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 AMICI CURIAE FEDERALISM SCHOLARS SUPPORTING RESPONDENTS

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INTERESTS OF AMICI CURIAE

Amici are professors who study constitutional law generally and federalism specifically.[*] As scholars of federalism, they offer their views on the power of states to legislate on the intrastate public-policy questions at issue in this case.

Amici's titles and institutional affiliations are included for identification only.

[*] As required by Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this amicus curiae brief.

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SUMMARY OF ARGUMENT

When California voters approved Proposition 12, they authorized the state to regulate the in-state production and in-state sale of pork. The resulting law reflects an exercise of the state's core police power over intrastate activities. Invalidating Proposition 12 would deny California the sovereign powers that the Constitution guarantees to all states.

First, Proposition 12 epitomizes a state's police power over commerce within its borders. When in other states, California residents may buy and eat pork products that would not comply with Proposition 12; and pork producers in other states may ignore Proposition 12 so long as they do not sell the resulting meat in California. Proposition 12 hence fits comfortably within the scope of state police power as understood in the 18th and early-19th century. These contested questions of intrastate policy are especially ill-suited for ad hoc constitutional judgments by federal courts applying inchoate standards.

Second, other states may not veto California's intrastate choices or force California to mimic states with fewer regulations or people. The dormant Commerce Clause does not wield a one-way ratchet—in which the states that regulate more comprehensively must always defer to states that are more permissive. A state's police

power merely to duplicate other states' laws is no police power at all. Nor may California's police power be singularly constrained on account of the state's population size or the amount of pork its residents eat. States do not surrender ever-increasing portions of their police power as they attract more residents. Instead, the Constitution prohibits—and certainly does not require—unequal treatment of sovereign states.

ARGUMENT

I. Proposition 12 exercises California's sovereign police power to regulate in-state production and in-state sales of pork.

Like all states, California has a "sovereign right" "to protect the lives, health, morals, comfort and general welfare of the people." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 503 (1987). In approving Proposition 12 by a margin of 25 points, California voters authorized a routine exercise of the state's police power. See Inst. of Governmental Stud., Univ. of Cal., Berkeley *Proposition 12 (2018)*, https://perma.cc/WV37-4SJ8.

The origins of the phrase "police power" highlight that states have wide latitude to resolve complex, contested policy questions affecting their citizens. While "police" now invokes images of crime-fighting constables, during the Founding Era the police power meant "the power chiefly associated with the idea of 'regulation.'" William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 Hastings L.J. 1061, 1074 (1994) (quoting Ernst Freund, *Legislative Regulation: A Study of the Ways and Means of Written Law* 53 (1932)).

This original use and meaning came from antecedents in several European countries. See Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J.

Const. L. 745, 748–752 (2007). In Europe, "[a]fter the decline of the Empire * * * there was revived in the capitularies of Charlemagne a body of regulations for weights and measures, tolls and markets, the sale of food and cattle and the relief of famine and pestilence." *Id.* at 757 (quoting J. Leonard Peirce & Harry Clayton Cook, *Manual to the Constitution of the United States Annotated* 52 (1938)). Since then, "the orbit of control in a measure marked out by these particulars has, with intermittent consistency, been called 'the police.'" *Ibid.* As Adam Smith explained about 18th-century Scotland, for instance, "[w]hatever regulations are made with respect to trade, commerce, agriculture, [or] manufactures of the country are considered as belonging to the police." *Id.* at 752 (quoting Adam Smith, *Lectures on Jurisprudence* 5 (R.L. Meek et al. eds., Clarendon Press 1978) (1896)).

In other words, police meant policy. See 4 William Blackstone, *Commentaries* 162 (1769) ("By the public police and [e]conomy I mean the due regulation and domestic order of the kingdom[.]"). Far from contemplating a dormant Commerce Clause that would stifle states' intrastate policy choices, "[t]he drafters of the U.S. Constitution seem to have had a police power concept firmly in mind during the creation and ratification of that document." David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine* 75 U. Colo. L. Rev. 497, 505 (2004). And as the Court first explained when alluding to the police power, "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State * * * are component parts of this mass." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

States readily and assertively exercised this sovereign power. Between 1781 and 1801, for instance, New York

regulated "lotteries; hawkers and peddlers"; "the destruction of deer; stray cattle and sheep"; and "the exportation of flaxseed." Novak, 45 Hastings L.J. at 1076 (citing *Laws of New York, 1781–1801* (1802)). The state also regulated "the inspection of lumber"; "the quarantining of ships; sales by public auction; stock jobbing; [and] fisheries"; and "the inspection of flour and meal." *Ibid.* And, as especially relevant here, "the packing and inspection of beef and pork." *Ibid.*

To take another example, in the 1830s Michigan adopted especially detailed standards governing the sale and export of beef and pork. The state used its police power to regulate meat's packaging and salting, the weight and shape of each piece, the labeling according to its quality, and the age of cattle at the time of slaughter. See *id.* at 1077 n.48 (quoting *Revised Statutes of Michigan* 136–138 (1838)). Michigan law directed:

- Beef and pork must be packed in barrels "made of good seasoned white oak or white ash staves and heading, free from every defect." *Ibid.*
- The barrels "shall measure seventeen and a half inches between the chimes, and be twenty-nine inches long, and hooped with twelve good hickory, white oak, or other substantial hoops; if the barrel be made of ash staves, it shall be hooped with at least fourteen hoops." *Ibid.*
- Each barrel of beef "shall be well salted with seventy-five pounds of good Turks Island salt, or a sufficient quantity of other salt to be equal thereto, exclusive of a strong new pickle; and to each barrel shall be added four ounces of saltpetre." *Ibid.*
- Beef cannot be sold or exported unless it comes from cattle "not under three years old," with inspectors examining all beef to confirm that it has "been killed at a proper age, and to be fat and merchantable." *Ibid.*

These and similar uses of state police power may well have incidentally or indirectly affected the economies of other states. But the Constitution errs on the side of protecting this authority, because sovereign states have the right "to exercise *fully* their reserved powers." *United States* v. *Darby*, 312 U.S. 100, 124 (1941) (emphasis added). That is why, in practice, "police power" referred to states' "right to provide and enforce reasonable regulations in behalf of the morals, safety and convenience of their inhabitants"—"even when interstate commerce or some other subject of Federal control was incidentally or indirectly" affected. Legarre, 9 U. Pa. J. Const. L. at 785 (quoting 3 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1766–1767 (2d ed. 1929)).

In considering whether to exercise this police power, California voters balanced a range of competing concerns. There was no obvious or inevitable recipe for balancing the dietary preferences of the state's consumers, the law's effects on in-state pork supply and prices, and judgments about which foods can be consumed safely and ethically. Debate over Proposition 12 was vigorous: While some opponents argued that Proposition 12 went too far, others argued that it did not go far enough. See Gabrielle Canon, "*A Loud and Clear Message": California Passes Historic Farm Animal Protections*, Guardian (Nov. 8, 2018), https://perma.cc/8VHT-PGL5 (a coalition of animal-rights groups called approval of Proposition 12 "a sad day for farm animals and those who care about their mistreatment") (quotation marks omitted). Despite heated arguments from all sides, California voters decisively approved the balance struck by Proposition 12.

States have especially wide latitude to resolve this type of controversial policy question—one involving both debates about local economic conditions and judgments

about what types of food should be sold in California. Historians have noted "the more contentious, policy-oriented nature of police legislation." Novak, 45 Hastings L.J. at 1074 n.39 (citing Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (1904)). Like questions of fiscal policy, regulatory choices resolving "competing needs and interests lie[] at the heart of the political process. " *Alden* v. *Maine*, 527 U.S. 706, 751 (1999). In answering these hard questions by approving Proposition 12, California residents reaffirmed that "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree." *Ibid.*

II. The dormant Commerce Clause does not permit other states to veto the intrastate policy choices of states choosing more rigorous regulation or states that are more populous.

Given the robust police power inherent in each state's sovereignty, the dormant Commerce Clause does not allow other states to effectively veto California's power to regulate in-state production and sale of pork. California is entitled to the same police powers as other states, and is not bound by greater dormant Commerce Clause limits than are other states.

A. States with looser regulations may not veto the intrastate policy choices of states with tighter regulations.

Petitioners implicitly and incorrectly treat certain other states' more permissive policy choices as the baseline against which California's choices must be compared. See Pet. Br. 30–31, 35, 45. But the dormant Commerce Clause does not treat certain states' laws as both a floor and ceiling within which other states must crouch.

California is hardly alone in regulating intrastate meat production and sales. Across the country, states have enacted laws governing standards for crates or cages for sows, calves, and hens; force-feeding of ducks and geese used to produce foie gras; and surgical removal of parts of cows' tails. See Animal Welfare Institute, *Legal Protections for Animals on Farms* 5–8 (Oct. 2018), https://perma.cc/7WMR-4VZA. Other states, meanwhile, can and do choose their own approaches to regulating agricultural practices within their borders. Iowa, for instance, is one of only three states that categorically excludes livestock from its animal-cruelty statute. See *id.* at 2.

Just as the dormant Commerce Clause does not allow California to veto the more permissive standards governing Iowa's livestock farms, the clause does not bind California consumers to the choices made by Iowa's legislature. Neither California law nor any other state owns the default regulatory regime. Instead, each state perceives and balances competing interests differently, and those differences lead states to regulate more or less strictly.

Under petitioners' theory, however, one state's stricter regulation inevitably must yield to another state's more lenient regulation. The Constitution imposes no such pecking order. As the Court long ago explained, the dormant Commerce Clause does not "force all of the states to accept the lowest standard for conducting the business permitted by one of them." *Robertson* v. *California*, 328 U.S. 440, 460 (1946).

B. States with fewer people may not veto the intrastate policy choices of states with more people.

For similar reasons, California's neutral, intrastate law does not warrant more scrutiny on the ground that California has a lot of people who collectively buy a lot of pork. See, *e.g.*, Pet. Br. 3, 8, 24, 45. To be sure, there are

many Californians, and in the aggregate Californians buy large quantities of most things. But the dormant Commerce Clause does not require—and the requirement of equal sovereignty forbids—the Court to single out California on the ground that it has too many residents.

Limiting the police power of more populous states would offend the constitutional requirement of equal sovereignty. The Union described in Article IV "was and is a union of States, equal in power, dignity, and authority." *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911). Central to this equality is states' "privilege of amending their organic laws to conform to the wishes of their inhabitants." *Bolln* v. *Nebraska*, 176 U.S. 83, 89 (1900). As a result, a population-based limit on California's police power would be "so repugnant to the theory of [its] equality under the Constitution that it cannot be entertained." *Ibid.*

It would be especially ironic to interpret the dormant Commerce Clause to override California's sovereign right to equal treatment. For one, "[e]quality of constitutional right and power is the condition of all States of the Union, old and new." *Escanaba & Lake Mich. Transp. Co.* v. *City of Chicago*, 107 U.S. 678, 689 (1882). And the Commerce Clause is "designed to prevent States from engaging in economic discrimination" against the commerce of other states, *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2093–94 (2018)—not to require discrimination against the economic regulations of certain states.

Even if, in theory, the Court may consider the number of Californians or the amount of pork they buy, in practice the size of California's pork market does not dictate the behavior of out-of-state pork producers when selling to other states. Agricultural economists estimate that 91% of United States pork sales take place outside California; even petitioners put that number at 87%. See Agricultural

Economics Professors Amicus Br. 9 & n.9. Pork producers in other states can and do segregate their products for many reasons and they already are using tracing methods to comply with Proposition 12; alternatively, they can choose to stop selling pork in California without imperiling their businesses; and they have conceded that Proposition 12 is unlikely to hurt their earnings. See, *e.g.*, State Resp. Br. 3–4, 5–6, 29–30; Intervenor Resp. Br. 5–6, 32–34; Amicus Br. Leon Barringer 33–35.

While petitioners invoke the number of California pork buyers when claiming interstate effects, petitioners overlook the harm that would result from blocking an intrastate policy choice made by tens of millions of Californians. If the Court were to invalidate Proposition 12, nearly one in ten of the nation's pork consumers would have little say over what kinds of pork may be sold in their state. Especially given the number of meat eaters protected by Proposition 12, California has a significant interest in ensuring that the state's consumers can buy and eat pork safely and ethically.

Finally, any state wishing to prevent another state from regulating intrastate food production or sales may ask Congress to, within the limits of its Article I power, enact national standards and preempt state laws. As authorized policymakers, federal lawmakers may resolve "disputes over [the] degree of economic effect" on interstate commerce. *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 345 (1989). Protections for less populous states are built into the Senate, and Congress regularly vindicates the policy interests of smaller states. See, *e.g.*, Frances E. Lee & Bruce I. Oppenheimer, *Sizing Up the Senate* 173–177 (1999).

Legislators who represent residents of Iowa or like-minded states, then, have every opportunity to support uniform standards or preempt state laws. In balancing

these interests, Congress can decide whether and to what extent certain states' policy choices should become the national standard. However legislators might answer these complicated and contested questions of food policy, the dormant Commerce Clause does not empower courts to choose one size that fits all.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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