No. 21-468

In the Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM BUREAU FEDERATION,
Petitioners,

v.

KAREN ROSS, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

DAN HIMMELFARB
COLLEEN M. CAMPBELL
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

TIMOTHY S. BISHOP
Counsel of Record
BRETT E. LEGNER
AVI M. KUPFER
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 701-7829
tbishop@mayerbrown.com

Counsel for Petitioners
Additional Counsel Listed on Signature Page

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This case arises on the pleadings. Petitioners' complaint recites facts based on their knowledge of the pork industry, backed by declarations from farmers, an economist, and an industry expert. Those allegations are "entitled to the assumption of truth"; the issue is not their "veracity," but "whether they plausibly give rise to an entitlement to relief" under the Commerce Clause. *Iqbal*, 556 U.S. at 679.

Respondents and amici label "implausible" any allegation they disagree with. They fail to acknowledge that California imports 99.9% of pork consumed there. Pet. App. 80a, 150a-151a. They ignore that every part of a pig bears Proposition 12's costs, wherever that part is sold. Pet. App. 168a, 176a-177a, 214a, 239a. And they devote scores of pages to arguing that Proposition 12 will not affect interstate commerce, and will promote sow welfare and human health, contrary to petitioners' specific allegations. Pet. App. 203a-230a. Had the case below turned on contesting petitioners' allegations, the district court would have treated respondents' motions as motions for summary judgment, and would have denied summary judgment because it is impossible to conclude that there is "no genuine dispute as to any material fact." Fed. R. Civ. P. 12(d), 56(a); *Carter* v. *Stanton*, 405 U.S. 669, 671 (1972). Respondents' factual assertions are wrong, showing a lack of knowledge of pigs, the industry, its markets, and federal oversight—and petitioners would so prove at trial.[1] But respondents' assertions are irrelevant here, given the posture of the case.

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[1] Assertions that tracing and segregation could isolate Proposition 12's effects to California consumers are fantasy. *E.g.*, Barringer Am Br.; *cf.* Pet. App. 181a-183a, 239a. Ear notches cannot be used to tie millions of individual market hogs to their

The Ninth Circuit held that petitioners "plausibly alleged that Proposition 12 will have dramatic upstream effects," "require pervasive changes to the pork production industry nationwide," and cause "cost increases to market participants and customers" everywhere. Pet. App. 18a, 20a. It described the mechanisms by which petitioners allege interstate commerce will be burdened. Pet. App. 9a. Those allegations state a claim for impermissible extra-territorial regulation of commerce. The complaint equally clearly alleges that Proposition 12 addresses sow housing almost exclusively in other States, which is beyond California's police powers, and promotes neither sow welfare nor human health. Pet. App. 150a-151a, 201a-230a. Those allegations state a claim under *Pike*.

I. PETITIONERS PLAUSIBLY ALLEGE THAT PROPOSITION 12 IS UNCONSTITUTIONAL EXTRATERRITORIAL REGULATION

There is nothing "incidental" about Proposition 12's extraterritorial effect. HSUS Br. i. It applies

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sows; RFID tags destroy saleable pork and disappear at slaughter, they are used to activate rare and costly electronic sow-feeding systems, almost never for market hogs; blockchain technology is not available for commercial use in the industry, nor is it any part of PQA+, an industry training program; and skin tattoos, unreliable at best, disappear when a pig is butchered. Segregation at the farm reduces production flexibility; at the packing plant it disrupts the quantity and timing of farmers' production and limits when and where any farmer can deliver pigs for slaughter. APHIS traceability requirements for disease control identify originating farms, not the housing of individual pigs. Only the tightest of control over the entire production process, by contract or vertical integration, could enable compliance with Proposition 12, which is exactly how packers are responding for *all* of their suppliers, given uncertainty over where cuts will be sold.

99.9% to pigs raised outside of California. There is no sow industry in California, where sow farms cannot meet land-use and environmental requirements or bear the cost of doing business. California keeps pork production out, but imposes costly measures on producers elsewhere.

The extraterritoriality doctrine is deeply rooted in our constitutional design. *Healy*, 491 U.S. at 336; *Brown-Forman*, 476 U.S. at 583; *Southern Pac.*, 325 U.S. at 767. A state law that has the practical effect of regulating wholly out-of-state commerce is invalid, regardless of whether it also regulates in-state commerce. *Healy*, 491 U.S. at 336. Petitioners plausibly allege that the practical effect of Proposition 12 is that commercial activity outside of California will need to comply with California's regulations, and therefore that Proposition 12 is an extraterritorial regulation of the $26-billion interstate pork market.

Respondents argue that the practical effects doctrine is limitless and would invalidate a wide range of laws. But they mischaracterize the legal standard. There is no violation just because a State law has some effect on commerce outside its borders, such as forcing a foreign producer to decide whether to comply with the State's regulatory standards or forego doing business in that State. The extra-territoriality principle comes into play only when a State law has the practical effect of controlling transactions that occur entirely outside the enacting State, imposing the enacting State's policies on citizens of other States and usurping the sovereign power of sister States.

That is what Proposition 12 does. Petitioners allege that most sow farmers will have to alter their facilities, practices, and contractual relationships to

accommodate California's requirements, incurring enormous costs to do so. Pet. App. 170a-178a, 203a-215a. Given the complex, vertically-segmented nature of pork production—designed to produce high-quality, inexpensive meat in a safe and efficient manner—and the fact that cuts from a single pig are sold across the country, farmers will have to house all their pigs in compliance with Proposition 12. Retailers, distributors, and packers, which will not otherwise be able to comply with Proposition 12 on the necessary scale, will so demand. Consumers nationwide will pay for California's preferred sow-housing methods. Pet. App. 205a-206a, 213a, 238a-239a, 244a-245a; see Danielle Ufer, *State Animal Welfare Policies Covering U.S. Pork Production*, USDA, Livestock, Dairy, and Poultry Outlook: February 2022, at 35 ("similarly-structured retail sales bans have placed upward pressure on retail prices both in and out of State"). Other States' views on how farmers may house sows will be overridden. Pet. Br. 31. And California will enforce the law's criminal and civil penalties with "on-site inspections" of "each * * * site that produces * * * covered animals." Pet. App. 200a; Pet. Reply App. 10a, 38a-39a. When animal rights activists persuade a State to adopt a *25*-square foot requirement, the wholesale revision of farm practices and contracts will begin again.

That is not the usual result of state regulation, and application of the extraterritoriality test is not an undue intrusion on the broad authority that States possess to regulate conduct within their borders. Instead, application of the doctrine in this case preserves the rights of other States to make their own policy choices regarding farming practices in their jurisdictions, and protects nationwide commerce in pork from Balkanized regulatory regimes.

A. The Extraterritoriality Doctrine Is A Core Aspect Of Constitutional Design

Petitioners explained in their opening brief that the extraterritoriality doctrine (1) helps prevent Balkanization; (2) stops one State from imposing its policy choices on another and thereby preserves state sovereignty; (3) safeguards national markets from parochial interests; and (4) protects citizens of other States who could be unfairly burdened by a foreign State's laws. Respondents offer no meaningful challenge to those points. Nor do they seriously contest that the extraterritoriality doctrine is at the heart of the constitutional design.

1. The dormant Commerce Clause is not concerned *only* with protectionism and discrimination

Unable to deny the importance of the policies served by the extraterritoriality doctrine, respondents say the dormant Commerce Clause bars only economic discrimination and protectionism. But this Court has repeatedly, and recently, held to the contrary. *Wayfair*, 138 S. Ct. at 2090-2091.

The purpose of the dormant Commerce Clause is not just to prevent discrimination and protectionism: it prevents States from "imped[ing] substantially the free flow of commerce from state to state" in all guises. *Southern Pac.*, 325 U.S. at 767; see *Great Atl. & Pac. Tea Co.* v. *Cottrell*, 424 U.S. 366, 370 (1976) ("emphasizing that '(t)he very purpose of the Commerce Clause was to create an area of free trade among the several States'"). The ways in which States may make "state lines * * * barriers to the free flow of both raw materials and finished goods," *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976), are not limited to protectionism and discrimination.

Accordingly, *Wayfair* cited *Brown-Forman* as an independent "variation" of the "primary principles that mark the boundaries of a State's authority to regulate interstate commerce." 138 S. Ct. at 2090-2091. And *Brown-Forman* applied the extra-territoriality principle to hold that States may not enact laws that have the "practical effect" of projecting a State's legislation into other States. 476 U.S. at 582-583.

The extraterritoriality principle is a fundamental part of dormant Commerce Clause jurisprudence because it works to preserve a free national market. Madison wrote that the "practice of many States in restricting commercial intercourse with other States" leads to "retaliating regulations." Madison, *Vices of the Political System of the United States*, 2 Writings of James Madison 361, 363 (Gaillard Hunt ed. 1901). HSUS (at 15-16) says Madison cited an example "addressing protectionism," but extraterritorial legislation unquestionably is a means of "restricting commercial intercourse with other States" that risks "retaliating regulations."

This Court's "early dormant Commerce Clause cases" do *not* limit the doctrine to protectionism. HSUS Br. 16. In *Cooley* v. *Board of Wardens*, for instance, the Court upheld a Pennsylvania law that penalized vessels that did not take on a pilot to navigate the State's rivers. 53 U.S. 299, 319-321 (1851). But the issue was whether States had the power to regulate navigation at all; there was no cause for the Court to consider (much less reject) the extra-territoriality doctrine, because the Pennsylvania law did not affect transactions occurring wholly outside of the State. There was no suggestion that the practical effect of the law was that vessels not traveling through Pennsylvania must take on pilots. That

contrasts with, for example, the train-length regulation in *Southern Pacific*, which had the practical effect of controlling train lengths "all the way from Los Angeles to El Paso." 325 U.S. at 775.[2]

This Court's invalidation of discriminatory or protectionist laws does not mean that those are the only concerns of the dormant Commerce Clause. Respondents cite no case in which the Court considered and *rejected* the extraterritoriality doctrine on the grounds that it is not an aspect of the dormant Commerce Clause. Far from it, this Court has explicitly embraced the doctrine, in *Baldwin*, *Healy*, *Brown-Forman, Edgar*, and *Southern Pacific*, and recently reiterated its place in Commerce Clause jurisprudence in *Wayfair*.

Respondents contend that *Baldwin*, *Healy*, and *Brown-Forman* are really about economic protectionism. Were that so, the Court could have ruled without reference to the extraterritorial effect of the challenged laws. Even if there were protectionist purposes to the laws in those cases, that is not solely why they were invalidated: the Court in each case recognized the infringement on the rights of other States to make their own policy choices as the basis for invalidating the statutes.

Thus in *Baldwin*, 294 U.S. 511, the Court invalidated a New York law that required milk sold in-state to have been purchased from suppliers at a minimum price, including milk from out-of-state farms. New York defended the law not only as ensuring an adequate milk supply (jeopardized "when

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[2] *Woodruff* v. *Parham*, 75 U.S. 123 (1868), involved a uniform sales tax on its citizens and those of other States. The Court had no occasion to consider the extraterritoriality doctrine.

the farmers of the state are unable to earn a living"), but also as ensuring that milk was wholesome (because underpaid farmers will be tempted to forego sanitary precautions). *Id.* at 522-524. The Court explained its decision in extraterritoriality terms: "One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the Legislature of Vermont and not that of New York must supply the fitting remedy." *Id.* at 524. Imposing standards within other States is not permissible under the dormant Commerce Clause, regardless of whether the law is "protectionist" or purports to serve social goals. *See ibid.* ("The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop").[3]

If respondents' narrow view of the dormant Commerce Clause were correct, this Court in *Healy* would have invalidated the law simply because it was a discriminatory measure. Instead, the Court held that the Connecticut statute was unconstitutional because it "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State" and its "practical effect," along with similar laws "that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." 491 U.S. at 337. Likewise, New York's law at issue in

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[3] Prohibiting the sale of products made by workers paid less than California's minimum wage would violate the Commerce Clause whether or not any of the product was made in California. That law's unconstitutionality would not depend (HSUS Br. 29) on its being protectionist.

Brown-Forman was not unconstitutional simply because it was protectionist, but rather because "the 'practical effect' of the law [was] to control liquor prices in other States." 476 U.S. at 583.

2. There is no special extra-territoriality rule for the transportation sector

Respondents have no answer for the other extraterritoriality cases that do not present discrimination or protectionism risks. They say *Southern Pacific* concerned "an instrumentality of interstate commerce." HSUS Br. 19 n.9. But this Court has never created a special Commerce Clause rule for transportation. The law in *Southern Pacific* impeded the free flow of goods in the national market—both the goods being transported and commercial transportation itself. 325 U.S. at 779. The best way of thinking about cases like *Southern Pacific* and *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 529-530 (1959), which invalidated a statute regulating in-state use of truck mudguards, is that the laws impeded the free flow of a "good"—rail and transportation services—in interstate commerce, which in turn impeded the ability to transport other goods.

There is no principled reason to carve out special rules for extraterritorial regulation of transportation when regulation of other goods or services in interstate commerce risks the same Balkanization and violation of state sovereignty that the dormant Commerce Clause is intended to guard against. And although qualitative judgments about the importance of the national market are not necessarily an element of the extraterritoriality analysis, the fact remains that the national pork market is an essential source

of affordable protein for millions of Americans. As with nationwide transportation industries, there are important policy reasons why the pork market should not be disrupted by idiosyncratic state regulation, as Congress has recognized. See Pet. Br. 8-9, 31-32.

3. Respondents exaggerate the effect of the extraterritoriality test

California argues (at 22) that *Healy*'s practical effects test cannot be "tak[en] seriously." It misunderstands the test in two important ways.

First, California ignores that the test is a straightforward application of a core aspect of the constitutional design: one State may not regulate conduct in other States. That rule is *protective* of state sovereignty, not destructive of it. Vigorous application of the doctrine is not "profoundly at odds with the Constitution's commitment" to safeguarding "'substantial state authority'" (HSUS Br. 22) because there is no authority to legislate commerce in other States. State sovereignty is preserved when one State is prevented from imposing its policy choices on the citizens of other States. See Indiana and 25 Other States Am. Br. 6-15. The threat that "interfering and unneighborly regulations" will become "multiplied and extended" into "serious sources of animosity and discord" among the States (Pet. Br. 24, quoting Madison and Hamilton) is on display here in the States' competing amicus briefs.[4]

[4] It is States with few sow farms, with no experience with sows, and where pig farmers have no political voice, like California and Massachusetts, that have imposed extraterritorial sow-housing requirements. Indeed, those States that ban the *in-state* use of

Second, California greatly exaggerates the consequences of the extraterritoriality doctrine when it claims (at 22) that all state laws that "have effects" in other States risk invalidation. A law that regulates in-state conduct that has "an effect," however small or attenuated, on conduct in other States is not invalid for that reason. The extraterritoriality doctrine comes in to play only when the law has the practical effect of controlling conduct wholly outside of the enacting State's jurisdiction or when the law usurps other States' policy-making prerogatives.

Another way respondents and their amici misunderstand the extraterritoriality doctrine is illustrated by Public Citizen's brief. Amicus argues (at 20-21) that petitioners' view of the extraterritoriality doctrine is irreconcilable with *Parker* v. *Brown*, 317 U.S. 341 (1943). *Parker* upheld a California law that required raisins made from grapes grown in California—almost all raisins—to be marketed in a specific way to maintain prices. *Id.* at 346-348. As a result, the prices of the 95% of raisins that were eventually sold out-of-state were higher than they otherwise might be. But any effect of that law on interstate commerce would not be impermissible under the extraterritoriality doctrine because the law did not, in practical effect, control conduct occurring wholly outside of California. First, no non-California growers were subject to the law and no non-California parties were required to market their raisins in any way. Second, there was no suggestion that the law governed transactions unrelated to California or that it usurped other States' rights to set their own policies

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gestation pens together produce only 3% of U.S. pork. Danielle Ufer, *supra*, at 34.

for their citizens. Only California-produced raisins were affected.

B. Proposition 12 Violates The Extra-territoriality Prohibition

Respondents ignore or contradict the complaint's factual allegations that Proposition 12 will have significant extraterritorial effects. They ignore the intrusive on-farm inspection regime set forth in CDFA's now-final regulations. See https://bit.ly/3L8n3VL (Art. 5). And they assert that tracing and segregation will limit Proposition 12's effects to the 13% of pork bound for California markets. But petitioners allege that all pigs will need to be raised in compliance with Proposition 12 because of the impracticability of segregating and tracing pigs and pork at every step of the production process at the necessary scale, because it is not known where a pig's meat will eventually be sold, and because of the demands of retailers and distributors faced with the risk of criminal and civil sanctions. Pet. Br. 16 & n.7; *supra*, p.1 & n.1. That respondents and amici offer opinions about the likelihood of that occurring only underscores that there are factual issues to be resolved.

II. PETITIONERS PLAUSIBLY ALLEGE THAT PROPOSITION 12 EXCEEDS CALIFORNIA'S POLICE POWER

A. States Must Demonstrate That Laws With Extraterritorial Effects Further Legitimate Local Interests

Alternatively, Proposition 12 is unconstitutional, if not *per se*, then because its substantial effects on out-of-state commercial activity serve no legitimate local interest. Pet. Br. 36-43; U.S. Br. 33-34; 2 Rot-

unda & Nowak, *Treatise on Constitutional Law* § 11.7(a) n.2 (extraterritorial regulations unrelated to a State's own "public safety or public order are beyond the police power of a state or locality and thus violate the commerce clause"). A State must "affirmatively establish—not merely recite—a legitimate and substantial local interest to justify burdens on interstate commerce." U.S. Br. 18; see Pet. Br. 38.

This requirement is not "novel." Cal. Br. 32; HSUS Br. 35-37. Courts must ensure that a regulation claimed "to promote the public health or safety" actually "further[s] th[at] purpose." *Kassel*, 450 U.S. at 670 (plurality op.); see, *e.g.*, *United Haulers*, 550 U.S. at 346-347 (considering whether ordinance "conferr[ed]" the asserted "health and environmental benefits"); *Southern Pac.*, 325 U.S. at 775 (invalidating State law with no "reasonable relation to safety"). With important horizontal-federalism principles at stake, courts do not simply take a State's word that its extraterritorial impositions on interstate commerce serve legitimate public purposes.

Respondents cite decisions of this Court for the uncontested proposition that a regulation may address "imperfectly understood * * * risks." Cal. Br. 47; HSUS Br. 35-36, 40. But each of those cases involved searching judicial review to determine whether the "justifications" "put forward" for the challenged measures in fact served a "legitimate local purpose." *Maine* v. *Taylor*, 477 U.S. 131, 148, 149 (1986); see *id.* at 140, 148 ("reviewing the expert testimony" presented at "evidentiary hearing"); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 460, 473 (1981) ("review[ing]" the record of "extensive evidentiary hearings"); *Southern Pac.*, 325 U.S. at 775 ("[e]xamination of the evidence and the detailed

findings" revealed law bore "no reasonable relation to safety").

B. Proposition 12 Advances No Legitimate Local Interest

Petitioners plausibly allege that Proposition 12 advances no legitimate local interest. Pet. App. 215a-230a; see Pet. Br. 39-43. Proposition 12 will not improve sow welfare, and may diminish it. Pet. App. 219a-225a. It has no human health benefits, but may increase pathogen transmission from pigs to humans. Pet. App. 225a-230a.

Respondents do not meaningfully engage with those allegations. California does not address them, and HSUS's brief simply asserts (at 40), without discussing any specific allegation, that petitioners fail to "show that California's concerns are * * * even debatable." Instead, respondents rely on outside evidence, Cal. Br. 47; HSUS Br. 37-41, 49, to try to rebut the allegations that Proposition 12 is beyond California's police power.

But this case is at the pleading stage, where petitioners' factual allegations must be taken as true. The time to consider "outside the pleadings" evidence is on summary judgment or at trial. This Court should not consider respondents' untested factual assertions in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"). Even if the Court were to consider respondents' evidence, that would not change the result.

1. Respondents' outside evidence does not undermine petitioners' plausible allegations that California has no legitimate local interest in "phasing out"

disfavored "methods of * * * confin[ing]" almost entirely out-of-state animals. Pet. App, 37a §2.

a. California has no valid interest in other States' animal-husbandry policies. To attach restrictions to the sale of pork based on concern for animals in other States would "extend [California's] police power beyond its jurisdictional bounds." *C & A Carbone*, 511 U.S. at 393 (1994). Just as a State has "no legitimate interest in protecting nonresident shareholders," *Edgar*, 457 U.S. at 644, or in the "wage scale * * * in other states," *Baldwin*, 294 U.S. at 528, so too it has no interest in the welfare of animals in other States. Unlike measures directed at harms to in-state persons or property, philosophical objections to out-of-state policies on wages, investors, or animal welfare are not legitimate local interests.

Respondents cite no precedent holding that one State's disagreement with the policy of other States concerning activities outside the borders of the regulating States qualifies as a legitimate exercise of police power under the Commerce Clause. Each of the cases that respondents cite, Cal. Br. 45-46; HSUS Br. 42-43, involved an outright product ban. Such measures do not raise the same Commerce Clause concerns as Proposition 12. Unlike a product ban, the "practical effect" of a regulation mandating out-of-state production methods for products sold in California is "to control [commerce] beyond the boundaries of the state." *Southern Pac.*, 325 U.S. at 775; see U.S. Br. 28.

Respondents' view that a State may burden interstate commerce based on a philosophical objection to the policy decisions of other States would force market conformance with the most "restricti[ve]" regulation "of any of the states," however out-of-tune

the State's views are with the rest of the Nation. *Southern Pac.*, 325 U.S. at 773. That would open the door to the "economic retaliation," and "rivalries and reprisals," that the Commerce Clause was meant to avert, *Baldwin*, 294 U.S. at 522, and threaten the "unrestrained intercourse between the States," The Federalist No. 11, at 51 (Hamilton) (Terence Ball ed. 2006), that it was intended to foster, see *Tennessee Wine & Spirits*, 139 S. Ct. at 2460-2461.

b. Even if California's disagreement with other States' animal-husbandry policies were a legitimate local interest, petitioners plausibly allege that Proposition 12 would cause—not "prevent"—"animal cruelty," Pet. App. 37a § 2, by removing important tools for maintaining herd health.

Given the animal-welfare tradeoffs between individual stalls and group pens, farmers make sow housing decisions based on changing herd needs. Pet. App. 216a-219a; see Am. Ass'n of Swine Veterinarians (AASV) Br. 15-16 (discussing the "virtually unanimous conclusion" of sow-health experts that neither method is superior in all circumstances). Proposition 12 eliminates that flexibility, forcing farmers to house sows in group pens notwithstanding risks to individual sow welfare.[5] Sows in group pens suffer stress and physical injuries from fighting and

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[5] Respondents say farmers could house sows in larger individual pens. Cal. Br. 47 n.24; HSUS Br. 49. But petitioners allege that individual 24 square feet gestational stalls would reduce sow inventory by 42%, increase fixed costs by the same amount, and cause farmers to breach supply contracts, and that stalls in fact would have to be even larger so sows could turn around without touching the pen. Pet. App. 172a. Large stalls would defeat some purposes of individual pens, including separating food from waste, facilitating care and breeding, and protecting employees. Pet. App. 185a, 189a.

food competition. Pet. App. 221a-224a. Experts agree that these are "serious" concerns. AASV Br. 8-13. In addition, sows often require tailored nutrient regimes and health care that are difficult to administer in group settings. Pet. App. 223a-224a.

Respondents ignore these consequences of housing sows in group pens. Although respondents contend that "experts disagree" with petitioners' "concerns," Cal. Br. 47 n.24; see HSUS Br. 49, they cite no evidence comparing sow welfare under the current system of flexible housing with a system requiring the use of group pens with 24 square feet per sow. In fact, sow experts agree with petitioners. In the aggregate, individual stalls and group pens "result in very similar observable levels of sow welfare," but individual stalls are often the "best option" for preventing "injuries or even death." AASV Br. 15, 19. Proposition 12 harms sow welfare by precluding farmers from making the necessary case-by-case housing decisions.

2. Respondents' fact assertions outside the record also do not undermine petitioners' plausible allegations that Proposition 12 has no local human-health benefits. The U.S. Department of Agriculture has a robust program for inspecting meat to ensure fitness for human consumption, Pet. App. 225a-226a; see Pet. Br. 14; U.S. Br. 6, including monitoring for pathogens of concern, *e.g.*, 9 C.F.R. 310.25. California could utilize an even more demanding in-state inspection regime, see 21 U.S.C. 661(a)(1), but it gave up its meat inspection program in 1976. See 9 C.F.R. 331.2.

Proposition 12 does not enhance food safety. There is no evidence that housing sows in individual gestation stalls increases the risk of disease spreading

from the offspring of those sows to humans. Pet. App. 226a-227a; see AASV Br. 20 (discussing the lack of "evidence that disease prevalence in mature slaughter pigs has any relationship whatsoever to whether their mothers were housed in stalls"). And even if sows housed in individual stalls had increased disease prevalence, geographic and temporal separation of sows from market pigs minimizes any food-safety risk. App. 226a-229a; see Ctr. for a Humane Econ. Am. Br. 22 (noting greater antibiotic resistance of pathogens found in pigs at sow farms versus finishing farms).

HSUS dismisses these factual claims as *ipse dixit*. Br. 38-39. But at this pleading stage petitioners have not yet had the opportunity to prove their case. Regardless, experts agree with petitioners' claims. AASV Br. 20-21. The only study on pathogen transfer cited by HSUS (at 28), assessed bacterial transmission from sows to newborn piglets—not the relationship between sow housing and bacterial prevalence in mature market pigs. See C.R. Young et al., *Enteric Colonisation Following Natural Exposure to* Campylobacter *in Pigs*, 68 Rsch. Vet. Sci. 75 (2000).

Housing sows in group pens may "actually 'increase risks of * * * food-borne pathogens'" because the "most common" transmission pathways are "nose-to-nose contact or shared water or feeding systems." AASV Br. 19-20 (quoting Panel on Biological Hazards, European Food Safety Auth., *Food Safety Aspects of Different Pig Housing and Husbandry Systems*, ESFA J. 613, 2-20 (2007)). The article on pathogen virulence HSUS cites (at 41), warns that "frequent contact" between livestock "provide[s] opportunities * * * for existing pathogens to evolve." Bryony Jones et al., *Zoonosis Emergence Linked to Agricultural Intensification and Environmental Change*, 110 Proceedings Nat'l Acad. Scis. 8399, 8402-8403 (2013).

In fact, respondents acknowledge the risks created by forcing farmers to house sows in group pens. See HSUS Br. 39 ("intermixing" pigs "spreads disease").

California does not question the plausibility of petitioners' allegations that Proposition 12 has no human-health benefits. CDFA acknowledged that Proposition 12's space requirements are "not based on" peer-reviewed science or "accepted as standard in the scientific community to reduce human-borne illness." Pet. App. 75a. Once faced with litigation, CDFA claimed it was not necessarily unreasonable for voters to enact Proposition 12 "as a precautionary measure to address any potential threats to health and safety." Pet. Reply App. 74a. But that is not responsive to petitioners' allegations that Proposition 12 does not actually do so. See *Great Atl. & Pac. Tea*, 424 U.S. at 375 ("contention" that statute served "vital interests in maintaining the State's health standards border[ed] on the frivolous").

HSUS asserts that CDFA was "incorrect" to conclude that the science does not show that Proposition 12 promotes human health. Br. 40. Even if the Court were to consider the evidence HSUS cites, it would support petitioners' contention that individual and group sow housing each have benefits and drawbacks, and that farmers and their own in-state regulators are in the best position to make sow-housing decisions.

HSUS's assertion that Proposition 12 has human-health benefits rests on its view that piglets born to sows housed in individual stalls have "reduced immune resistance * * * compared to other piglets" that increases the risk of disease spread from market pigs to humans. Br. 37-38. As discussed above, pp. 18-19, there is no evidence that housing sows in group

pens in compliance with Proposition 12 reduces disease prevalence in market pigs. No study cited by HSUS (at 37-38) analyzed the alleged relationship between sow housing and disease in market pigs. Experts in swine health disagree with HSUS that any such relationship exists. AASV Br. 19-22.

HSUS's other human-health claims (Br. 38-41) lack merit. The cited portion of the preamble to the proposed amendment of USDA's rule on organic livestock production states that "outdoor and pasture access encourages" behaviors, such as "foraging," that "may be positively associated with improved health" and that "may," in turn, "result in healthier livestock products." 87 Fed. Reg. 48,562, 48,565 (Aug. 9, 2022). Proposition 12 does not require outdoor and pasture access, nor that pigs be "forage-fed." See Frederick D. Provenza et al., *Is Grassfed Meat and Dairy Better for Humans*, 6 Frontiers in Nutrition 3 (Mar. 2019); 87 Fed. Reg. at 48,565 & n.6.

HSUS's claims about disease transmission (Br. 38-39) are overstated. HSUS focuses on transmission of *Campylobacter* from sows to piglets. Yet USDA has found that "*Campylobacter* from pork [is] not frequently a cause" of "foodborne illnesses in humans." Animal and Plant Health Inspection Serv., USDA, *Campylobacter on U.S. Swine Sites—Antimicrobial Susceptibility* 1 (2008). Between 1998 and 2015, only 27 illnesses from a single *Campylobacter* outbreak were attributable to pork. J.L. Self et al., *Outbreaks Attributed to Pork in the United States, 1998-2015*, 145 Epidemiology & Infections 2980, 2983 (2017).

HSUS erroneously contends (Br. 39) that pork is responsible for 525,000 annual infections in the United States. The cited study relies on estimates

based on an outdated methodology that the CDC has since "improved." Interagency Food Safety Analytics Collaboration, CDC, *Foodborne Illness Source Attribution Estimates for 2019* 3 (2021). Between 1998 and 2015, only four deaths were attributable to outbreaks associated with pork; the study neither linked any outbreak to sow housing nor excluded introduction of pathogens at the processing plant. Self, *supra*, at 2982; see Pet. App. 228a ¶437. And respondents cite no evidence that ties any human disease, ever, to housing sows in 24 rather than 16-18 square feet of space. See Pet. App. 228a ¶441.

III. PETITIONERS PLAUSIBLY ALLEGE A CLAIM UNDER *PIKE*

Petitioners also plausibly allege that Proposition 12 fails *Pike* balancing. It imposes substantial burdens on interstate commerce that clearly outweigh its negligible local benefits. Pet. Br. 44-48. The United States agrees. U.S. Br. 17-30.

Respondents' incorrectly assert that *Pike* claims concern only "discrimination and protectionism." HSUS Br. 20. The Commerce Clause requires that state regulations "not discriminate against" *or* "impose undue burdens" on interstate commerce. *Wayfair*, 138 S. Ct. at 2091. When a regulation "discriminates against interstate commerce," a court "need not resort to the *Pike* test." *C & A Carbone*, 511 U.S. at 390. *Pike* instead applies when "nondiscriminatory legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade." *Camps Newfound/Owatonna*, 520 U.S. at 583 n.16 (alterations omitted); see *Department of Revenue of Ky.*, 553 U.S. at 353 (discussing when "nondiscriminatory burdens on commerce" violate *Pike*); *Pike*, 397 U.S. at 142

(applying test to state law that "regulate[d] even-handedly").

The complaint alleges that Proposition 12 imposes substantial burdens on interstate commerce. Pet. App. 203a-215a; Pet. Br. 44-46. As the court of appeals acknowledged, Pet. App. 18a, those burdens fall on out-of-state farmers and their customers across the Nation. Respondents' arguments that Proposition 12's effects will be limited to California, and that the industry can trace and segment Proposition 12-compliant market pigs, Cal. Br. 43; HSUS Br. 32-35, are incorrect and, at this stage, irrelevant. *Supra*, p.1.

Respondents repeat the court of appeals' erroneous holding that "cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce." Pet. App. 18a; Cal. Br. 41-43; HSUS Br. 45-47. As this Court has made clear, cost increases are "relevant" when considered in conjunction with "other factors." *Raymond Motor Transp.*, 434 U.S. at 445 n.21; see Pet. Br. 49.

The complaint alleges other significant impacts on interstate commerce. Proposition 12 will decrease "productivity rates" on farms. Pet. App. 173a. Group pens increase pregnancy losses, lengthen recovery from weaning, heighten risks for sow injury and death, and interfere with individualized nutritional and medical care. Pet. App. 173a-175a. That in turn will interfere with farmers' supply contracts, and require changes in the terms on which sow farmers, nurseries, finishing farms, and packers do business with each other and with retailers. Pet. App. 176a-177a, 206a, 213a. Increased costs will force further consolidation, reducing competition. Pet. App. 213a. California's inspection and certification regime will

interfere with farms' operations and biosecurity measures. Pet. App. 200a, 206a-207a; Pet. Reply App. 33a, 38a-39a. Together with the enormous expense of conforming operations to California's law (which is cost-prohibitive for many farms, Pet. App. 176a) and price increases for consumers everywhere, those effects with "nationwide reach" will impose a substantial burden on the flow of goods in interstate commerce. *Edgar*, 457 U.S. at 643.

Respondents disregard those burdens in asserting that *Exxon* resolves this case. Cal. Br. 42-43; HSUS Br. 45-47. The law in *Exxon* impacted a few "particular interstate firms" and did not "interfer[e] with the movement of goods in interstate commerce." 437 U.S. at 127. By contrast, petitioners allege that Proposition 12 requires structural changes to an industry that plays "a significant role in the economy of the U.S.," 7 U.S.C 4801(a)(2), and that those changes will increase sow mortality, decrease herd size, interfere with entirely out-of-state contracts, and result in consumers nationwide paying for California's preferred out-of-state farming practices. Those effects must be taken into account under *Pike*, and easily outweigh California's negligible interests.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DAN HIMMELFARB
COLLEEN M. CAMPBELL
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006

TIMOTHY S. BISHOP
Counsel of Record
BRETT E. LEGNER
AVI M. KUPFER
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606

ELLEN STEEN
TRAVIS CUSHMAN
American Farm Bureau Federation
600 Maryland Avenue SW
Suite 1000W
Washington, DC 20024

MICHAEL C. FORMICA
National Pork Producers Council
122 C Street NW
Suite 875
Washington, DC 20001

Counsel for Petitioners

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