority under the Commerce Clause to regulate interstate commerce in pork products and

preempt laws like Proposition 12. This Court, however, "is not the forum to resolve that policy debate." *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896, 1906 (2022).

STATEMENT

A. Background

1. In recent decades, the market for animal food products has experienced "increased product differentiation." USDA, *Livestock Mandatory Reporting* 8 (2018), https://tinyurl.com/mv65fu6z. Modern American grocery stores typically offer cage-free eggs, free-range chicken, and grass-fed beef, to name just a few examples. Increased differentiation results primarily from consumer demand, informed by health, safety, and moral considerations.[1] Product differentiation is particularly apparent in the marketplace for pork, where "evolving consumer demand" has led to an array of products "such as crate-free, beta-agonist-free, organic, and antibiotic-free." USDA, *Livestock Mandatory Reporting*, *supra*, at 17.

In response to consumer preferences, many businesses have shifted away from animal food products that they (or their customers) view as unethical. For example, McDonald's has pledged "to source 100% cage-free eggs by 2025."[2] And many restaurants and retailers have vowed to eliminate from their supply

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[1] *See* Alonso, et al., *Consumers' Concerns and Perceptions of Farm Animal Welfare*, 10 Animals 1, 5-7 (2020), https://tinyurl.com/2p96fu8m.

[2] Kelso, *McDonald's Cage-Free Egg Progress Signals an Industry Sea Change*, Rest. Dive (Apr. 12, 2019), http://tinyurl.com/2p8k4fpy/.

chains pork that was derived from breeding pigs (or their offspring) if the breeding pigs were housed in "gestation crates," which are tight metal enclosures in which pigs "can step a few inches forward or backward but not turn around."[3] McDonald's, Burger King, Costco, and Safeway—among many others—have made that commitment.[4]

Informed by similar concerns, States have enacted laws imposing restrictions on their own farms and food supplies. For example, Florida has made it unconstitutional "for any person to confine a pig during pregnancy . . . in such a way that she is prevented from turning around freely." Fla. Const. art. X, § 21. Arizona, Ohio, Utah, and Massachusetts likewise restrict certain animal confinement practices within their borders.[5] Some States also regulate their own marketplaces by barring the in-state sale of products derived from animals confined in certain ways. For example, Arizona, California, Colorado, Massachusetts, Michigan, Nevada, Oregon, and Washington prohibit the in-state sale of eggs (wherever produced) from hens that are not provided a minimum amount of space.[6] And Massachusetts prohibits the sale of

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[3] Jackson & Marx, *Pork Producers Defend Gestation Crates, but Consumers Demand Change*, Chi. Trib. (Aug. 3, 2016), https://tinyurl.com/bdhr9pkx.

[4] *See, e.g.*, McDonald's, *2022 Annual Meeting Update* 7 (2022), https://tinyurl.com/6mc8rue4 ("commit[ting] to source from producers who do not use gestation stalls for pregnant sows"); U.S. Humane Society, *Food Company Policies on Gestation Crates*, https://tinyurl.com/mptz7pvn.

[5] Animal Welfare Inst., *Farm Animal Confinement Legislation*, https://tinyurl.com/2rbc5we3.

[6] Nellie's Free Range, *Mapping the Transition to Cage-Free Eggs*

pork products derived from breeding pigs or their offspring if the breeding pig was "confined so as to prevent [it] from lying down, standing up, fully extending [its] limbs, or turning around freely." 2021 Mass. Acts 945.

Changes in consumer preferences and legal requirements have prompted many producers of animal food products to alter their practices and develop new supply-chain operations. *See, e.g.*, USDA, *Livestock Mandatory Reporting*, *supra*, at 17 ("[P]roduction practices have evolved to meet these growing consumer demands and preferences."). By 2019, for example, nearly a third of the Nation's pork industry had converted sow breeding facilities to allow for group housing—an alternative system that groups multiple breeding pigs together in one pen, allowing them to move around more freely. Pet. App. 186a.[7] Pork produced this way may be marketed as "crate-free" pursuant to USDA regulations, provided that producers segregate crate-free pork from other pork products and trace the crate-free pork through production and distribution to the point of sale.[8] For years, several of the Nation's largest pork producers—including Smithfield, Seaboard, Clemens, and JBS—have segregated their supply chains to produce and market specialty pork products, ensuring that those products

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State by State, https://tinyurl.com/444w6jvu; 28 Ariz. Admin. Reg. 802-803 (Apr. 22, 2022), https://tinyurl.com/uy2tmu6f.

[7] *E.g., Smithfield Foods Delivers on Decade-Old Promise to Eliminate Pregnant Sow Stalls in U.S.* (Jan. 23, 2018), https://tinyurl.com/ycy56pwk.

[8] *See* USDA, *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims* 10-11 (2019), https://tinyurl.com/z6tatyns.

"are traceable to [the] farm of origin." *E.g.*, USDA, *Official Listing of Approved USDA Process Verified Programs* 55, https://tinyurl.com/yt2a4k5v.

2. In 2018, California voters approved Proposition 12, which expanded on existing legal standards for the in-state sale of eggs, and adopted new standards for the in-state sale of certain pork and veal products. Pet. App. 37a-46a. As relevant here, the measure bars "the sale within the state" of whole pork meat from breeding pigs or their immediate offspring if the breeding pigs were housed in a manner that denied them at least 24 square feet of usable floorspace or the ability to "l[ie] down, stand[] up, fully extend[] [their] limbs, or turn[] around freely." Cal. Health & Safety Code § 25990(b)(2); *id.* § 25991(e). These sales restrictions apply to all whole pork meat sold to purchasers in California, no matter its origin. *Id.* § 25990(b)(2). Proposition 12 separately imposes confinement standards on in-state farm owners and operators. *Id.* § 25990(a).

Proponents of Proposition 12 argued that the measure would "eliminate inhumane and unsafe products . . . from the California marketplace." Cal. Sec'y of State, *Voter Information Guide* 70 (2018), https://tinyurl.com/2ds3rxee. The ballot materials also explained that Proposition 12 "would likely result in an increase in prices" for California consumers, because any "increased costs" of producing compliant pork "are likely to be passed through to consumers who purchase the products." *Id.* at 69. Over 62 percent of voters approved the measure. Pet. App. 196a.

B. Proceedings Below

In December 2019, petitioners sued the respondent state officials, alleging that Proposition 12's restrictions on the in-state sale of pork violate the Commerce Clause. Pet. App. 230a-233a. Petitioners did not seek preliminary injunctive relief.[9] The district court dismissed petitioners' complaint with leave to amend. *Id.* at 21a-35a. Petitioners appealed and the court of appeals affirmed. *Id.* at 1a-20a.

The court of appeals first rejected (Pet App. 6a) petitioners' contention that Proposition 12 has an "impermissible extraterritorial effect" under *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). Unlike the state laws invalidated in those cases, the court explained, "Proposition 12 is neither a price-control nor price-affirmation statute": it "neither dictates the price of pork products" in other States "nor ties the price of pork products sold

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[9] Most of Proposition 12's restrictions on pork, veal, and egg sales took effect between 2018 and 2020, but the 24-square-foot restriction on pork sales did not take effect until January 1, 2022. *See* Cal. Health & Safety Code § 25991(e)(3). The next month, a state trial court temporarily enjoined enforcement of that restriction on state-law grounds. *Cal. Hisp. Chambers of Com. v. Ross*, No. 34-2021-80003765 (Cal. Super. Ct. Feb. 2, 2022), https://tinyurl.com/2vkda3fj. The court reasoned that California voters did not intend for the restriction to take effect until final implementing regulations are promulgated under California Health & Safety Code Section 25993(a). *Id.* at Ex. A 7-8. The State has appealed, *see* No. C095799 (Cal. Ct. App.), but the injunction is set to remain in effect until 180 days after the final regulations are promulgated. Those regulations are currently in the final stages of notice-and-comment rulemaking. *See* Cal. Dep't of Food & Agric., *Proposition 12 Implementation*, https://tinyurl.com/y57fxnae.

in California to out-of-state prices." Pet. App. 8a. The court acknowledged that some of those cases contained "broad language" and "dicta" regarding state laws with extraterritorial effects. *Id.* at 7a (internal quotation marks omitted). But the court rejected petitioners' attempt to invoke that language, reasoning that it could not be squared with this Court's subsequent precedent or with the reality that state laws have "practical effect[s]" in other States "all the time." *Id.* (internal quotation marks omitted); *see id.* at 7a-8a.

The court also held that petitioners' claim failed when viewed in light of a "broad[er]" conception of "the *Baldwin* line of cases" adopted by some lower courts. Pet. App. 9a (internal quotation marks omitted). Under that approach, a state law is "impermissibly extraterritorial" if "it directly regulates conduct that is wholly out of state." *Id.* at 10a. Even under that test, however, the fact that an in-state sales restriction like Proposition 12 produces "indirect," "upstream effects" in other States does not render it invalid. *Id.* at 10a, 11a.

Finally, the court rejected petitioners' claim that "Proposition 12 imposes a burden on interstate commerce which is 'clearly excessive in relation to the putative local benefits.'" Pet. App. 16a (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The court noted that state laws are invalid under *Pike* "only in rare cases," generally where they unduly burden an "inherently national" activity like interstate transportation. *Id.* at 17a; *see id.* at 14a-16a. And this Court has made clear that "increased costs" to certain industries do not, standing alone, suffice to render state laws unconstitutional. *Id.* at 17a (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978)).

Applying that precedent, the court held that petitioners' allegations of "excessive" costs to the pork industry were insufficient to state a *Pike* claim. *Id.* at 16a; *see id.* at 18a-19a.

SUMMARY OF ARGUMENT

Petitioners concede that Proposition 12 does not implicate the core concern of the dormant Commerce Clause—prohibiting protectionist laws that discriminate against interstate commerce. Pet. Br. 2 n.2. They instead argue that Proposition 12 "violates the Commerce Clause under this Court's extraterritoriality and *Pike v. Bruce Church* doctrines." *Id.* at 19. Those arguments lack merit.

First, the holdings of this Court's cases do not support the broad extraterritoriality doctrine that petitioners urge the Court to apply here. Several times, the Court has struck down as *per se* invalid state laws that controlled out-of-state prices by tying them to in-state prices; and a plurality of the Court once favored similar treatment for laws that directly regulate wholly out-of-state transactions. But Proposition 12 does neither of those things. It only restricts the products that businesses choose to sell within California's borders. Like other in-state sales restrictions, Proposition 12 will have some upstream effects on out-of-state commercial actors who participate in California's market; but this Court has never treated those kinds of practical effects as a sufficient basis for striking down an in-state sales restriction under the Commerce Clause, and there is no persuasive reason for it to do so now. Moreover, petitioners' specific assertions before this Court about the effects that Proposition 12 will have in practice are both implausible and inconsistent with allegations in their complaint.

Second, petitioners failed to state a claim under *Pike*. *Pike* is not an invitation for judges to conduct interest balancing whenever a plaintiff alleges that a non-discriminatory state law imposes costs on out-of-state businesses. A judicial balancing of costs and benefits under *Pike* is appropriate only where the plaintiff has plausibly alleged a burden on interstate commerce comparable to those recognized by the Court's previous *Pike* cases, such as direct interference with an instrumentality of interstate transportation. In approving Proposition 12, California voters chose to prohibit the in-state sale of pork products that they found to be immoral and potentially dangerous to human health. Petitioners' allegations that out-of-state producers who choose to sell compliant pork products in California will have to adjust their structure or methods of operation, or will face increased production costs, do not establish a cognizable burden warranting *Pike* balancing. Nor is any burden imposed by Proposition 12 clearly excessive if weighed against the important local benefits that persuaded millions of California voters to support the measure.

ARGUMENT

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce," this Court has "long interpreted the Commerce Clause as an implicit restraint on state authority." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). This "dormant" Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v.*

Limbach, 486 U.S. 269 (1988). Such laws so clearly obstruct interstate commerce that there is no need for Congress to exercise its regulatory powers under the Commerce Clause before they will be invalidated.

Normally, "two principles guide the courts in adjudicating" claims under the dormant Commerce Clause. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). If a challenged law discriminates against interstate commerce, it is "subject to a 'virtually *per se* rule of invalidity,' which can only be overcome by showing that the State has no other means to advance a legitimate local purpose." *United Haulers*, 550 U.S. at 338-339 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). In contrast, a state law that "regulates even-handedly to effectuate a legitimate local public interest" will be upheld unless the plaintiff establishes that it imposes a cognizable burden on interstate commerce and a court determines that the burden "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). These principles are sometimes subject to "exceptions and variations," *Wayfair*, 138 S. Ct. at 2091, including the rule that laws controlling out-of-state prices are *per se* invalid. *See, e.g.*, *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).

The dormant Commerce Clause is not without controversy. One Justice has observed that the doctrine "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). Another characterized it as "an unjustified judicial invention, not to be expanded beyond its existing domain." *Gen. Motors Corp. v. Tracy*, 519

U.S. 278, 312 (1997) (Scalia, J., concurring). The Court recently acknowledged these "vigorous and thoughtful critiques," while renewing its commitment to the core "proposition that the Commerce Clause by its own force restricts state protectionism." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019).

In this case, petitioners principally rely on isolated statements in the price-control line of cases, and urge the Court to strike down Proposition 12 based on the assertion that it has "the practical effect of controlling commerce outside the state." Pet. Br. 19. But "the Court's holdings" in those cases "have not gone nearly so far" as to "declare 'automatically' unconstitutional any state regulation with the practical effect of 'control[ling] conduct beyond the boundaries of the State.'" *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015) (Gorsuch, J.). And petitioners do not identify any convincing basis for the Court to adopt the expansive new extraterritoriality rules that they propose—which would provide a "roving license for federal courts to decide what activities are appropriate for state and local government to undertake," *United Haulers*, 550 U.S. at 343, instead of leaving to Congress the responsibility for deciding whether to preempt state laws by exercising its authority under the Commerce Clause. Nor have petitioners advanced the kind of factual allegations necessary to state a claim under *Pike*.

I. PROPOSITION 12 IS NOT AN IMPERMISSIBLE "EXTRATERRITORIAL" REGULATION UNDER THE DORMANT COMMERCE CLAUSE

Petitioners' primary argument relies (Pet. Br. 21-35) on the line of cases beginning with *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), which invalidated state laws controlling out-of-state prices. None of those cases (or any other case decided by this Court) establishes that a neutral, in-state sales restriction like Proposition 12 is an impermissibly "extraterritorial" regulation under the dormant Commerce Clause. And there is no good reason for the Court to expand its precedent in this area.

A. Proposition 12 Does Not Control Out-of-State Prices or Directly Regulate Wholly Out-of-State Transactions

1. The *Baldwin* line of cases holds that a "price control or price affirmation statute[]" that ties in-state prices to out-of-state prices violates the dormant Commerce Clause. *Walsh*, 538 U.S. at 669. That kind of law has "the same effect as a tariff or customs duty—neutralizing the advantage possessed by lower cost out-of-state producers." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994). And "a tariff is the paradigmatic Commerce Clause violation." *Id.* at 203.

In *Baldwin*, New York "set up a system of minimum prices to be paid" to in-state milk producers. 294 U.S. at 519. As part of that system, New York barred the in-state sale of milk produced out-of-state "unless the price paid to the producers was one that would be lawful upon a like transaction within the state." *Id.* The law thus kept New York's system of minimum prices "unimpaired by competition from afar." *Id.* That type of protectionist measure was invalid because it "set a barrier to traffic between one state

and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521.

The Court invoked *Baldwin* to invalidate a similar statute in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986). That statute required "every liquor distiller or producer" selling "liquor to wholesalers within the State to sell at a price that [was] no higher than the lowest price the distiller charge[d] wholesalers anywhere else in the United States." *Id.* at 575. Through that mechanism, New York impermissibly dictated the price paid for liquor in out-of-state transactions: "[o]nce a distiller ha[d] posted prices in New York, it [was] not free to change its prices elsewhere in the United States during the relevant month." *Id.* at 582. As in *Baldwin*, New York could "not 'project its legislation into [other States] by regulating the price to be paid'" for products in those States, *id.* at 582-583, thereby forcing out-of-state commercial actors to "surrender whatever competitive advantages they may possess," *id.* at 580.

In *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 326 (1989), the Court again confronted a "price-affirmation statute." That statute "require[d] out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers [were], as of the moment of posting, no higher than the prices at which those products are sold in" Massachusetts and other bordering States. *Id.* Connecticut enacted the statute because prices were often lower in neighboring States, prompting Connecticut "residents living in border areas [to] frequently cross[] state lines to purchase" beer from out-of-state retailers. *Id.* Although

the majority opinion contained an "expansive" discussion of various principles, *id.* at 345 (Scalia, J., concurring in part and concurring in the judgment); *see infra* pp. 19-20, the holding rested on the ground that "the Connecticut statute has the extraterritorial effect, condemned in *Brown-Forman*, of preventing brewers from undertaking competitive pricing in [other States] based on prevailing market conditions," *Healy*, 491 U.S. at 338.

The Court in *Healy* also recognized that the Connecticut statute "fac[ially] . . . discriminate[d]" against interstate commerce. 491 U.S. at 340. It left beer producers "free to charge . . . whatever [in-state] price [they] might choose so long as [they did] not sell" in other States. *Id.* at 341. That discriminatory treatment created "a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce." *Id.*

Thus, "[i]n all three cases," the Court "faced (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses." *Epel*, 793 F.3d at 1173. And "a careful look at the holdings in the three . . . cases suggests" that each of them was motivated by "a concern with preventing discrimination against out-of-state rivals or consumers." *Id.* Much like the protectionist trade barrier invalidated in *Baldwin*, the price-affirmation laws in *Healy* and *Brown-Forman* equalized prices across borders to protect in-state businesses from out-of-state competition—eliminating the incentive for in-state residents to "cross[] state lines to purchase [alcohol] at lower prices" from out-of-state retailers. *Healy*, 491 U.S. at 326. The invalidity of those laws was so obvious that the Court struck

them down as *per se* invalid, without any further inquiry. *See id.* at 336-340; *Brown-Forman*, 476 U.S. at 583-584.

Proposition 12 bears no resemblance to those laws. It is not a "price control or price affirmation statute[]." *Walsh*, 538 U.S. at 669. It does not tie "[in-state] price[s] . . . to out-of-state prices." *Id.* (internal quotation marks omitted). And as petitioners concede, it does not discriminate in any way. *See* Pet. Br. 2 n.2; Pet. App. 5a, 17a. "The rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case." *Walsh*, 538 U.S. at 669.

2. A plurality of the Court proposed a somewhat broader extraterritoriality rule in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). That case concerned an Illinois securities statute that "directly regulat[ed] transactions which [took] place . . . wholly outside" of Illinois—specifically, tender offers made by out-of-state buyers to "those living in other States and having no connection with Illinois." *Id.* at 641, 642 (plurality). The majority struck down the statute on *Pike* grounds, *see id.* at 643-646; *infra* pp. 39-40; but a four-justice plurality reasoned that the dormant Commerce Clause also prohibited Illinois from "regulat[ing] directly . . . commerce wholly outside the State." *Id.*[10]

Consistent with that reasoning, lower courts have struck down state laws that "directly regulate[] . . . a transaction that occurs wholly outside the State."

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[10] The *Edgar* plurality invoked both the dormant Commerce Clause and due process limits on "extraterritorial jurisdiction." 457 U.S. at 643 (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977)); *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815 (1985) (applying Due Process Clause to bar Kansas from directly regulating out-of-state activities with "no apparent connection" to Kansas).

E.g., *Sam Francis Found. v. Christie's, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (en banc). In *Sam Francis*, for example, the court of appeals invalidated a California statute that required a "seller of fine art to pay the artist a five percent royalty if 'the seller resides in California,'" even for "sales [with] no necessary connection with the state other than the residency of the seller," *id.* at 1322, 1323. Lower courts have likewise held that a State may not directly regulate the disposal of medical waste in other States that has no "effect whatsoever in" the enacting State, *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 616 (9th Cir. 2018), or "directly regulate[] the production facilities . . . of out-of-state [vaping] manufacturers" including with respect to vaping products sold in different States, *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 837 (7th Cir. 2017); *see also Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 380 (6th Cir. 2013) (Sutton, J., concurring) ("if Ohio . . . made it illegal for its citizens to gamble, the State could not prosecute Nevada casinos for letting Buckeyes play blackjack").

As the court below recognized, however, Proposition 12 does not directly regulate wholly out-of-state commerce. Pet. App. 10a-14a. It does not, for example, empower state officials to obtain a "cease and desist [order]" blocking transactions that take place wholly outside of California. *Edgar*, 457 U.S. at 629. It does not require payment of royalties on sales with "no necessary connection" to California. *Sam Francis*, 784 F.3d at 1323. It does not authorize civil penalties for engaging in "transactions that occur wholly outside of the State." *Sharpsmart*, 889 F.3d at 615. And it does not impose permitting requirements on "out-of-state . . . manufacturers' production facilities" that necessarily govern the manufacturing of products sold both in-state and out-of-state. *Legato*, 847 F.3d at 834;

see, e.g., *id.* ("[T]he Indiana Act directly regulates specific elements of any security contract made by out-of-state manufacturers.").

To the contrary, Proposition 12 serves the localized objective of "eliminat[ing] inhumane and unsafe products . . . from the *California marketplace*." Cal. Sec'y of State, *Voter Information Guide* 70 (2018), https://tinyurl.com/2ds3rxee (emphasis added); *see infra* pp. 44-48. The challenged provision regulates only the specific products that producers sell "within the state" of California, imposing no limits on how out-of-state businesses produce pork sold in other States or otherwise conduct their business operations. Cal. Health & Safety Code § 25990(b)(2). Proposition 12 is thus not comparable to a law that "regulates the out-of-state transactions of" producers "who sell in-state" by conditioning the legality of their in-state sales on how they price or produce goods sold in other States. *Brown-Forman*, 476 U.S. at 580. Instead, it is consistent with the long tradition of state laws that regulate "'products that are brought into or are otherwise within the borders of [the enacting State],'" Pet. App. 14a, such as by requiring products sold in-state (wherever produced) to bear certain labels, come in certain packaging, or adhere to certain quality, content, or safety standards.[11]

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[11] *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981) (statute barring in-state sale of milk in plastic, nonreturnable containers); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001) (law requiring lightbulbs sold in-state to bear labels "inform[ing] consumers that the products contain mercury"); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 791 (8th Cir. 1995) (law prohibiting in-state "sale of petroleum-based sweeping compounds").

B. Petitioners' Arguments for an Expansive New Extraterritoriality Doctrine Lack Merit

Petitioners invite the Court to expand the dormant Commerce Clause far beyond the Court's prior holdings. All of their proposals are untenable.

1. The "practical effects" inquiry is not an appropriate constitutional standard

Petitioners primarily contend that courts should invalidate any state law that "ha[s] the practical effect of controlling commerce outside the State." Pet. Br. 19. They derive that proposed standard from language in *Healy*. But more recent precedent makes clear that an open-ended "practical effects" inquiry is not—and should not be—a part of the Court's dormant Commerce Clause doctrine. It is not supported by text or history; it would create opportunities for substantial and unwarranted incursions on state sovereign authority; and it is not necessary to serve petitioners' policy concerns.

a. The holding in *Healy* was that the challenged price-affirmation statute was "essentially indistinguishable from" the price-affirmation statute struck down in *Brown-Forman*. 491 U.S. at 339. In discussing constitutional limits on state laws with out-of-state effects, however, the majority opinion "used broad language." Pet. App. 7a. It observed that, "[g]enerally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State," and prohibits a state regulation if "the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336-337. That "practical effect" language

forms the cornerstone of petitioners' arguments in this case. *See* Pet. Br. 21-29.

But *Healy*'s "expansive" discussion of extraterritoriality was criticized by Justice Scalia in *Healy* itself as both "unnecessary" and "dubious." 491 U.S. at 345 (concurring in part and concurring in the judgment). And "the Court's holdings" in subsequent dormant Commerce Clause cases "have not gone nearly so far" as to "declare 'automatically' unconstitutional any state regulation with the practical effect of 'control[ling] conduct beyond the boundaries of the State.'" *Epel*, 793 F.3d at 1174 (Gorsuch, J.); *see id.* (characterizing the same argument advanced by petitioners here as "[e]xploiting dicta in *Healy*").

To the contrary, in *Walsh*, the Court unanimously rejected a similar effort to convert *Healy*'s dicta into a sweeping new branch of dormant Commerce Clause doctrine. The Court addressed a Maine statute subjecting certain in-state drug transactions to a government review process unless the manufacturer agreed to provide rebates to the State. *See Walsh*, 538 U.S. at 653-655. The plaintiffs argued that the law "constitute[d] impermissible extraterritorial regulation," *id.* at 669, because virtually all drugs subject to the statute were manufactured and sold to wholesalers outside of Maine, *see, e.g.*, *id.* at 656-658. Although the Court acknowledged that the statute could produce certain out-of-state "effects"—by requiring out-of-state manufacturers that wanted to serve the Maine market to choose between entering a rebate agreement or submitting to the review process—the Court held that "[t]he rule that was applied in *Baldwin* and *Healy* . . . is not applicable to this case." *Id.* at 669. It explained that *Baldwin* and *Healy* addressed "price control or price affirmation statutes." *Id.* Unlike

those statutes, "the Maine Act does not regulate the price of any out-of-state transaction," "does not insist that manufacturers sell their drugs to a wholesaler for a certain price," and does "not t[ie] the price of . . . in-state products to out-of-state prices." *Id.* (internal quotation marks omitted).

None of the other cases from this Court that petitioners invoke (Pet. Br. 21-22 & n.8) supports their broad "practical effects" inquiry. In *C&A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383 (1994), the Court invalidated a waste-processing ordinance that deprived "out-of-state firms[] of access to a local market," holding that the ordinance "discriminate[d] against interstate commerce." *Id.* at 386, 390; *see id.* at 392 (discussing its "protectionist effect"). Petitioners and the federal government quote a sentence from that opinion (Pet. Br. 26; U.S. Br. 32) saying that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *Carbone*, 511 U.S. at 393. In context, that sentence addressed why a facially *discriminatory* ordinance may not be "justif[ied] . . . as a way to steer solid waste away from out-of-town disposal sites that [the town] might deem harmful to the environment." *Id.* The Court did not hold (or even suggest) that the dormant Commerce Clause imposes a *per se* bar on *non*-discriminatory, in-state sales restrictions merely because of their practical "effects on conduct that takes place outside" the enacting State's borders. Pet. Br. 34.

In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the Court applied an early form of *Pike* balancing to strike down an Arizona law that burdened an instrumentality of interstate commerce by limiting train lengths. The law required "breaking up and

remaking long trains upon entering and leaving the state," which "delay[ed] the traffic and diminish[ed] its volume moved in a given time." *Id.* at 772. The Court reasoned that the state interest asserted to support that limitation was outweighed by an overriding need for "an efficient and economical national railway system." *Id.* at 771; *see infra* pp. 38-39. Nothing in that decision supports the expansive extraterritoriality doctrine advanced by petitioners here—or undermines the Court's more recent holding in *Walsh* about the scope of the *Baldwin* line of cases.

b. Other jurists and commentators have warned of the perils of "tak[ing] seriously" the expansive dicta in *Healy*. *E.g.*, *Am. Beverage*, 735 F.3d at 378 (Sutton, J., concurring). If adopted as a constitutional standard, that language would "risk serious problems of overinclusion." *Epel*, 793 F.3d at 1175. "The modern reality" of our economic union is that "the States frequently regulate activities that occur entirely within one State but that have effects in many," including when States enact in-state sales requirements that lead out-of-state businesses to choose whether to produce compliant goods that may be sold within the enacting States. *Am. Beverage*, 735 F.3d at 379 (Sutton, J., concurring). If every law with that kind of "practical effect" were invalid, then "[e]ven state laws that neither discriminate against out-of-state interests nor disproportionately burden interstate commerce" could violate the dormant Commerce Clause. *Id.* at 378.

That regime would be profoundly at odds with the Constitution's commitment to safeguarding the States' "substantial sovereign authority," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and preserving the "numerous and indefinite" powers that were meant "to remain in the State governments," The Federalist No. 45

(James Madison). From the founding to the present day, States have enacted laws that regulate in-state commerce but have the practical effect of influencing business decisions of actors in other States. Those statutes range from founding-era "inspection laws," *Livingston v. Van Ingen*, 9 Johns. 507, 580 (N.Y. 1812) (Kent, Ch.); to "quarantine laws" and "health laws of every description," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (Marshall, C.J.); to taxes on "businesses that operate across state lines," *Am. Beverage*, 735 F.3d at 379 (Sutton, J., concurring); to state corporation laws, like Delaware's, with "de facto nationwide application," Pet. App. 8a (internal quotation marks omitted); to modern regulations of the "quality, labeling, health, or safety" of products sold within a State's borders, *Epel*, 793 F.3d at 1173.[12]

Petitioners' suggestion that the dormant Commerce Clause casts constitutional doubt on so many longstanding state laws is "audacious"—"especially given [the Court's] remarks about the limits of *Baldwin* doctrine in *Walsh*." *Epel*, 793 F.3d at 1175; *see also, e.g.*, Goldsmith & Volokh, *State Regulation of Online Behavior*, 101 Texas L. Rev. (forthcoming)

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[12] *See also, e.g.*, *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 559 (6th Cir. 2021) ("state consumer protection laws" applicable "in the context of eCommerce"); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993-994 (9th Cir. 2000) (antitrust laws as applied to conspiracies hatched out-of-state that harm in-state businesses or consumers); *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994) (contract laws, as applied to "contract[s] which cover[] multiple states"); Goldsmith & Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 795, 804 (2001) ("products liability actions against out-of-state manufacturers," "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws, and much more").

(draft at 6), https://tinyurl.com/mr3x3cy7 (*Healy*'s "dicta . . . cannot be taken seriously"); Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* § 6.08[E], p. 6-115 (2d ed. 2013) (questioning *Healy*'s "sweeping" dicta).

Rather than identify any meaningful limiting principle for their proposed standard, petitioners seem to embrace its far-reaching implications. In their view, for example, when a product manufactured out-of-state raises "genuine . . . concerns about the health and safety" of a State's residents, the State has only two options: either "assume[] that its sister States share those concerns and will regulate their own businesses accordingly," or wait for "Congress . . . to step in" and "address [the] concerns through a federal regulatory regime." Pet. Br. 35. That would turn our constitutional order on its head. In the absence of a constitutional prohibition or valid federal legislation with preemptive effect, the States have "broad power" to regulate markets and sales within their borders. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531 (1949); *see generally Gibbons*, 22 U.S. at 203 (describing "immense mass" of valid state legislation, "embrac[ing] everything within the territory of a State, not surrendered to the general government").

The vagueness of petitioners' "practical effects" standard would also invite abusive litigation and produce inconsistent results. As Judge Sutton has noted, "I do not think *Healy*'s suggestion to look to the 'practical effect' of the regulation offers any meaningful guidance." *Am. Beverage*, 735 F.3d at 379; *see id.* at 379-380 (courts are "ill-equipped" to assess which types of "extraterritorial effects exceed [the] bounds" of a "'practical effect' inquiry" and "which do not"). "In the absence of a clear purpose or meaning," petitioners'

expanded extraterritoriality doctrine would "provide[] a 'roving license for federal courts to determine what activities are appropriate for state and local government to undertake.'" *Id.* at 380; *see also Epel*, 793 F.3d at 1175 (petitioners' preferred standard would create "a weapon far more powerful than *Pike* or *Philadelphia*" built "on the basis of dicta").

c. Notwithstanding the threat it would pose to state sovereignty, petitioners contend that their expansive new rule is necessary to protect our federal system. Pet. Br. 22. They invoke the perils of economic Balkanization, the importance of nationwide markets, and the need to respect the sovereign policy choices of other States. *Id.* at 22-27. Petitioners are correct that those matters were of central concern to the Framers. *See, e.g.*, *Tenn. Wine*, 139 S. Ct. at 2460. But petitioners ignore the existing constitutional safeguards—actually created by the Framers—that protect against state overreach.

Most obviously, "Congress retains authority under the Commerce Clause as written to regulate interstate commerce." *United Haulers*, 550 U.S. at 345 n.7. If Congress perceives a problem arising from the effects of a state regulation, it "can use this power, as it has in the past," to adopt a federal regulatory statute addressing the problem. *Id.* Some members of Congress, for example, have introduced legislation that would preempt laws like Proposition 12. *See* S. 2619, 117th Cong. (2021); H.R. 4999, 117th Cong. (2021). If the policy concerns advanced by petitioners and their amici are widely shared by the People and their elected federal representatives, then the political branches of the federal government can enact that legislation. That "is precisely what the Commerce Clause (the *real* Commerce Clause) envisions." *United*

Haulers, 550 U.S. at 349 (Scalia, J., concurring in part). Under petitioners' proposed rule, by contrast, Congress would be spared the trouble of having to decide whether to exercise that authority.

Petitioners also ignore existing constitutional safeguards that impose "[t]erritorial limits on lawmaking." *Am. Beverage*, 735 F.3d at 380 (Sutton, J., concurring). The Constitution already imposes restrictions on direct extraterritorial regulation. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-823 (1985) (Due Process Clause); *cf. Edgar*, 457 U.S. at 641-643 (plurality); *supra* pp. 16-17. Other limits on extraterritorial lawmaking are found in the Extradition Clause, the Sixth Amendment, and the Full Faith and Credit Clause, *Am. Beverage*, 735 F.3d at 380 (Sutton, J., concurring), as well as the right to interstate travel, *see, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring). And where a state law with extraterritorial effects either discriminates against interstate commerce or imposes clearly excessive burdens on interstate commerce, it may be held invalid under this Court's existing dormant Commerce Clause doctrine.

That existing doctrine would, for example, provide a basis for challenging petitioners' hypothetical law "bar[ring] imports of goods not produced by workers paid California's $15-an-hour minimum wage, even though in most States the minimum wage is below $10." Pet. Br. 33. An attempt to level the economic playing field in that way would raise serious protectionism concerns, as this Court previously indicated in *Baldwin*, 294 U.S. at 528. And while there may be other problematic hypotheticals for which the dormant Commerce Clause does not provide a solution,

cf. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring in part and concurring in the judgment), Congress retains the ability at all times to adopt nationwide solutions by exercising its authority under the express terms of the Commerce Clause.

Finally, petitioners disregard the possibility of state-level political checks. To be sure, one of the rationales underlying the virtually *per se* prohibition on *discriminatory* state laws is that "when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *United Haulers*, 550 U.S. at 345. When the citizens *inside* a State "bear the costs of the" law enacted by that State, however, "[t]here is no reason" for the courts to hand the opponents of that law "a victory they could not obtain through the political process." *Id.*; *see, e.g.*, *Epel*, 793 F.3d at 1170, 1174. In this case, the ballot materials informed California voters that Proposition 12 would increase pork prices in California because the "increased costs" of producing compliant pork products would be "passed through to consumers who purchase the products." *Voter Information Guide*, *supra*, at 69; *see infra* pp. 30-31. In our federal system, the proper way for petitioners to address their concerns about that policy is to raise those concerns either with Congress or with the California voters who chose to impose higher prices on themselves in the first place.

2. Proposition 12 would satisfy any sensible understanding of a "practical effects" standard

For all the reasons discussed above, there is no basis for the Court to adopt a broad extraterritoriality

doctrine asking whether the "practical effect" of a state law is to "control[] commerce outside the State." Pet. Br. 19. But if the Court were inclined to "take[] seriously" the dicta in *Healy*, *Am. Beverage*, 735 F.3d at 378 (Sutton, J., concurring), that language should at most apply in cases where the challenged law truly "*control[s]* commercial activity occurring wholly outside the boundary of the State," *Healy*, 491 U.S. at 337 (emphasis added). Proposition 12 does not do so, either directly or in practical effect.

The challenged provision allows out-of-state producers to freely choose whether to make the adjustments necessary to produce Proposition 12-compliant pork that may be sold (at a higher price) in California. *See* Cal. Health & Safety Code § 25990(b)(2). Rational economic actors will choose to do so only if they "anticipate a net revenue stream from serving California that meets or exceeds the higher costs of producing and marketing [that] pork." Br. of Agricultural Economics Professors 13. Otherwise, they can sell non-compliant pork products to customers in other States. *Id.*; *see id.* at 15-16. Proposition 12 in no way "controls" that business decision.

Petitioners argue that "because of the nature of the industry and its product," the "practical effect of Proposition 12 is" to "govern sow housing generally, not just for out-of-state pigs destined for" California. Pet. Br. 19. They assert that "farmers everywhere will be required to conform their *entire* operations with Proposition 12 for all their sows." *Id.* at 28. As their brief makes clear, that assertion turns on petitioners' views regarding the "impracticality" of segregating supply chains and tracing pork products back to sows housed in compliance with Proposition 12's standards. *Id.*

At times, petitioners have argued that "[t]racing a particular cut of meat to a particular sow housed a particular way is an impossible task." Pet. 17. Portions of their merits brief appear to repeat that argument. *See* Pet. Br. 17 n.7 ("[T]racing from gilt to whole pork cut is not currently possible."). But their own complaint acknowledges that tracing, while allegedly "difficult[]," *is* possible. Pet. App. 205a. The complaint alleges only that, "*[a]bsent* tracing . . . and segregation," "it will be impossible to sell any commercially produced pork into California." *Id.* at 205a-206a (emphasis added); *see also id.* at 183a, 214a.

Nor could petitioners allege that tracing and segregation are impossible. Pork producers have used segregated supply chains for years in response to growing consumer demand for specialized and ethically-produced pork products. *Supra* pp. 5-6; *see* Br. of Dr. Leon Barringer 12-30. The United States' brief never questions the feasibility of creating such segregated supply chains, and for good reason: the USDA operates nationwide programs for auditing and verifying specialized supply chains for a range of pork products. *Supra* pp. 5-6.[13] Indeed, pork producers themselves have publicly confirmed that they have developed segregated supply chains to produce Proposition 12-compliant pork for California while continuing to supply other States with other kinds of pork products.[14] And

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[13] *See, e.g.*, USDA, *Process Verified Program*, https://tinyurl.com/3uzzuzd5.

[14] *See, e.g.*, Tyson Foods, *Third Quarter 2021 Earnings* 15 (Aug. 9, 2021), https://tinyurl.com/m72skzs6 (reassuring shareholders that the company will not have difficulty "align[ing] suppliers" to produce Proposition 12-compliant pork and pork for other States "simultaneously"); *Hormel Foods Company Information About*

California officials have viewed pork producers' systems for segregating and tracing Proposition-12 compliant pork on in-person visits to out-of-state farms and facilities, at the invitation of several major producers.[15]

At other times, petitioners soften their argument, contending that because it is "impracticable" to segregate supply chains, "buyers of market hogs everywhere will demand that their suppliers comply with Proposition 12." Pet. Br. 16. Again, however, petitioners' complaint acknowledges that the on-the-ground reality is different. It alleges that "[e]nd of chain suppliers who sell pork into California" will *either* "force their pork suppliers to produce *all* products they provide to those suppliers in compliance with California's specifications," *or* require them "to carefully segregate products." Pet. App. 206a; *see id.* at 214a-215a.

Any argument that business forces will require all pork produced nationwide to comply with Proposition 12 would be "unsupported and plainly incorrect" as a matter of basic economics. Br. of Agricultural Economics Professors 4. When consumers or markets

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California Proposition 12 (Jan. 1, 2022), https://tinyurl.com/598v48ur (similar); Mem. of Amicus Perdue Premium Meat Co. at 2, *Iowa Pork Producers Ass'n v. Bonta*, No. 3:21-cv-3018 (N.D. Iowa Aug. 4, 2021) ("compliance is straightforward and economically feasible"), https://tinyurl.com/4cck4xfv; *id.* at 9 (describing the "segregation of animals"); *see also* Smithfield, *Sustainability Impact Report* 22 (2021), https://tinyurl.com/23xd362m ("As a leader in group housing gestation, Smithfield will comply with [Proposition 12].").

[15] Cal. Dep't of Food & Agric., *Proposition 12 Update* (July 7, 2022), https://tinyurl.com/2p8s9zh4 (describing visits to facilities operated by Clemens, Hormel, JBS, and Premium Iowa Pork).

demand specialized goods, businesses respond by passing the increased costs of producing the specialized goods along to *those* consumers or markets in the form of a price premium.[16] If a meat packer chose not to segregate its supply chain, and instead to provide Proposition 12-compliant pork to all consumers nationwide, it would soon be undercut in non-California markets by competitors—including competitors that "choose not to acquire the [more] costly Prop 12-compliant hogs."[17] And if a packer demanded that farmers provide it with exclusively Proposition 12-compliant hogs, *see, e.g.*, Pet. Br. 16, 29, farmers who prefer to run their operations in different ways could do business with different packers serving the estimated 87 percent of American pork consumers (*id.* at 8) who live outside California, *see* Br. of Agricultural Economics Professors 9-13.

Out-of-state businesses will thus be free to make their own decisions about whether to produce Proposition 12-compliant pork for sale in California. And while Californians will likely pay higher prices for that pork, experts predict "almost no impact on prices for consumers outside California." Br. of Agricultural Economics Professors 15; *see id.* at 23 (estimating a "0.2% *decline* in the price of retail pork outside California") (emphasis added).

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[16] *See, e.g.*, Carlson & Jaenicke, USDA, Econ. Rsch. Serv., *Changes in Retail Organic Price Premiums* 7 (2016), https://tinyurl.com/2hp34apy.

[17] Lee, Sexton & Sumner, *Voter Approved Proposition to Raise California Pork Prices*, Giannini Found. of Agric. Econ., 24 ARE Update 6 (2021), https://tinyurl.com/2p9h7b98.

3. Petitioners' alternative extraterritoriality theory is inconsistent with precedent and States' broad police powers

Petitioners also propose (Pet. Br. 36-43) an alternative extraterritoriality test, which suffers from similar problems as their principal proposal and finds even less support in this Court's cases. Under that "strict[]" inquiry, *id.* at 38, courts would scrutinize any state law with "substantial extraterritorial effects," *id.* at 39, and strike down the law as "exceed[ing] the police power" if it cannot "reasonably . . . be justified" by a "legitimate local" interest, *id.* at 36, 37; *cf.* U.S. Br. 33.

Petitioners identify no precedent supporting that proposal. They invoke cases in which the Court has considered whether a *discriminatory* law advances "a legitimate local purpose" that cannot be served by other means. *United Haulers*, 550 U.S. at 339; *see, e.g.*, Pet. Br. 41 (citing *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)). They also point to cases in which the Court has applied the *Pike* balancing inquiry to facially neutral statutes that impose a cognizable burden on interstate commerce, *see, e.g.*, *id.* at 38 (citing *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671 (1981) (plurality)), examining whether such a burden clearly exceeds "the putative local benefits," *Pike*, 397 U.S. at 142. But the Court has never suggested that a "searching" judicial assessment of the reasonableness or legitimacy of the justifications for a law (Pet. Br. 43) should be the first line of inquiry under the Commerce Clause whenever a state law is alleged to have substantial extraterritorial effects.

That novel proposal would force courts to conduct a policy-focused inquiry, taking a "hard look at the proffered rationales for [a law] . . . and how well the

law serves those purposes." Pet. Br. 39; *see id.* at 38-39 ("much stricter than the test of reasonableness of economic activities under the due process and equal protection cases") (internal quotation marks omitted). Courts would have to undertake that inquiry for every state law that has "substantial extraterritorial effects," *id.* at 39—including any of the myriad laws "regulat[ing] activities that occur entirely within one State but that have effects in many," *Am. Beverage*, 735 F.3d at 379 (Sutton, J., concurring). "There was a time when this Court" "rigorously scrutinize[d] economic legislation passed under the auspices of the police power" in that way, *United Haulers*, 550 U.S. at 347; but it long ago recognized that courts should not "substitute their social and economic beliefs for the judgment" of state lawmakers and voters, *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).[18]

Finally, petitioners' contention that an in-state sales restriction like the one challenged here is not "a legitimate exercise of [the] police power" (Pet. Br. 43) is remarkable. A State's police power encompasses all "laws in relation to persons and property within its borders as may promote the public health, the public morals, and the general prosperity and safety of its inhabitants." *W. Union Tel. Co. v. James*, 162 U.S. 650, 653 (1896). While that power may not be used to "encroach upon the powers of the federal government in regard to rights granted or secured by the federal constitution," *id.* at 653-654; *see, e.g.*, U.S. Const. art. VI, cl. 2, it is plenary in other respects, U.S. Const. amend.

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[18] *Cf. Am. Beverage*, 735 F.3d at 379 (Sutton, J., concurring) (criticizing *Pike*'s "ineffable test" because it requires "courts to balance interests they are ill-equipped to measure," and asking "[w]hy have *two tests* that suffer from these problems rather than just one?").

X. And it surely encompasses laws like Proposition 12 that serve legitimate local interests by prohibiting the in-state sale of animal products that the voters view as morally objectionable. *See infra* pp. 44-48.

4. Petitioners' remaining arguments lack merit

The remaining arguments advanced by petitioners also fail. Petitioners suggest that the "invasive inspection requirements" in the proposed implementing regulations (which were released after petitioners filed their complaint) "impermissibly intrude[] into the operations of out-of-state businesses." Pet. Br. 29-30. But the proposed regulations would not impose any inspection requirements on out-of-state producers who choose not to supply pork to California. As to producers who do choose to supply the California market, the proposed regulations would not require them to allow California officials to visit their facilities. They could instead obtain inspection reports from third-party certification organizations or local government officials. *See* Cal. Dep't of Food & Agric., *Proposed Regulatory Text* 37-38, 40 (May 28, 2021), https://tinyurl.com/yy4cvmsd.[19] This Court has long recognized that the Constitution allows a State to impose such requirements. *See, e.g.*, *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 373, 377 & n.11

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[19] *See also* Cal. Dep't of Food & Agric., *Initial Statement of Reasons* 8-9 (May 28, 2021), https://tinyurl.com/5n787k4u ("certification . . . will rely heavily on third-party certifiers," many of which "are currently used . . . on farms for established animal care, organic, or environmental sustainability verification programs"); Pet. App. 77a-78a ("If a production operation is already inspected by a third-party company for welfare standards . . . then the producer may not have to incur additional costs for certification.").

(1976); *cf. Baldwin*, 294 U.S. at 524 ("Appropriate certificates may be exacted from farmers in Vermont and elsewhere[.]").

Petitioners next assert that Proposition 12 "subjects pork farmers to inconsistent regulations." Pet. Br. 30. They do not, however, identify an actual conflict between Proposition 12 and another state law; they merely demonstrate that States regulate certain animal husbandry practices in different ways. [20] States often take divergent approaches to regulation. *See, e.g.*, *Ferguson*, 372 U.S. at 730-731. Differences in regulatory approaches do not, on their own, "transcend constitutional limitations." *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 542 (1935).

Finally, petitioners suggest that pork production, "by [its] nature," "demand[s] a single uniform rule." Pet. Br. 32. But petitioners identify no support for that assertion. While they point to an early case suggesting that the Constitution reserves to Congress the regulation of certain inherently "national" (as opposed to "local") subjects, *Cooley v. Bd. of Wardens of Port of Phila.*, 53 U.S. (12 How.) 299, 319 (1852), the Court long ago abandoned any effort to apply that distinction, *see* Denning, *supra*, § 6.03, p. 6-20 (collecting cases). And nothing in *Cooley* (or any other case) suggests that the Commerce Clause ousts States from regulating an industry simply because of the need to "foster[]

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[20] Petitioners cite Michigan, Ohio, Colorado, and Rhode Island statutes allowing certain practices such as "us[ing] individual pens from seven days prior to farrowing until pregnancy is confirmed." Pet. Br. 31. But nothing in Proposition 12 restricts how farmers in those States may raise their pigs; it merely controls which pork products may be sold in California. And nothing in the cited statutes forbids producers from making Proposition 12-compliant pork to sell in California.

an efficient nationwide . . . market." Pet. Br. 33. The modern Court has sometimes considered a need for national uniformity in the regulation of instrumentalities of interstate transportation as a relevant factor in the *Pike* inquiry, *see infra* pp. 38-39; but it has otherwise recognized that regulation is properly "left to the states" unless Congress enacts "legislation designed to secure uniformity," *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189-190 (1938); *see id.* ("that is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce").

II. PETITIONERS HAVE NOT STATED A *PIKE* CLAIM

Petitioners also claim that Proposition 12 fails the *Pike* balancing test, *see* Pet. Br. 44-50, and the principal contention of the United States is that this Court should remand for factual development and further exploration of the *Pike* claim by the courts below, *see* U.S. Br. 17-30. Both the United States and petitioners misunderstand the *Pike* framework and mischaracterize the nature of the interests advanced by Proposition 12.

A. Petitioners Have Not Alleged a Cognizable Burden Under *Pike*

1. The *Pike* balancing test asks whether a state law imposes a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Like other aspects of dormant Commerce Clause doctrine, that test is controversial. The Court has "not provided a clear methodology" for applying *Pike*, Pet. App. 16a, and members of the Court have criticized the test for "invit[ing] us, if not compel[ling] us, to function more as legislators than as

judges," *e.g.*, *Camps Newfound*, 520 U.S. at 619 (Thomas, J., dissenting). In particular, critics contend that "[t]he burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 360 (2008) (Scalia, J., concurring in part).

While the Court has retained the *Pike* test, it has not invalidated a law under *Pike* in more than three decades. Its more recent cases have noted the deferential nature of that inquiry, underscoring that "[s]tate laws frequently survive this *Pike* scrutiny." *Davis*, 553 U.S. at 339. Although some *Pike* cases have proceeded to free-form balancing regardless of the nature of the purported burdens, *see, e.g.*, *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 393-395 (1983), the Court has elsewhere recognized that not all burdens or costs allegedly resulting from a challenged law are sufficient to trigger *Pike* balancing. Under that approach, courts conduct the balancing of incommensurate burdens and benefits "only in rare cases," Pet. App. 17a, where plaintiffs plausibly allege a burden on interstate commerce of such a "nature and extent" as to offend the "interests safeguarded by the commerce clause from state interference," *S. Pac.*, 325 U.S. at 770-771.

The Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), illustrates the proper approach. That case concerned a Maryland law barring "a producer or refiner of petroleum products . . . [from] operat[ing] any retail service station within the State." *Id.* at 119. Exxon and other gasoline producers argued that the law would cause serious disruption

to the industry's "market structure," *id.* at 127, leading many retail stations to close and several out-of-state producers to "stop selling in Maryland" altogether, *id.*; *see id.* at 121-122. The Court "assum[ed] the truth of [those] assertions," but it refused to balance the burdens of the law against the putative benefits under *Pike*. *Id.* at 127. It explained that the dormant Commerce Clause does not "protect[] the particular structure or methods of operation in a retail market." *Id.* Although there was a strong possibility "that the consuming public [would] be injured by the loss of the high-volume, low-priced stations operated by the independent refiners," the Court reasoned that such injuries "relate[] to the wisdom of the statute, not to its burden on commerce." *Id.* at 128. In other cases, the Court has similarly refrained from conducting a balancing analysis even in the face of allegations that a law imposed costs or burdens on out-of-state economic actors.[21]

The few cases in which this Court has struck down laws under *Pike* illustrate the type of burden necessary to proceed to a balancing inquiry. On several occasions, the Court has invalidated state laws that burdened "the free flow of interstate commerce" by directly interfering with instrumentalities or channels

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[21] *See, e.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 & n.16 (1981) (refusing to balance benefits and burdens of non-discriminatory severance tax, noting that "it is difficult to see how the court is to go about comparing costs and benefits in order to decide whether the tax burden . . . is excessive"); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960) (local smoke abatement ordinance applied to ships transporting cement from Michigan to plants in neighboring States); *Breard v. City of Alexandria*, 341 U.S. 622, 638 (1951) (restriction on door-to-door solicitation resulting in "economic effects on interstate commerce [that] cannot be gainsaid").

of interstate commerce. *S. Pac.*, 325 U.S. at 770; *see Gen. Motors*, 519 U.S. at 298 n.12. In *Southern Pacific*, for example, state restrictions on the maximum lengths of trains obstructed the interstate passage of freight and passengers. 325 U.S. at 779-782; *see supra* pp. 21-22. In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527 (1959), an anomalous state regulation of truck mudguards significantly disrupted interstate trucking, requiring "two to four hours of labor" at the state border to make vehicles compliant. *See also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (restriction on length of trucks); *Kassel*, 450 U.S. at 671 (plurality) (same).

In another category of cases—"including *Pike* itself"—the Court has invoked the balancing inquiry to scrutinize laws that (while facially neutral) raised concerns about lurking discriminatory purposes. *Gen. Motors*, 519 U.S. at 298 n.12 (collecting cases that "arguably turned in whole or in part on the discriminatory character of the challenged state regulations"). For instance, in *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 889 (1988), the Court invalidated an Ohio law that tolled the statute of limitations for contract disputes involving certain out-of-state corporations. Although the Court chose to invalidate the law under *Pike* in light of the "substantial restraints" it imposed on "interstate commerce," the Court also recognized that the law "might have been held to be a discrimination that invalidates without extended inquiry." *Id.* at 891.

Finally, as noted above, the Court applied *Pike* to strike down the Illinois securities regulation in *Edgar*. *Supra* p. 16. That regulation imposed a "substantial" and "obvious burden . . . on interstate commerce" through its "nationwide reach which purport[ed] to

give Illinois the power to determine whether a tender offer may proceed *anywhere*," including between out-of-state buyers and out-of-state shareholders. *Edgar*, 457 U.S. at 643 (emphasis added). After first establishing that burden, the Court turned to the interests asserted by Illinois and held that they were "insufficient to outweigh the burdens Illinois imposes on interstate commerce." *Id.* at 644.

2. The threshold inquiry with respect to petitioners' *Pike* claim is thus whether they have plausibly alleged that Proposition 12 imposes "a significant burden on interstate commerce" comparable to those in the cases discussed above. Pet. App. 17a. They have not. *See infra* pp. 41-44. But the United States urges the Court to reverse the analytical framework, by first examining the interests underlying the challenged law, *see* U.S. Br. 17-27, and then considering whether the law imposes "burdens on interstate commerce [that] 'outweigh'" those interests, *id.* at 27; *see id.* at 27-30. That approach to *Pike* would invite free-ranging judicial scrutiny of the interests underlying a challenged policy without first determining whether it imposes any cognizable burden on interstate commerce.

That sequencing is problematic. As the Court has recognized, *Pike* balancing can be a fraught endeavor. In some (perhaps many) cases, "the Judicial Branch is not institutionally suited to draw reliable conclusions" or to "mak[e] whatever predictions" are necessary to resolve the subtle "cost-benefit questions" that are bound up in the balancing exercise. *Davis*, 553 U.S. at 353, 355. The approach taken in *Exxon* (and by the courts below) avoids having courts unnecessarily embark on an inquiry that is "ill suited to the judicial function and should be undertaken rarely[.]" *CTS*

Corp., 481 U.S. at 95 (Scalia, J., concurring in part and concurring in the judgment). Under the United States' approach, in contrast, the first step in analyzing any *Pike* claim would be a fact-intensive and policy-oriented inquiry of the type better undertaken by a congressional committee.

3. The courts below correctly held that petitioners have not alleged a cognizable burden on interstate commerce that would trigger *Pike* balancing. Pet. App. 16a-19a, 31a-35a.

Petitioners' allegations principally address the increased costs that pork producers who choose to produce Proposition 12-compliant pork will confront. They allege that such producers will have "to reduce their sow inventory," Pet. App. 208a, "reconstruct their sow housing," *id.* at 214a, and "hire additional farm hands," *id.* at 175a, which will collectively result in "a 9.2% cost increase at the farm level," *id.* at 214a.

Those allegations do not present the kind of substantial burden on interstate commerce that this Court has previously viewed as sufficient to support a *Pike* claim. Petitioners have not alleged that Proposition 12 interferes with the channels or instrumentalities of interstate commerce, thereby impeding the free flow of commerce across state borders. *See S. Pac.*, 325 U.S. at 770-771. They concede that this case does not implicate concerns about latent discrimination or protectionism, of the type that has sometimes prompted this Court to scrutinize facially neutral legislation under *Pike*. *See Gen. Motors*, 519 U.S. at 298 n.12. And Proposition 12 is not at all analogous to the law invalidated in *Edgar*, which empowered state officials to block wholly out-of-state commercial transactions. 457 U.S. at 643.

No doubt, petitioners have alleged that businesses electing to produce Proposition 12-compliant pork will face additional costs. But businesses often face additional costs when they decide to produce goods subject to sales restrictions in other States. *See, e.g.*, *Epel*, 793 F.3d at 1173-1175. Such "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 (citing *Exxon*, 437 U.S. at 127-128); *cf. Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 438 (2005).[22] And while producers who choose to supply Proposition 12-compliant pork may need to alter some of their facilities or sow-housing methods, this Court has already held that the Commerce Clause does not, of its own force, protect an industry's preferred "structure or methods of operation." *Exxon*, 437 U.S. at 127.

Petitioners assert that the effects of Proposition 12 will be more substantial than those of the Maryland law upheld in *Exxon* because "Proposition 12 will in practice require sow farms everywhere to adopt its production standards." Pet. Br. 50; *see id.* at 44-46. As discussed above, however, that assertion is at odds with the allegations in petitioners' complaint. *Supra* pp. 29-30. It is also at odds with the reality that pork producers have segregated their supply chains to produce and sell specialty products for years—and

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[22] The United States notes (at 28) that the costs of a regulation are not always "entirely irrelevant" under *Pike*. *Raymond Motor*, 434 U.S. at 445. But *Raymond Motor* merely recognized that costs arising from a law that disrupts "the interstate movement of goods" by imposing anomalous restrictions on instrumentalities of interstate commerce may require balancing under *Pike*. *Id.*; *supra* pp. 38-39. Proposition 12 is not such a law.

that major pork producers have already made the adjustments necessary to deliver Proposition 12-compliant pork to California consumers. *Supra* pp. 29-30 & nn.14-15. The Court need not disregard that reality when assessing the adequacy of petitioners' complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

While petitioners do plausibly allege that segregated supply chains are more costly, *see, e.g.*, Pet. App 214a, basic economics teaches that any producers choosing to supply the California market will pass those and other costs "forward to California consumers through ordinary market processes," Br. of Agricultural Economics Professors 18—just as the ballot materials for Proposition 12 said they would. When a State adopts a policy that leads to higher costs for its own residents, those costs are not a cognizable burden on "interstate commerce" for purposes of *Pike*. *See, e.g.*, *Exxon*, 437 U.S. at 128; *cf. United Haulers*, 550 U.S. at 345.[23]

The United States argues that "[o]ther 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 other matters. U.S. Br. 23. But speculation about such hypothetical laws does not establish that Proposition 12's in-state sales requirements impose a cognizable burden on interstate commerce. In our federal system, there will always be substantial and legitimate variation between the policy choices of the

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[23] If any producers "do[] not believe that any increased price for Proposition-12 compliant pork in California would recoup [the] increased production costs" of making that pork, Pet. App. 168a, the rational response would be to choose not to produce pork for California's market, *supra* p. 28. A number of major producers, however, have already made the opposite choice. *Supra* p. 29.

States on any number of issues, including animal husbandry. *See, e.g.*, Pet. Br. 31. If the United States perceives a need for greater national uniformity, Congress is free to exercise its Commerce Clause power to provide it. *Cf.* U.S. Br. 1, 6 (discussing Animal Health Protection Act and Federal Meat Inspection Act).

B. Petitioners Have Not Plausibly Alleged That Any Burden Resulting from Proposition 12 Is "Clearly Excessive"

Even if petitioners could establish a cognizable burden under *Pike*, they could not establish that the burden "is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Petitioners argue that "Proposition 12 does not offer *any* legitimate justification to counterbalance [its] burdens." Pet. 30; *see* Pet. Br. 47-48. But that argument obscures the justifications considered by millions of voters when they passed Proposition 12 by an overwhelming margin.

1. Petitioners and the United States note that one purpose of Proposition 12 was "'to prevent animal cruelty by phasing out extreme methods of farm animal confinement.'" Pet. Br. 7 (quoting Pet. App. 37a); U.S. Br. 3. That is what the voters accomplished by barring "farm owner[s] or operator[s] within the state" from confining covered animals "in a cruel manner." Cal. Health & Safety Code § 25990(a). The separate provision of Proposition 12 challenged here, however, prohibits "the sale within the state" of certain pork products. *Id.* § 25990(b)(2). The text and ballot materials make clear that the challenged provision was focused on the in-state purpose of "eliminat[ing] inhumane and unsafe products . . . from the California marketplace." *Voter Information Guide*, *supra*, at 70.

According to petitioners and the United States, the voters' concerns about prohibiting the sale of inhumane products is "not a legitimate" interest because most breeding sows are housed outside of California. Pet. Br. 40; *see* U.S. Br. 20. But Californians plainly have an interest in whether local grocery stores and other retailers are contributing to a market that they view as immoral. As this Court has recognized, regulations advancing "the public morals" within a State are no less legitimate than regulations advancing "public health" or safety. *James* 162 U.S. at 653; *cf. Marvin v. Trout*, 199 U.S. 212, 224 (1905).

Indeed, there is a long tradition of States determining that a certain product is immoral or unethical and prohibiting the sale or purchase of that product within the State on that basis. That tradition includes circumstances in which some or all of the conduct that state lawmakers find morally objectionable occurs before the product crosses the State's borders. *See, e.g.*, *Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 543 (7th Cir. 2019) (ban on in-state sale or transfer of fetal tissue derived from aborted fetuses, even though "much of the tissue" came "from other states"); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 335 (5th Cir. 2007) (ban on in-state sale of horsemeat for human consumption, even if horses were slaughtered out-of-state); Ga. Code Ann. § 26-2-160 (same with respect to in-state sale of dog meat); 410 Ill. Comp. Stat. 620/17.2(b) (ban on in-state sale of cosmetics developed using animal testing); N.Y. Gen. Bus. Law § 69-a (prohibition on in-state sale of goods produced "through the use of child labor"); N.J. Rev. Stat. § 23:2A-13.3(a) (ban on in-state sale of "any ivory, ivory product, rhinoceros horn, or rhinoceros horn product"); *cf.* 19 U.S.C. § 3903 (restriction on trade in conflict diamonds).

For its part, the United States seems to acknowledge the general legitimacy of morals-based sales restrictions: it concedes, for example, that States have a legitimate local interest in enacting an "outright prohibition on certain products" (such as dog meat) on ethical grounds. U.S. Br. 28 (citing Ga. Code Ann. § 26-2-160). Like Proposition 12, those statutes are based on "distaste" for or "disgust" with the prohibited product. *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 557 (7th Cir. 2007); *see* Pet. App. 75a. And their legitimacy is not undermined if the prohibited product was once permissible or remains in favor in other regions. *See, e.g.*, *Cavel*, 500 F.3d at 552 ("[h]orse meat was until recently an accepted part of the American diet" and remains "a delicacy" in some countries).

The United States seeks to distinguish Proposition 12 on the ground that it is not a "blanket ban[]" on all pork sales. U.S. Br. 28. But it makes no sense to say that the people of a State could have a legitimate local interest in banning *every* kind of pork product, but lack any legitimate local interest in banning particular pork products that they view as morally objectionable. That would also be at odds with the judgments of Arizona, Colorado, Michigan, Nevada, and several other States—all of which have responded to "concern[s] about the welfare of . . . hens in caged housing environments" by prohibiting the in-state sale of eggs laid by hens that were not provided a minimum amount of space. 28 Ariz. Admin. Reg. 803 (Apr. 22, 2022), https://tinyurl.com/uy2tmu6f; *see supra* p. 4; *see also, e.g.*, *Ass'n Des Eleveurs De Canards et D'Oies Du Quebec v. Harris*, 729 F.3d 937, 941 (9th Cir. 2013) (upholding California's restriction on the in-state sale

of duck liver produced by force-feeding ducks "through a tube inserted directly in [their] esophagi").[24]

2. Proposition 12 was also intended to mitigate "the risk of foodborne illness." Pet. App. 37a. The State's regulatory experts have since elaborated that, while the connection between sow housing and public health "remain[s] a subject of scientific scrutiny," it was reasonable for the "voters to pass the Proposition 12 initiative as a precautionary measure to address any potential threats to the health and safety of California consumers."[25] As this Court has recognized, States have "a legitimate interest in guarding against imperfectly understood . . . risks, despite the possibility that they may ultimately prove to be negligible." *Maine v. Taylor*, 477 U.S. 131, 148 (1986). Voters need not "sit idly by" and wait "until the scientific community agrees" on whether particular practices might imperil their health. *Id.*

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[24] Petitioners suggest that the voters made an "erroneous" moral determination in prohibiting pork products that are not compliant with Proposition 12, because group housing supposedly "*decreases* sow welfare." Pet. 31; *see* Pet. Br. 47. A broad coalition of experts disagrees with petitioners' policy concerns about group housing. *See, e.g.*, Pew Comm'n on Indus. Farm Animal Prod., *Putting Meat on the Table* 38 (2008), https://tinyurl.com/5b3yz8f8. In all events, Proposition 12 does not require group housing; farmers may instead use larger individual pens when producing Proposition 12-compliant pork. *See supra* p. 6. More fundamentally, a moral determination by millions of voters that certain products are inhumane does not become "invalid" (Pet. Br. 47) merely because interested parties debate its factual premise.

[25] Cal. Dep't of Food and Agric., *Addendum to Initial Statement of Reasons* 2 (Dec. 2, 2021), https://tinyurl.com/2p84x7ay; *see generally* Br. of Am. Public Health Ass'n et al. (collecting authorities on potential health risks).

Petitioners argue that "federal law already 'protects the health and welfare of consumers' by 'assuring' the safety of 'meat and meat food products' in interstate commerce." Pet. Br. 43 (alteration omitted); *see* U.S. Br. 24-25 (similar). But those federal standards cannot negate the legitimacy of a State's interests in adopting more protective standards governing in-state sales, unless the federal standards have a preemptive effect—which neither petitioners nor the United States contends they do. *See, e.g.*, *CTS Corp.*, 481 U.S. at 78-87, 93 (recognizing the legitimacy of State's regulatory interests even though Congress had regulated in the same area).

At bottom, petitioners ask this Court to use the dormant Commerce Clause "'to second-guess . . . the utility of legislation.'" *CTS Corp.*, 481 U.S. at 92. That is not how the *Pike* inquiry has been understood or applied in recent decades. And if *Pike* did authorize or compel that kind of judicial second-guessing, that would provide considerable support for the argument that the Court "should abandon the *Pike*-balancing enterprise altogether and leave these quintessentially legislative judgments" to the political branches of government. *Davis*, 553 U.S. at 360 (Scalia, J., concurring in part).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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