

No. 21-468

In the
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, ET AL.,

Petitioners,

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY
OF THE CALIFORNIA DEPARTMENT OF FOOD &
AGRICULTURE, ET AL.

Respondents.

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

**BRIEF FOR O. CARTER SNEAD, MARY
EBERSTADT, AND MATTHEW SCULLY, AS
AMICI CURIAE SUPPORTING RESPONDENTS**

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INTEREST OF AMICUS CURIAE

Amici are scholars and public intellectuals with experience speaking and writing on morality, ethics, and public policy.¹

O. Carter Snead is Professor of Law, Concurrent Professor of Political Science, and Director of the de Nicola Center for Ethics and Culture at the University of Notre Dame. He is the author, most recently, of *WHAT IT MEANS TO BE HUMAN: THE CASE FOR THE BODY IN PUBLIC BIOETHICS* (Harvard Univ. Press 2020).

Mary Eberstadt is the author of numerous books commenting on ethics, morality, and public policy. She is a frequent contributor to *First Things*, America's foremost ecumenical journal of religion and public life. She has written about the demands of human decency related to the ethical treatment of animals.

Matthew Scully has been a contributor to *National Review* for more than thirty years and served as a senior speechwriter to President George W. Bush. He is the author of *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* (St. Martin's).

Amici write to explain the deep roots of moral and philosophic concern for the welfare of animals, particularly the view—consistently held by key

¹ No counsel for a party authored this brief in whole or in part. John and Timi Sobrato have made a monetary contribution to fund the preparation and submission of this brief. All parties have consented to the filing of this brief.

philosophers, theologians, and other major contributors to Western civilization—that human decency requires basic respect for animals. *Amici* also write to explain that states and the federal government often enact laws that express moral priorities, and doing so serves a legitimate local interest. Here, Proposition 12 limits the in-state sale of products derived from the most extreme confinement of pregnant pigs, and *amici* think it clear that California’s voters acted in furtherance of a legitimate local purpose when by enacting Proposition 12.

INTRODUCTION AND SUMMARY

Proposition 12 excludes from California’s markets products that the State’s citizens view as immoral—pork produced using extreme and cruel animal confinement methods. Petitioner and the United States, as amicus, make the extraordinary claim that Proposition 12 serves *no legitimate local interest* because the cruel treatment of pregnant pigs held in close-confinement gestation crates takes place outside of California. Pet’r’s Br. 47, U.S. Amicus Br. 20. Such an argument defies the bedrock principle that laws are legitimately justified by moral claims, including moral beliefs about the permissibility of contributing to others’ immoral conduct. If accepted, the argument that Petitioner and the United States venture would call into question many existing (and unchallenged) laws that legislate based on precisely analogous moral judgments.

Proposition 12 rests on the moral judgment not just that some treatment of animals is inhumane, but also—critically—that consumers act immorally if they

facilitate that inhumane treatment by purchasing the products it generates. Such a moral claim is not novel but has deep roots in the history of Western civilization. Western philosophy and religious thought, including from the ancient Greek, Catholic, Protestant, Jewish, and Muslim traditions, has long understood that human decency requires affording animals a basic measure of respect. This belief does not depend on any notions of equality between animals and humans—quite the opposite. It is precisely because animals are vulnerable at the hands of humans that humans are morally bound to treat them decently and honorably. Nor is it mere sentimentality to extend concern to animals; the obligation to treat them decently requires conscientious effort and self-restraint. Just as human beings in the Western tradition are required to moderate other natural appetites that can lead to harmful and unjust conduct, so too must humans moderate their appetite for products generated through the exploitation of vulnerable animals.

Proposition 12 specifically addresses products made by subjecting pregnant pigs to close-confinement in gestation crates, which is an extreme abuse and clearly contrary to longstanding beliefs about the decency humans owe to animals. Close-confinement gestation crates make it impossible for a pregnant pig to lie down freely or turn around, essentially immobilizing her for long periods, and depriving her of all opportunities for natural physical and social behaviors. Because of the cruelty of this treatment, states are increasingly moving to ban the use of close-confinement gestation crates. Voters have banned close-confinement gestation crates every time

the question has been put on the ballot, including in states that differ in their political composition. Consumers, too, are growing in their awareness of the inhumane origins of some pork products and are demanding more humane farming methods in increasing numbers. For this reason and because of laws like Proposition 12, pork producers in the United States (including some of the nation's largest producers) have announced that they have or will phase out close-confinement gestation crates for some or all their product lines.

Proposition 12 therefore clearly serves a legitimate *and local* interest premised on the moral culpability of consumers whose point-of-sale transactions would otherwise facilitate the inhumane treatment of pigs. This is in all relevant respects the same as the moral justifications that underlie federal laws banning the importation of conflict diamonds, African elephant ivory, cat and dog pelts, and products made from forced labor abroad—laws that no one doubts serve a *domestic* interest and do not regulate extraterritorially. So too, many state laws spring from moral concern about complicity, including laws banning in-state ivory transactions, the in-state transfer of aborted fetal tissue even when obtained out-of-state, and state sales bans on eggs from cage facilities, cosmetics tested on animals, horsemeat, dogmeat, and goods produced through child labor.

All of these laws and others like them “implicate[] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling

or facilitating the commission of an immoral act by another.” *Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682, 724 (2014). In answering that difficult and important question, Californians have confined themselves to a wholly intrastate regulation that restrains only intrastate acts (the purchase of pork that has been produced through the use of inhumane, close-confinement gestation crates). Californians’ choice serves a legitimate local purpose premised on their moral judgment. This Court should uphold that choice and affirm the judgment of the Court of Appeals.

ARGUMENT

I. KEY PHILOSOPHERS, THEOLOGIANS, AND OTHER MAJOR CONTRIBUTORS TO WESTERN CIVILIZATION HAVE CONSISTENTLY ARGUED THAT HUMAN DECENCY REQUIRES BASIC RESPECT FOR ANIMALS.

While Proposition 12’s ban on the sale of certain products of animal cruelty is itself a recent enactment by California voters, it reflects concerns of ancient lineage in Western moral thought. Western philosophers and religious leaders have considered the treatment of animals to be an appropriate and important subject of inquiry for millennia. They have explained how human decency demands that animals be treated with basic respect for their needs, natures, and dignity as living creatures, and why humans are morally bound not to participate in or facilitate animal abuse.

1. Much of Western thought about the welfare of animals traces to the works of Aristotle. Fully one-sixth of Aristotle’s surviving works focus on animals, including the *Generation of Animals* (*De generatione animalium*), the *History of Animals* (*Historia animalium*), the *Movement of Animals* (*De motu animalium*), the *Parts of Animals* (*De partibus animalium*) and the *Progression of Animals* (*De incessu animalium*). D. Grumett, *Aristotle’s Ethics and Farm Animal Welfare*, 32 J. OF AGRIC. & ENV’T ETHICS 321, 322 (2019). From those works, it is apparent that Aristotle regarded animals as ethically significant, discerning that each strives to flourish in its own way, according to an internal governing principle (in Aristotle’s terminology, a “soul”). *Id.* at 323. For Aristotle, an animal’s “soul” guides the animal to the ends that it seeks in life—an animal’s *telos*. *Id.* at 326, 327. An animal’s *telos* is apparent from observing its natural behavior, as Aristotle did at length. For example, Aristotle observed that pigs flourish on a varied diet; they love roots; and their fattening is promoted by wallowing in mud. *Id.* at 325.

Among animals, Aristotle believed, farmed animals occupied a higher status than wild animals. *Id.* at 327. Farmed animals fulfill their *telos* more fully than wild animals because farmed animals’ lives are humanly ordered, from birth to death. *Id.* at 327. Yet far from advocating a despotic human rule over animals, Aristotle set forth a vision of harmonious human-animal relations that depended on humans facilitating an animal’s natural behaviors, in pursuit of the animal’s *telos*. *Id.* “For Aristotle, farming systems are functional only if they promote natural animal behaviors, and this principle significantly

delimits the range of acceptable systems” by which animal husbandry should be practiced. *Id.* at 328.

2. While Thomas Aquinas had comparatively less to say about animals, his views were broadly consistent with Aristotle’s. Aquinas believed that the entire physical universe, including plants, birds, and mammals, is ordered towards “ultimate perfection,” which is in turn ordered toward God. J. Berkman, *Toward a Thomistic Theology of Animality*, 24 (2009). Animals manifest God’s goodness by living according to their own *telos*, and each species makes a necessary contribution to the perfection of the universe by doing so. *Id.*

3. Many other Christian authorities and figures exhibited particular care for animals, motivated by God’s creation of them and the human duty to love what God loves. The Bible itself begins with God’s creation of the universe, including God’s proclamation that his created animals are “good,” even without reference to humans, and indeed, even before God has created humans. CHARLES CAMOSY, FOR LOVE OF ANIMALS: CHRISTIAN ETHICS, CONSISTENT ACTION, 45-46 (2013). In keeping with this earliest understanding of the goodness of creation, Saint Francis of Assisi lived with now-famous compassion for animals. In his well-known laud, St. Francis praises God alongside his created animals: “Praise be to Thee, my Lord, with all Thy creatures.” *Writings of St. Francis*, 152. While the prayer is now commonly called the Canticle of the Sun, it was originally known as the “Praises of the Creatures,” being introduced as follows: “Here begin the praises of the creatures which the blessed Francis made to the praise and honor of God.” *Id.* at 150, 152.

Saint Catherine of Sienna wrote powerfully of God's love for his creatures and the obligation for humans to love them, too: "We love God's creatures because we see that God loves them supremely. It is the very nature of love to love everyone and everything that our beloved loves." Thomas Kelch, *A Short History of (Mostly) Western Animal Law: Part I*, 19 ANIMAL L. 23, 43 (2012) (cleaned up). Similarly, Saint Bridget of Sweden wrote in God's voice, "People should therefore fear me, their God, above all things, and treat my creatures and animals more mildly, having mercy on them for the sake of me, their Creator." *Id.*

4. St. Bridget's injunction to mercy continues to reverberate in the Catholic teachings of the modern church. The Catechism of the Catholic Church states that the Seventh Commandment "enjoins respect for the integrity of creation." *Catechism of the Catholic Church* (2415). And although "[a]nimals ... are by nature destined for the common good of past, present, and future humanity," their use "cannot be divorced from respect for moral imperatives" because "[m]an's dominion over inanimate and other living beings granted by the Creator is not absolute." *Id.* Indeed, man owes some basic duties to animals, even when they live in service of man:

Animals are God's creatures. He surrounds them with his providential care. By their mere existence they bless him and give him glory. Thus men owe them kindness. We should recall the gentleness with which saints like St. Francis of Assisi or St. Philip Neri treated animals.

Id. (2416). (emphasis in original).

Additionally, in the Church’s view, “[i]t is *contrary to human dignity* to cause animals to suffer or die needlessly.” *Id.* (2418) (emphasis added).

5. The three most recent popes have also commented directly on the obligation of humans to treat animals with kindness and mercy. In a 1990 address on the World Day of Peace, Pope John Paul II expressed his “hope that the inspiration of Saint Francis will help us to keep ever alive a sense of ‘fraternity’ with all those good and beautiful things which Almighty God has created,” and asked that God would “remind us of our serious obligation to respect and watch over them with care.” Camosy, 67 (original text available at <https://bit.ly/3p8tmhA>)². He rejected the idea that man’s dominion over creation entitled man to treat living things in any way that serves him:

The dominion granted to man by the Creator is not an absolute power, nor can one speak of a freedom to ‘use and misuse,’ or to dispose of things as one pleases. The limitation imposed from the beginning by the Creator himself and expressed symbolically by the prohibition not to ‘eat of the fruit of the tree’ shows clearly enough that, when it comes to the natural world, we are subject not only to biological laws but also to moral ones, which cannot be violated with impunity.

² All links cited throughout were last visited on Aug. 12, 2022.

Sollicitudo rei socialis, Pope John Paul II (1987), available at <https://bit.ly/3bCyojz> (last visited Aug. 12, 2022) (cleaned up).

Pope Benedict XVI echoed the same ideas. When asked whether man is “allowed to make use of animals, even to eat them?” he responded:

“This is a very serious question. At any rate, we can see that they are given into our care, that we cannot just do whatever we want with them. Animals, too, are God’s creatures Certainly, a sort of industrial use of creatures, so that geese are fed in such a way as to produce as large a liver as possible, or hens live so packed together that they become just caricatures of birds, this degrading of living creatures to a commodity seems to me in fact to contradict the relationship of mutuality that comes across in the Bible.”

Camosy, 74-75.

Similarly, Pope Francis has written that “we are called to recognize that other living beings have a value of their own in God’s eyes.” *Laudato si* (2015), available at <https://bit.ly/3BTglQF>. “In our time, the Church does not simply state that other creatures are completely subordinated to the good of human beings, as if they have no worth in themselves and can be treated as we wish.” Instead, the Catechism rejects such an approach: “Each of the various creatures, willed in its own being, reflects in its own way a ray of God’s infinite wisdom and goodness. Man must therefore respect the particular goodness of every

creature, to avoid any disordered use of things.” *Catechism* (339).

6. The injunction to treat animals with mercy comes from their inherent *inequality* with humans. Just as God, in Judeo-Christian teaching, enjoins humans to show mercy to all who are vulnerable, so “[w]e have a duty to treat ... animals with kindness, ... not because they are our equals, but in a sense because they are *not* our equals.” Camosy, 77. Being so thoroughly subject to human power, and thus so helpless against abuses of that power, animals are a test of character, and call on our empathy because they are so vulnerable.

Nor do these beliefs arise out of mere sentimentality or “softness” for animals. Catholic doctrine, in particular, depends not on *softness*, but on the *discipline* required to live in accord with God’s will. “Disciplining our appetites so that we do not participate in injustice is anything but soft.” Camosy, 77. Just as the Church expects Christians to discipline our natural appetites for wealth, consumption, comfort and ease, or sexual satisfaction, so too are Christians called to “[r]esist[] our culture’s addiction to unjust use of nonhuman animals for food,” which “requires countercultural commitment, determination, and strength.” Pope Francis has confirmed that respect for animals “cannot be written off as naïve romanticism, for it affects the choices which determine our behavior.” *Laudato si*, para. 11. “If we no longer speak the language of fraternity and beauty in our relationship with the world, our attitude will be that of masters, consumers, ruthless exploiters, unable to set limits on their immediate needs.” *Id.*

8. These ideas have been embraced by prominent Protestant thinkers, too. William Wilberforce is best known for his advocacy to abolish slavery, but he was also a prominent advocate for the welfare of animals and was a founding member of the Royal Society for the Prevention of Cruelty to Animals. Camosy, 67-68. C.S. Lewis, too, cared deeply about the welfare of animals. Much of his children's fiction, including the *Lion, the Witch, and the Wardrobe*, contains memorable depictions of animals imbued with human speech and rationality, prompting child readers to better see the worth of animals in their own world. Gerald Root, Ph.D, *C.S. Lewis as an Advocate for Animals*, at 7, available at <https://bit.ly/3QvMFgv>. Lewis also penned an essay opposing vivisection, *id.* at 15-21, and wrestled at length with the question of why animals feel pain in his book, *The Problem of Pain*, *id.* at 8-11. Lewis called animal suffering at human hands a "question of justice," and asked, in connection with cruelly treated animals, "What shall be done for these innocents?" C.S. LEWIS, *THE PROBLEM OF PAIN: HOW HUMAN SUFFERING RAISES ALMOST INTOLERABLE INTELLECTUAL PROBLEMS*, 136 (1962).

9. Other religious faiths in the Western tradition instruct adherents on humanity's proper obligations toward animals and also advocate compassion and mercy. Judaism strictly forbids cruelty to animals and requires that animals be treated with compassion. Lewis Regenstein, *Commandments of Compassion: Jewish Teachings on Protecting Animals and Nature*, at 4, available at <https://bit.ly/3QzGA2u>. These views date back at least as far as the 12th and 13th centuries and stem from the Torah's discussion of animals as

created by God and pronounced good. *Id.* at 3-4. Jews are prohibited from working animals on the Sabbath, thereby granting a day of rest even to beasts, yet “to relieve an animal of pain or danger” is an injunction of such weight that it supersedes the Sabbath observance. *Id.* at 9. Kosher laws prohibit the consumption of animals not slaughtered in keeping with principles of *shechita*, which has the intention of commanding a quick and merciful slaughter and reducing animal suffering. S.D. Rosen, *Physiological Insights into Shechita*, 154 VETERINARY REC. 759, 759-60 (2004).

The Islamic tradition also demands the humane treatment of animals. One hadith quotes the Prophet Muhammad as saying “A good deed done to an animal is as meritorious as a good deed done to a human being, while an act of cruelty to an animal is as bad as an act of cruelty to a human being.” Sira Abdul Rahman, *Religion and Animal Welfare—An Islamic Perspective*, Animals (2017) at 2, available at <https://bit.ly/3QeXm7l>. Many other hadiths also speak of man’s obligation to treat animals with gentleness and mercy. *Id.* at 3. Halal butchering requires that an animal be humanely treated before slaughter and prescribes methods of slaughter that are designed “in such a way that its life departs quickly, and it is not left to suffer.” *Id.* at 4.

The moral sentiments that motivated California voters to pass Proposition 12, addressing the severe abuses of pregnant pigs, find their roots in longstanding beliefs held among religious thinkers and philosophers throughout Western civilization.

II. PROPOSITION 12 REFLECTS THE GROWING MORAL CONSENSUS THAT PRODUCTS RESULTING FROM IMMORAL PRACTICES—LIKE EXTREME MISTREATMENT OF PREGNANT PIGS—ARE THEMSELVES IMMORAL.

When the voters of California enacted Proposition 12, they voted to prohibit the sale of pork products in their state that were obtained through some of the most extreme and inhumane abuses perpetrated against domesticated animals today: the practice of confining pregnant female pigs in metal crates so cramped that they cannot so much as turn around. Californians were hardly alone in reviling this inhumane treatment: a growing chorus of states have passed laws banning the same abuses. Consumers themselves have even begun demanding products derived by better treatment of pigs, and in such numbers that many pork producers have diversified their product lines to cater to consumers' growing insistence on humane animal husbandry. In short, Proposition 12 is not radical legislation seeking to reorder an industry; it is a public reaction to a radical form of cruelty, expressing a basic moral belief that humans should not, through their consumption, participate in the abuse of animals.

1. Matthew Scully, one of the undersigned, observed the inhumane treatment of pregnant pigs firsthand while researching his 2002 book, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY*. At a confinement facility in North Carolina, Scully observed pig husbandry the

way it is practiced at farming enterprises in the United States and, indeed, throughout much of the developed world. In a “Gestation Barn,” six hundred pregnant pigs are housed in individual metal crates essentially fitted to size around each animal. *Id.* at 265. Within these structures, the animals “are encased, pinned down,” and unable to walk, turn around or lie down freely. *Id.* These pregnant mothers remain in their confinement crates for sixteen weeks before receiving their only opportunity for exercise: when they are driven or dragged to the Farrowing Barn for a week to ten days of further confinement, during which time they birth their piglets. *Id.* They are then returned to the Gestation Barn for another sixteen weeks, then back to the Farrowing Barn again, and so on until, in the words of an employee, “[w]e get rid of them after eight litters.” *Id.*

These pigs’ entire existence is artificial, from the climate-controlled building (unpenetrated by sunlight), to the heat lamps and misters, and even to the scientifically formulated pelleted food, rich in antibiotics (to ward off disease), laxatives (since pigs will otherwise become constipated to avoid fouling their own confinement crates), and even the rendered remains of other pigs (“recycled” for their brethren to eat). *Id.* at 266.

In the Gestation Barn, each pig weighs approximately 500 pounds, while each iron crate is seven feet long and less than two feet wide. *Id.* at 267. To say that the arrangement restricts movement is an understatement. Mere inches, if that, separate each animal from the iron bars to her front and rear, and along each side. Somehow the animals manage to lie

down—“a powerful inclination during months of confinement in twenty-two inches of space”—but not freely, of course. To accomplish this, the pregnant pigs “try to put their legs through the bars into a neighboring crate,” with the predictable result that “their legs get crushed and broken.” *Id.* These conditions are made worse by the animals’ fragility, having been engineered to an abnormally large weight but deprived of exercise. *Id.* “About half of those pigs whose legs can be seen appear to have sprained or fractured limbs, never examined by a vet, never splinted, never even noticed anymore.” *Id.*

Beyond this, the pigs suffer from “vices,” as they are termed in the industry: physical, mental, and social maladies brought about by their close confinement and the absence of opportunity for natural movement or behavior.

Sores, tumors, ulcers, pus pockets, lesions, cysts, bruises, torn ears, swollen legs everywhere. Roaring, groaning, tail biting, fighting ... [f]renzied chewing on bars and chains, stereotypical ‘vacuum’ chewing on nothing at all, stereotypical rooting and nest building with imaginary straw. And ‘social defeat,’ lots of it, in every third or fourth stall some completely broken being you know is alive only because she blinks and stares up at you.

Id. at 267-68.

Even the Farrowing Barn provides no respite from these conditions. The confinement crates there remain essentially the same, only that “beside each

crate is a little area where pigs are deposited from the womb, slipping out one by one onto concrete and with great labor crawling back to suckle from their immobilized mothers, who can hardly turn to see them.” *Id.* at 274. This arrangement is seen as necessary because without it, mother pigs would fall or lie on their piglets and crush them. *Id.* But this makes sense only if one has already accepted as normal the privations pregnant pigs go through up to this point. *Id.* Of course a creature will lose physical coordination if released from prolonged confinement, with an unnaturally large body due to genetic manipulation, and with fragile or broken bones from injuries and lack of exercise. *Id.* The offense comes not from the clumsy mother pig, but from the industrial conditions in which she has been kept.

Under such conditions, it is no surprise that not all animals survive to their useful, eight-litter life. The “cull pen” awaits for dying and dead animals—those who are lame, or are losing weight, who are now aborting pregnancies, or who are sick with pneumonia. *Id.* at 269. In an industrial operation, “[m]ost of the culls go to market, ... but the ones with disease ... are ... trash.” *Id.*

2. Of course, none of this is natural for a pig. Pigs like to root in dirt to find food and roll in mud to stay wet and cool, since they lack sweat glands. They have olfactory powers far superior to a human (after all, they can sniff truffles ten feet underground), and do not leave their droppings near where they live and sleep. *Id.* at 266. Breeding pigs in particular are known to build a series of communal nests in a cooperative way, to farrow and raise their young

together. *Id.* at 273. Pigs form close social bonds and even special relationships, “for example, a pair of sows would join together for several days after farrowing, and forage and sleep together.” *Id.* at 273 (internal citation omitted).

Scientific research further reveals that pigs are highly intelligent creatures, similar to such beloved species as dogs and dolphins. Pigs are highly social animals who rely on their tactile and perceptive snouts to engage in social interactions and who can use their sense of smell to discriminate between the identities of other pigs. L. Marino, and C. Colvin, *Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in sus domesticus*, INT’L J. OF COMPAR. PSYCH. 28(1), at 3 (2015). Pigs display a robust ability to discriminate between objects and to recall objects even over long periods of time, much as dogs do. *Id.* at 5. They perform tasks associated with symbolic language comprehension in the same way as dolphins, including by exhibiting complex three-choice object discrimination and discrimination among action commands. *Id.* at 5-6. Pigs are naturally playful and curious, being “best stimulated by diverse, complex, *hands on*, and renewable objects and materials.” *Id.* at 9 (emphasis in original). This need is so important that pigs who are deprived of it develop behavioral abnormalities. *Id.*

One study designed to investigate time perception in pigs holds special relevance in the context of Proposition 12 and the industrial use of confinement crates for pigs. In the study, female pigs were given a choice between two crates that differed in the duration of confinement they imposed. One

crate imposed 30 minutes of confinement while the other imposed 240 minutes of confinement. “The pigs showed an overall preference for confinement in crates associated with short durations instead of those associated with longer durations.” *Id.* at 6. It would seem that even as Petitioners claim that confinement crates “reduce[] sow stress, injury, and mortality,” the available scientific evidence (not to mention common sense) suggests the opposite is true. Pigs are intelligent and naturally social, playful, and curious, and they thrive best when allowed to pursue these natural inclinations and behaviors freely.

3. Given the extreme conditions in which pregnant pigs are kept in industrial farming operations, and particularly in light of the wide disparity between such treatment and the natural behaviors and intellectual capacities of pigs, it is no wonder that an increasing number of states have passed laws banning close-confinement gestation crates. Ten states, including California, ban close-confinement gestation crates for pregnant pigs. ARIZ. REV. STAT. § 13-2910.07 (2012); CAL. HEALTH & SAFETY CODE § 25990, 25991 (2018); COLO. REV. STAT. § 35-50.5-102 (2008); FLA. CONST. art. 10 § 21; ME. REV. STAT. ANN. tit. 7 § 4020 (2011); MASS. GEN. LAWS ANN. ch. 129 App. §§ 1-2, 1-5 (2016); MICH. COMP. LAWS § 287.746 (2020); OHIO ADMIN. CODE § 901.12-8-01, 901:12-8-02 (2011) (phased in by Dec. 31, 2025); OR. REV. STAT. § 600.150 (2008); R.I. GEN. LAWS § 4-1.1-3 (1956).

Among those laws are the only five ballot measures proposing bans on close-confinement gestation crates that have been put to voters in the

last twenty years (Arizona, Florida, Massachusetts, and California—twice,). Despite the political diversity among these states, all five efforts succeeded by a significant margin, revealing that voters strongly support bans on close-confinement gestation crates when they are asked directly.

Additionally, like California’s Proposition 12, Massachusetts’ law forbids the intrastate sale of pork products if those products are derived by use of close-confinement gestation crates. MASS. GEN. L. ANN. ch. 129 App. §§ 1-3, 1-5.

It is telling, too, that in opposing laws like these, Petitioners have preferred to conceal the reality of close-confinement gestation crates from voters, rather than defend such confinement on its merits. In 19 of the 26 amici states supporting Petitioners here, the pork and other farming industries have advocated—and sometimes succeeded in passing—so-called “ag gag” laws, which criminalize the mere photographing or filming of pigs and other creatures in confinement, even by news agencies and investigative reporters. Matthew Scully, *A Brief for the Pigs: The Case of National Pork Producers Council v. Ross*, NAT’L REVIEW (July 11, 2022), available at <https://bit.ly/3zMGzBH>.

4. Yet consumers do know, increasingly, that pork produced through extreme confinement raises serious animal welfare concerns, and as a result they are demanding humanely-raised pork in ever-greater numbers.

Cage-free pork is a growing segment of U.S. pork production, spurred by the fact that “[c]onsumers are

increasingly aware of and concerned about the conditions under which livestock is raised, and somewhat more willing to pay higher prices for meat certified to have come from animals that were humanely raised.” Stephanie Strom, *Demand Grows for Hogs That Are Raised Humanely Outdoors*, NY TIMES (Jan. 20, 2014), available at <https://nyti.ms/3dnPzFV>. Some chain restaurants, like Chipotle, already sell only meats from humanely raised animals, and other large food businesses have pledged to stop selling pork from pigs raised in close-confinement gestation crates, including Burger King, Oscar Mayer, and Safeway. *Id.*; T. Cone, , *Burger King Vows Cage-Free Chicken and Pork*, NBC NEWS (April 25, 2012).

Demand in the humanely-raised segment of U.S. pork production is so high that producers must expand their capacity to meet it. One producer who supplies humanely-raised pork to Chipotle has stated that “[w]e could sell 20 percent more than what we have in no time.” *Id.* And a representative of Applegate Farms, the organic and natural meats brand owned by Hormel Foods, told a reporter that “[i]t is a challenge to supply organic pork. There just aren’t enough organic-, animal welfare-certified producers in the U.S. to supply the quantities we need.” Deena Shanker, *Why It’s Difficult to Find Organic Pork*, BLOOMBERG (Nov. 1, 2018), available at <https://bloom.bg/2OllYdP>.

5. As states continue to pass laws forbidding close-confinement gestation crates, and as consumers demand humanely-raised pork in greater numbers, it is perhaps no surprise that individual pork producers

(despite Petitioner's protestations here) have confirmed that they can and will adapt their supply chains to abandon close-confinement gestation crates for some or all product lines and will raise pork that complies with Proposition 12.

- Hatfield/Clemens Food Group: “[Clemens Food Group] made the decision based on its research to transition company owned sows to a group housing system with open pen gestation. ... [A] sow must be placed in an open pen where she has freedom of movement, social interaction, and access to sufficient feed and water. ... Hatfield plans to offer a variety of pork products across our portfolio of bacon, marinated, and fresh pork items that meet the [California] ‘Prop 12’ and [Massachusetts] ‘Question 3’ statutory requirements.” Hatfield statement, available at <https://bit.ly/3pgtnjv>.
- Hormel Foods: “Hormel Foods has assessed Proposition 12 and ... the company is preparing to fully comply when the law goes into effect ... The company’s Applegate portfolio of products already complies with Proposition 12. Hormel Foods has confirmed that it faces no risk of material losses from compliance with Proposition 12. ... We ... expect a full range of Proposition-12 compliant products to be available in both retail and foodservice.” Hormel Foods statement, available at <https://bit.ly/3AcpimM>.

- Seaboard Foods: “Seaboard Foods, the second-biggest U.S. pig producer ... said it is converting some farms to comply with [Proposition 12] and expects to have pork for sale to California this year that complies with Proposition 12.” Tom Polansek, *U.S. pork producer to resume shipments to California after farm animal law delayed*, REUTERS (Feb. 8, 2022), available at <https://reut.rs/3QytNxl>.
- Tyson Foods: “Tyson is currently aligning incentivizing suppliers where appropriate [to comply with Proposition 12]. We can do multiple programs simultaneously, including Prop 12. ... [W]e can certainly provide the raw material to service our customers that way.” Tyson Foods, Q3 2021 Earnings Call (Aug. 9, 2021), at 15, available at <https://bit.ly/3P9p980>.
- Smithfield:³ “As a leader in group housing gestation, Smithfield will comply with [Proposition 12 and Massachusetts’ Question 3], is assessing these new requirements and ways to mitigate sow stress levels and injuries, and is evaluating options to ensure the continuity of our pork supply in California and Massachusetts.”

³ Smithfield, a wholly-owned subsidiary of WH Group of China, is the largest pork producer in the United States. Caroline Christen, *Top Pork Producing States: Who Is the Largest Pork Producer in the U.S.?*, SENTIENT MEDIA (Jan. 29, 2021), available at <https://bit.ly/3JKxm1f>.

Smithfield 2021 Sustainability Impact Report, available at <https://bit.ly/3JKvUfj>.

Ultimately, Proposition 12 addresses only the sale of products derived through the most extreme abuses against pregnant pigs on modern industrial farms—the practice of encasing these animals in crates so small they cannot freely lie down or turn around—and it does so with the force of a growing consensus among citizens and consumers that such treatment is inhumane. Every time voters have been asked to ban close-confinement gestation crates in the last twenty years, they have done so. And pork producers, including some of the largest pork producers in the U.S., have acknowledged that they can and will comply with Proposition 12’s basic protections for the welfare of pregnant pigs. Proposition 12 is not extreme or out of step with commonly held views about the basic protections that should be afforded to animals.

III. PROPOSITION 12 SERVES A LEGITIMATE LOCAL INTEREST PREMISED ON CONSUMERS’ SENSE OF MORAL COMPLICITY.

Proposition 12 serves a legitimate local interest premised on California voters’ sense of their own moral culpability when participating in commerce within their state: that furnishing a market with meat from inhumanely-raised animals makes them complicit in that inhumane treatment. *See Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest ... it will be upheld unless the burden imposed on such [interstate]

commerce is clearly excessive in relation to the putative local benefits.”). This type of complicity justification is recognized as real and legitimate throughout this Court’s jurisprudence and in federal and state law, yet incredibly, Petitioner and its amicus, the United States, dismiss it out of hand. *See, e.g.*, U.S. Amicus Br. 20 (California has “no legitimate interest in protecting the welfare of animals when they are located outside the State”); Pet’r’s Br. at 47 (“We have explained that Proposition 12’s purported benefits are invalid or non-existent,” and “even if there are cognizable local impacts, they are flimsy.”). But if Californians’ regulation of intrastate meat sales premised on the immorality of consuming products produced through animal cruelty is “illegitimate,” such a rule would cast doubt on the legitimacy of all kinds of other morals-based legislation adopted at both the state and federal levels. The Court should not second-guess Californians’ view that an animal’s inhumane treatment is morally relevant at the point of sale and should recognize that regulating such sales serves a legitimate local purpose.

1. Numerous federal laws ban domestic sales or the importation of an item based on its provenance, and yet no one regards these domestic sales bans as extraterritorial regulations or as laws lacking a legitimate domestic purpose.

For example, the United States bans the importation of conflict diamonds. 19 U.S.C. § 3901, *et seq.* The impetus for the law is that “[f]unds derived from the sale of” conflict diamonds “are being used by rebels and state actors to finance military activities, overthrow legitimate governments, subvert

international efforts to promote peace and stability, and commit horrifying atrocities against unarmed civilians.” 19 U.S.C. § 3901(1). Federal law does not ban the importation of diamonds outright, but makes a selective choice to ban the importation of diamonds that raise human-rights and humanitarian concerns while allowing importation of diamonds certified conflict-free by the Kimberly Process Certification Scheme. *Id.* § 3903(a).

The United States also bans nearly all ivory importation out of concern for the protection of African elephants abroad. 50 C.F.R. §§ 17.21(b), 17.40; *see also* 81 Fed. Reg. 36387, 36390-91 (July 6, 2016) (describing very limited circumstances in which ivory importation is allowed). Here again, there are exceptions rather than a wholesale ban of ivory imports, and the exceptions depend on the provenance of the item. 81 Fed. Reg. at 36390-91 (identifying such exceptions as ivory obtained in law enforcement and for genuine scientific purposes, and certain worked ivory that meets specific conditions and is contained in a musical instrument). These regulations aim to ensure that “the U.S. ivory market is not contributing to the poaching of elephants in Africa.” 81 Fed. Reg. at 36387.

In the case of both conflict diamonds and African elephant ivory, the United States excludes certain items from being sold or imported into the country based not on the item’s nature but on its provenance, which the U.S. has deemed to be illegitimate. *Cf.* U.S. Amicus Br. 28 (distinguishing Proposition 12 from “blanket bans” on a product, which the U.S. argues the dormant commerce clause would permit). While the

dormant commerce clause has nothing to say about such laws directly, these laws nonetheless confirm that jurisdictions have an interest in preventing the sale within their borders of items immorally produced abroad. These provenance-based laws depend on moral judgments, and no one doubts they serve a *domestic* purpose and do not regulate extraterritorially. The U.S. has elected to remove itself from the international market for conflict diamonds and African elephant ivory, based on the illegitimate and morally tainted ways in which these restricted items would otherwise enter commerce in the U.S. Those laws address a *domestic* concern based on a belief about complicity in immoral acts.

Also relevant are federal laws that ban the importation of certain products even when those products are made legally in the jurisdiction where they originate. For example, while the killing of dogs and cats for their fur might be legal in foreign countries or even within certain U.S. states, federal law bans the “import into ... the United States [of] any dog or cat fur product” or their introduction “into interstate commerce.” 19 U.S.C. § 1308(b)(1). Federal law also prohibits the importation of “[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions,” including “forced or indentured child labor,” regardless of whether such forced labor (like penal labor) was legally permissible where the goods originated. 19 U.S.C. § 1307. Here again, these laws do not implicate the dormant commerce clause directly, but they are nonetheless powerful examples of U.S. laws that reflect a moral

judgment about the importation of products even if those products are lawfully created in their places of origin. No one doubts that these laws serve a legitimate domestic purpose or thinks that they regulate extraterritorially. Yet the United States freely claims that Proposition 12 is not “directed toward a legitimate *in-state* interest” because it is “based on a philosophical objection to animal-welfare policy in other States.” U.S. Amicus Br. 21.

2. Many state laws are of a kind with these federal examples, and under the erroneous reading of the dormant commerce clause that Petitioner and the United States advocate, these morals-based state laws would serve “no” legitimate local purpose.

California, New Jersey, Illinois, and New York have passed bans on in-state ivory transactions above and beyond the requirements of federal law (while allowing for the same exceptions provided in federal law). CAL. FISH & GAME CODE § 2022 (2017); N.J. STAT. ANN. §§ 23:2A-13.2, 23:2A-13.3 (2014); ILL. COMP. STAT. ANN. §§ 357/5, 357/10 (2022); N.Y. ENV’T CONSERV. LAW § 11-0535-a (2014) All four states define “ivory” to include mammoth ivory, which federal importation bans do not restrict.

Fourteen states ban the possession and sale of shark fins. HAW. REV. STAT. § 188-40.7 (2010); WASH. REV. CODE ANN. § 77.15.770 (2014); OR. REV. STAT. § 498.257 (2012); CAL. FISH & GAME CODE § 2021-2021.5 (2012); MD. CODE ANN. NAT. RES. § 4-747 (2017); 515 ILL. COMP. STAT. § 5/5-30 (2013); DEL. CODE ANN. tit. 7 § 928A; N.Y. ENV’T CONSERV. LAW § 13-0338 (McKinney 2020); MASS. GEN. LAWS ANN. ch 130 § 106 (2014); TEX. PARKS & WILD. CODE § 66.2161 (1981); R.I.

GEN. LAWS § 20-1-29 (1956); NV NRS ch. 597 § 2-3; N.J. STAT. ANN. § 23:2B-23 (2020); FLA. STAT. § 379.2426 (2021).

Nine states ban the in-state transfer of aborted fetal tissue for all or some purposes, whether the tissue was obtained in- or out-of-state. ALA. CODE § 26-23F-5 (2016); IDAHO CODE § 39-9306 (2017); IND. CODE. § 35-46-5-1.5 (2016); KAN. STAT. ANN. § 65-67a04 (2000); KY. REV. STAT. ANN § 436.026 (West); LA. STAT. ANN. § 14:87.3 (2018); N.D. CENT. CODE § 14-02.2; OHIO REV. CODE § 2919.14 (1974); S.D. CODIFIED LAWS § 34-23A-17 (2016).

Nine states (California, Hawaii, Illinois, Louisiana, Maine, Maryland, Nevada, New Jersey, and Virginia) ban the in-state sale of cosmetics that have been tested on animals. CAL. CIV. CODE § 1834.9.5 (2020); HAW. REV. STAT. § 321-30.4 (2022); 410 ILL. COMP. STAT. 620/17.2 (2020); 2022 H.R. 714, 2022 Gen. Assemb., Reg. Sess. (La. 2022) (enacted); ME. REV. STAT. ANN. tit. 10 § 1500-M (2021); MD. CODE ANN. HEALTH-GENERAL § 21-259.3 (2022); NEV. REV. STAT. § 598.993 (2020); VA. CODE ANN. § 59.1-572 (2022).

Eight states (Arizona, California, Colorado, Massachusetts, Michigan, Nevada, Oregon, and Washington) ban the sale of eggs from cage facilities. 2022 Ariz. Reg. Text 604242 (NS) (eff. Oct. 1, 2022) (phased in by Jan. 1, 2025); CAL. HEALTH & SAFETY CODE § 25990, *et seq.* (2018); COLO. REV. STAT. § 35-21-201, *et seq.* (2020) (phased in by Jan. 1, 2025); MASS. GEN. STAT. 129 App. § 1-3, *et seq.* (2022); MICH. COMP. LAWS § 287.746 (phased in by Dec. 31, 2024); NEV. REV. STAT. § 583.239 (2022) (phased in by Jan. 1, 2024); OR.

REV. STAT. § 632.835 (eff. Jan. 1, 2024); WASH. REV. CODE ANN. § 69.25.107 (2019) (phased in by Jan. 1, 2024).

Texas bans the in-state sale of horsemeat for human consumption, even if the horses were slaughtered out-of-state. TEX. AGRIC. CODE § 149.002 (1991). Georgia bans the in-state sale of dog meat, regardless of whether the dog was slaughtered out-of-state. GA. CODE ANN. § 26-2-160 (2010). New York bans the in-state sale of goods produced “through the use of child labor” anywhere. N.Y. GEN. BUS. LAW § 69-a (McKinney 1938).

All of these state laws reflect moral judgments about in-state product sales and transfers, even when the products (and their moral taint) originate out-of-state. These laws and others like them serve legitimate *in-state* interests premised on the moral culpability of participating in the relevant product market, even at the point of sale.

The United States resists this obvious conclusion, claiming that “[t]he respective sovereignty of each State that is embodied in our Constitution ... means that voters in pork-producing States must determine what constitutes ‘cruel’ treatment of animals housed in those States—not voters in California.” U.S. Amicus Br. 20 (cleaned up). Transferring this principle to another context reveals its deficiency. Each of the fifty states sets the age at which a person can consent to sexual conduct, anywhere from 16 to 18 years old. Some states have also adopted exemptions from their age-of-consent laws for sexual partners who are close in age, commonly known as “Romeo and Juliet” laws. But no one seriously believes, as the

United States’ argument would logically imply, that a state would have *no legitimate interest* in banning the in-state sale or transfer of child pornography even if that material featured a 16- and 17-year old partner in a state whose age-of-consent or “Romeo and Juliet” laws permitted the sexual contact depicted. Contrary to the United States’ argument, each state’s “respective sovereignty” *permits* that state to make moral judgments about in-state activities—including in-state sales and transfers—regardless of the moral judgments made by the laws of states where prohibited products originate.

3. This Court has also confronted and legitimated moral claims based on the chain of causation leading to objectionable conduct, even against assertions that such claims are too attenuated to have legal significance.

In *Hobby Lobby*, the petitioners believed that “providing [contraceptive] coverage demanded by ... HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” 573 U.S. at 724. The Court acknowledged that “[t]his belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.” *Id.* The Court refused to second-guess the petitioners’ sincere belief on that serious moral question. *Id.*; see also *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981) (holding that “it is not for us to say that the line [the petitioner]

drew” regarding what work was consistent with his religious beliefs and what work made him complicit in immorality “was an unreasonable one”); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2391 (2020) (Alito, J., concurring) (accepting, for himself and Justice Gorsuch, petitioners’ assertion that self-certifying their religious objections was itself a substantial burden on religious exercise because, in petitioners’ sincere view, it triggered morally objectionable contraception coverage).

The Court is no better equipped to second-guess the moral judgment of Californians in enacting Proposition 12. The purchase of inhumanely obtained pork is surely “an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another,” and it indeed “implicates a difficult and important question of religion and moral philosophy.” *Hobby Lobby*, 573 U.S. at 724. In answering that difficult and important question, however, Californians have confined themselves to a wholly intrastate regulation that restrains only intrastate acts (the purchase of pork that has been produced through the use of close-confinement gestation crates). Just as the Religious Freedom Restoration Act provided no legal means to question a religious belief acknowledged to be sincere, neither does this Court’s dormant commerce clause jurisprudence allow—let alone require—the Court to question the moral foundations of a State’s wholly intrastate regulation.

CONCLUSION

The undersigned amici urge the Court to affirm the judgment of the Court of Appeals.

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Respectfully submitted,

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