

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL PORK PRODUCERS COUNCIL,)
ET AL.,)
 Petitioners,)
 v.) No. 21-468
KAREN ROSS, IN HER OFFICIAL)
CAPACITY AS SECRETARY OF THE)
CALIFORNIA DEPARTMENT OF FOOD &)
AGRICULTURE, ET AL.,)
 Respondents.)

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13
14 Washington, D.C.
15 Tuesday, October 11, 2022
16

17 The above-entitled matter came on for
18 oral argument before the Supreme Court of the
19 United States at 10:02 a.m.
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12 et al., Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-468, National Pork Producers versus Ross.

Mr. Bishop.

ORAL ARGUMENT OF TIMOTHY S. BISHOP

ON BEHALF OF THE PETITIONERS

MR. BISHOP: Mr. Chief Justice, and may it please the Court:

The facts we allege are assumed to be true for purposes of decision here. They state a claim that Proposition 12 violates the Commerce Clause almost per se because it's an extraterritorial regulation that conditions pork sales on out-of-state farmers adopting California's preferred farming methods, for no valid safety reason. Proposition 12 also fails the Pike test because it burdens interstate commerce for no local benefit.

California wants to change farming methods everywhere to "prevent animal cruelty by phasing out extreme methods of farm animal confinement." That confinement occurs in other states. California imports 99.9 percent of its

1 pork.

2 Decisions like Baldwin establish that
3 even when a law is triggered only by in-state
4 sales, a state may not project its legislation
5 into other states in that way. To do so
6 infringes the territorial autonomy of sister
7 states and it impedes our national common
8 market.

9 No other state makes its farmers house
10 pigs the way that California does. And very few
11 farmers do. They keep sows in individual pens
12 during the vulnerable breeding period, and they
13 provide less than 24 square feet of space in
14 group pens. An Iowa farmer doesn't know where
15 pork from his sows will be sold. Pigs go to a
16 nursery, a finisher, then a slaughterhouse,
17 where the packer butchers them into parts that
18 are sold around the world in response to demand.

19 The only safe course is to raise all
20 pigs the California way, which is what we see
21 buyers demanding, and the costs of doing that
22 inhere in pork parts sold in places where buyers
23 are unwilling to pay more to satisfy
24 California's policy preferences.

25 If Proposition 12 is lawful, New York

1 can say that pigs have to have 26 feet of space
2 and send inspectors into farms to police
3 compliance as California does. Oregon can
4 condition imports on workers being paid the
5 minimum wage. And Texas can condition sales on
6 the producer employing only lawful U.S.
7 residents. And at that point, we have truly
8 abandoned the framers' idea of a national
9 market.

10 I invite the Court's questions.

11 JUSTICE THOMAS: Mr. Bishop, when
12 exactly is a state -- intrastate regulation
13 impermissibly extraterritorial?

14 MR. BISHOP: Well, the --

15 JUSTICE THOMAS: Because this, as I
16 read California's law, it is about products
17 being sold in California. Unlike some of the
18 cases you cite, it's not reaching out and
19 regulating something across state line or
20 regulating prices.

21 MR. BISHOP: Well, the test that we
22 propose is that a state law that conditions
23 sales on an out-of-state business operating in a
24 particular way is almost --

25 JUSTICE THOMAS: And how does

1 California exactly do that?

2 MR. BISHOP: You cannot sell pork in
3 California unless you raise your sows in a
4 particular way out of state. It's a condition
5 on sale. That's very little different from
6 Baldwin. Baldwin conditioned the sale of milk
7 in New York predicated on the Vermont producer
8 being paid the New York rate, and it did that
9 because it thought that it was necessary to pay
10 Vermont farmers that much in order for them to
11 use sanitary methods on the dairy.

12 JUSTICE THOMAS: Right, but --

13 MR. BISHOP: This Court held that --

14 JUSTICE THOMAS: -- but what if --
15 what --

16 MR. BISHOP: -- New York could not
17 project its legislation that way on Vermont.

18 JUSTICE THOMAS: But what if -- what
19 if California -- I'm sorry to interrupt you, I
20 apologize.

21 MR. BISHOP: That's all right.

22 JUSTICE THOMAS: What if California
23 said a house has to be built according to
24 certain rules by certain standards with certain
25 products, hence, excluding products that are

1 made in another state? For example, it says
2 that you can't build a house entirely out of
3 wood, so you can't import wood from another
4 state like -- that's a lumber state like
5 Georgia.

6 MR. BISHOP: That's -- that's
7 different, Justice Thomas. We -- we have --

8 JUSTICE THOMAS: Why is it? I mean,
9 it's affecting -- it's affecting your product
10 from your -- from -- extraterritorially.

11 MR. BISHOP: No, a state may ban a
12 product. There's no doubt about that. It could
13 ban pork. It can ban lumber to be used in
14 building houses. What it can't do is condition
15 sales in the state on a business in another
16 state adopting particular methods of production.
17 That tramples on the other state's rights.

18 JUSTICE KAGAN: I understand New York
19 has a law that says that if you want to import
20 firewood into the state, you have to have used a
21 certain kind of pesticide to make sure that
22 various pests don't come in with the firewood.

23 Would that be forbidden?

24 MR. BISHOP: Well, I think you can --
25 you can ban a product that contains certain

1 pests. The -- the -- Maine -- Maine versus
2 Taylor, I think, establishes -- establishes
3 that. And there is a --

4 JUSTICE KAGAN: But you -- but you
5 can't -- New York can't say any producers that
6 don't use -- that don't use some -- you know --

7 MR. BISHOP: A particular --

8 JUSTICE KAGAN: -- some list of
9 approved pesticides?

10 MR. BISHOP: A particular pesticide.
11 I think -- and this won't always be easy --

12 JUSTICE KAGAN: Your answer is that
13 you can't?

14 MR. BISHOP: You can't, right.

15 JUSTICE KAGAN: So anytime a state
16 does something that I say forces -- it doesn't
17 really force, but it -- you know, if you want
18 the -- the state's market, it forces you.

19 MR. BISHOP: Right.

20 JUSTICE KAGAN: Anytime a state does
21 something that forces you to change production
22 methods in any way, that would be --

23 MR. BISHOP: Yes.

24 JUSTICE KAGAN: -- banned?

25 MR. BISHOP: Anytime -- well, banned,

1 I mean, I say this is almost a per se rule, even
2 for discrimination cases. There's always a
3 safety out if the -- the state can show that the
4 -- the rule is necessary --

5 JUSTICE JACKSON: But, counsel --

6 MR. BISHOP: -- for safety --

7 JUSTICE JACKSON: -- can I just --

8 MR. BISHOP: -- and can't be achieved

9 --

10 JUSTICE JACKSON: -- can I just --

11 MR. BISHOP: -- but, yes, that is the

12 -- that's our position.

13 JUSTICE JACKSON: Can I just clarify?

14 Because I -- I perceive a difference in the rule
15 that you're articulating right now than what's
16 in your briefs, and I just want to make sure I
17 understand the per se rule that you are
18 articulating.

19 I thought your briefs were asking us
20 for a rule that says that a state may not enact
21 laws that have the practical effect of
22 controlling conduct outside the state's borders.
23 And that's different, I think -- and maybe I'm
24 wrong, so you can tell me -- than the rule that
25 you're now saying, which is a state law that

1 conditions sales on an out-of-state business
2 operating in a particular way is prohibited.

3 So which --

4 MR. BISHOP: Well --

5 JUSTICE JACKSON: -- which one of
6 these --

7 MR. BISHOP: -- well, I think, you
8 know, our -- our -- our view is that an
9 extraterritorial -- an extraterritorial rule
10 always has that practical effect on -- on
11 commerce. It does two things. It affects
12 commerce out of state, and it tramples the
13 rights of the states in which the business is
14 located.

15 JUSTICE JACKSON: But I -- I see a
16 delta between the question of whether or not the
17 state's regulation controls conduct outside of
18 the state's borders and a -- what seems to me to
19 be a narrower proposition that you want a per se
20 rule that says if a state conditions sales on
21 out of -- on an out-of-state business operating
22 in a particular way.

23 Am I wrong --

24 MR. BISHOP: Well, it may --

25 JUSTICE JACKSON: -- that that's a

1 narrower thing?

2 MR. BISHOP: -- it may be a
3 narrower -- it may be a narrower subset, but
4 this Court has used that control language in --
5 in cases like Carbone and -- and Baldwin to
6 stand for this proposition that you may not
7 condition in-state sales on out-of-state --
8 out-of-state operations.

9 JUSTICE ALITO: Mr. Bishop, you have
10 -- you have several arguments, and I gather that
11 your answer to Justice Kagan based on your
12 extraterritoriality argument is no, New York
13 can't do that.

14 MR. BISHOP: It can't do that, right.

15 JUSTICE ALITO: But what -- how would
16 that play out under your other argument, which
17 is that the Pike balancing test would apply?

18 MR. BISHOP: Well -- well, Pike --
19 Pike is a -- you know, it's a factual -- it's a
20 factual test. It's a factual test, and so you
21 consider what is the impact on interstate
22 commerce, and then you weigh that against --
23 that burden against the local interest.

24 But, I mean, what I -- what the rule
25 -- what the extraterritorial rule that we are

1 proposing does really operates at that first
2 level, the burden level, and what it says is
3 it's so clear that laws that condition sales on
4 out-of-state operation, changes in operations is
5 always going to be a significant burden on
6 interstate commerce that implicates the very
7 concerns that the framers had about
8 balkanization.

9 JUSTICE KAGAN: So suppose it were
10 Wyoming or Rhode Island --

11 MR. BISHOP: It wouldn't --

12 JUSTICE KAGAN: -- that passes a law
13 like this.

14 MR. BISHOP: -- it wouldn't make any
15 difference.

16 JUSTICE KAGAN: It -- it certainly
17 makes a difference in the kind of burden that's
18 involved, right?

19 MR. BISHOP: It -- it does.

20 JUSTICE KAGAN: Somebody could easily
21 just cut off the Wyoming market.

22 MR. BISHOP: But what we are
23 proposing, Your Honor, is a -- is a -- a per se
24 rule that these conditions on sale in state --

25 JUSTICE BARRETT: But that's not a

1 matter of Pike balancing. Your per se rule goes
2 to the extraterritorial rule, and I think
3 Justice Alito was asking you about Pike.

4 MR. BISHOP: Right. Well, and I --
5 what I'm trying to explain is the -- is the
6 relationship between extraterritoriality and
7 Pike, which is that the extraterritoriality rule
8 establishes per se that that burden is -- is
9 present in every case. It cuts out the need to
10 do the --

11 JUSTICE ALITO: It establishes --

12 MR. BISHOP: -- individual --

13 JUSTICE ALITO: -- it establishes that
14 there is a substantial burden on interstate
15 commerce.

16 MR. BISHOP: Yes, exactly, Justice
17 Alito.

18 JUSTICE ALITO: Or there -- there
19 certainly is in the case where the state is a
20 behemoth like California, but if you go to Pike
21 balancing, then you would also take into account
22 in a situation like the one that was posited by
23 Justice Kagan the strength of the state's
24 interest. And so, if New York has a --

25 MR. BISHOP: Yes. If this Court

1 doesn't think --

2 JUSTICE ALITO: -- has a very strong
3 interest in preventing a really dangerous
4 product from coming into its borders, that would
5 be taken into account.

6 MR. BISHOP: Yes, and we think that's
7 taken into account under extraterritoriality
8 too. I mean, even -- even in cases like Oregon
9 Waste, where it's a discriminatory law, this
10 Court does consider the safety rationale that is
11 offered by the -- by the state, but the state
12 has to offer a -- a real non-speculative safety
13 rationale that is not --

14 JUSTICE GORSUCH: Counsel, why -- why
15 isn't this Pike balancing test a bit reading too
16 much into too little? It's one paragraph in a
17 short unanimous opinion and it relies on three
18 very old cases, Baldwin, Healy, and Brown, which
19 were all --

20 MR. BISHOP: They're not so old, Your
21 Honor.

22 JUSTICE GORSUCH: Well, they're a
23 hundred years old around about -- that involve
24 price fixing or price affirmation statutes that,
25 in effect, are a form of discrimination against

1 out-of-state market participants. At least
2 that's how many people in many courts have read
3 them.

4 I confess I'm guilty of that too on
5 the Tenth Circuit. That was my understanding
6 what Pike was about. What's wrong with that
7 understanding, especially when the alternative
8 you are selling us appears to be that this Court
9 should engage in a freewheeling balancing test a
10 la Lochner to protect an economic liberty rather
11 than defer to state regulation on health and
12 safety?

13 MR. BISHOP: Well, let me make two
14 points. I mean, it -- Pike -- Pike -- you know,
15 Healy is a 1989 case, and Brown-Forman is 1986.
16 I mean, these are not ancient cases.

17 There -- Pike is an extremely
18 well-established precedent not only in this
19 Court but in the lower courts, and it has been
20 applied --

21 JUSTICE GORSUCH: That's not a
22 question. The question is what it means.
23 And -- and it could either mean what many lower
24 courts have thought it meant, looking at these
25 very old dairy statutes, things like that, or it

1 could mean something very broad that would endow
2 this Court to weigh competing interests.

3 Does California have enough of an
4 interest in pork compared to lumber, compared to
5 fireworks, compared to whatever you want to come
6 up with?

7 MR. BISHOP: The narrow read we --

8 JUSTICE GORSUCH: What business do we
9 have in that?

10 MR. BISHOP: The narrow reading would
11 not satisfy the interests of the Commerce
12 Clause. The Commerce Clause is intended to
13 prevent balkanization. It was a reaction to --
14 to balkanize rules at the time of the
15 constitutional convention. And it was intended
16 to stop interstate -- interstate strife over
17 these sorts of rules.

18 A narrow rule focused on old dairy
19 statutes is not going to achieve that. And what
20 we're proposing, this per se rule that we are
21 proposing --

22 JUSTICE GORSUCH: It's new, right?

23 MR. BISHOP: -- it's away from --

24 JUSTICE GORSUCH: It's -- it's a new
25 rule?

1 MR. BISHOP: No. Well, we don't think
2 it's new. We think it's firmly grounded --

3 JUSTICE GORSUCH: Where -- where is
4 that --

5 MR. BISHOP: -- in Baldwin.

6 JUSTICE GORSUCH: -- in Pike? I don't
7 see per se --

8 MR. BISHOP: It's -- it's in Baldwin,
9 Your Honor.

10 JUSTICE GORSUCH: It's in Baldwin?
11 Okay.

12 MR. BISHOP: That's what -- that's
13 what Baldwin --

14 JUSTICE GORSUCH: With respect to
15 price affirmation and price fixing?

16 MR. BISHOP: Price affirmation cannot
17 conceivably be an appropriate limitation of this
18 rule because it doesn't achieve what the
19 Commerce Clause is supposed to achieve.

20 JUSTICE GORSUCH: Well, then let me
21 ask you how this --

22 MR. BISHOP: -- which would be a
23 national market.

24 JUSTICE GORSUCH: -- let me ask you
25 how this works, though. You say -- you say

1 California could ban pork.

2 MR. BISHOP: Yes.

3 JUSTICE GORSUCH: Okay. Why doesn't
4 that affect interstate commerce in some
5 impermissible way?

6 MR. BISHOP: Well, it -- it does
7 affect it. But the -- the -- the difference
8 between a ban is that that seems to us to be
9 much more -- which are commonplace, bans are
10 commonplace, they're much more in-state focused.
11 All they do is reduce the size of the market for
12 out-of-state businesses. That is very different
13 from conditioning a sale on the precise way that
14 an out-of-state business conducts itself, how it
15 operates.

16 JUSTICE KAGAN: But -- but,
17 presumably, the reason why out-of-state
18 businesses care about change in production
19 methods is that those production methods will be
20 more costly. And if you're thinking about
21 costs, California banning your product would be
22 the greatest costs of all. So why would you,
23 you know, divide the world in that way?

24 MR. BISHOP: Well -- well, we're not
25 only talking about costs, Justice Kagan.

1 We're -- we're talking about the impact on the
2 state where the business is located.

3 You know, Iowa has 65,000 sow farms.
4 It has a very great interest in how those sows
5 are -- are housed. And what California is doing
6 is essentially trampling on Iowa's ability to
7 say, no, you know, our farmers really ought to
8 be able to use --

9 JUSTICE KAGAN: Right. But its --

10 MR. BISHOP: -- breeding sows.

11 JUSTICE KAGAN: -- interest is
12 cost-related. Its interest is, look, we think
13 that this is, you know, sufficient and we don't
14 want to do anything that's more expensive.

15 MR. BISHOP: It's not only
16 cost-related. It could be morally related.
17 California's moral position, moral view that
18 pigs shouldn't be kept this way can be matched
19 in Iowa by a view that the most important thing
20 about sows is -- is producing --

21 JUSTICE KAGAN: Well, I must say --

22 MR. BISHOP: -- inexpensive --

23 JUSTICE KAGAN: -- that seems
24 unlikely.

25 MR. BISHOP: -- inexpensive pork.

1 JUSTICE KAGAN: I must say that seems
2 unlikely.

3 MR. BISHOP: No, not at all.

4 JUSTICE KAGAN: The -- the question
5 from Iowa's position, and it's an important
6 question, is you're making this incredibly
7 costly for us.

8 MR. BISHOP: No, I don't think -- I
9 don't see how that -- how you say that's
10 unlikely. If California can tell folks in Iowa
11 how to raise their sows, then Iowa can take the
12 moral position that the most important -- the
13 most important moral thing to do here is to feed
14 people at a reasonable cost by -- by raising
15 sows using pens.

16 But people -- or the 350 --

17 JUSTICE KAGAN: I mean, we're supposed
18 --

19 MR. BISHOP: -- million people in the
20 country eat --

21 JUSTICE KAGAN: -- you're suggesting
22 that we decide this case on the premise that the
23 interests at stake in Iowa and among pork
24 farmers have nothing to do with costs?

25 MR. BISHOP: No, that you should

1 decide this case on the basis that Iowa's views
2 on how pork should be raised, whatever those
3 are, are just as weighty as California's.

4 JUSTICE SOTOMAYOR: But why?

5 MR. BISHOP: And that --

6 JUSTICE SOTOMAYOR: I -- I mean, I
7 know that you dismiss the moral objection, and
8 I'm going to put it aside, but we have a brief
9 from scientists that point out that there are
10 some genuine scientific reasons for fearing the
11 -- the -- the raising of pigs.

12 You may disclaim it, and I know your
13 complaint says something different, but some
14 people could reasonably believe that close
15 confinement of farm animal increases the
16 likelihood of new diseases jumping from humans
17 -- from animals to humans or vice versa. That
18 -- we know that's happening.

19 It is also reasonable to think that
20 reducing close confinement of pigs may reduce
21 the use of antibiotics in pigs, thus reducing
22 the development of antibiotic-resistant
23 bacteria. And some think that the use of
24 gestation crates increases the presence of
25 diseases in piglets that carry -- can carry

1 through to time of slaughter.

2 Now I know you're going to tell me
3 there's no scientific proof, but there is
4 certainly a reasonable basis for these people to
5 think this.

6 MR. BISHOP: We don't think there's a
7 reasonable basis. Our -- our veterinarians say
8 exactly the opposite. But, for current
9 purposes, Justice Sotomayor, what counts is
10 we're here on motion to dismiss, okay? There
11 has been no opportunity to test these
12 propositions in --

13 JUSTICE SOTOMAYOR: Well, how about --

14 CHIEF JUSTICE ROBERTS: Thank -- thank
15 you -- thank you, counsel.

16 Mr. Kneedler?

17 JUSTICE SOTOMAYOR: Chief?

18 CHIEF JUSTICE ROBERTS: Oh, I'm sorry,
19 Mr. Kneedler.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: Very
22 interested to hear from you.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Would -- I think you

1 touched on this in your final comments, but let
2 me just make sure about it.

3 Most of your argument seemed to be
4 arguing the merits of the extraterritoriality
5 argument and the Pike balancing argument to a
6 lesser extent. But is that the question we have
7 here? This is on the pleadings. So what is the
8 standard that we're supposed to apply?

9 MR. BISHOP: Well, under Iqbal, we
10 have to plausibly allege facts that are
11 sufficient to a basis for our legal claims.
12 You've got two counts in the complaint, one
13 based on extraterritoriality, one based on -- on
14 Pike. We think that we have easily pled both an
15 extraterritorial regulation and a significant
16 burden on interstate commerce and that at that
17 point, the state has to show that it has good
18 reason for these rules. And that -- that whole
19 process has been curtailed by the dismissal. We
20 should get a remand in order to make our case.

21 JUSTICE ALITO: Justice Sotomayor
22 recited factual allegations made in an amicus
23 brief submitted in support of California, and,
24 certainly, those merit serious consideration.

25 But was any of that evidence in the

1 record here?

2 MR. BISHOP: No. In fact, to the
3 contrary. We think that we should be entitled
4 to judgment as a matter of law on remand because
5 California's expert agency, its Food and
6 Agricultural Department, looked at the law and
7 it concluded that the confinement standards,
8 which is what Prop 12 is, confinement standards,
9 are not based on specific peer-reviewed
10 scientific literature or accepted as standards
11 within the scientific community to reduce human
12 foodborne illness, promote worker safety, the
13 environment, or other human safety concerns.

14 When they realized that that was a
15 litigation issue and they tried to claw some of
16 it back, the best they could come up with is
17 this: That the California voters -- it was
18 reasonable, not unreasonable, for them to adopt
19 this law as a "precautionary measure to address
20 any potential threats." All right?

21 That is not enough under Pike or our
22 extraterritoriality test to justify a law that
23 has massive effects on interstate commerce.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Counsel, your
3 complaint acknowledges at paragraph 160 that
4 consumer demand has led roughly 28 percent of
5 the pork industry -- not quite a third, but
6 that's a very high percentage -- to convert from
7 individual gestation stalls to group housing.
8 To meet that consumer demand, 28 percent of the
9 industry already must be able to trace its pork
10 meat back to how individual pigs were housed
11 because consumer demand demands it.

12 We have marketed already pork marked
13 as organic, crate-free, antibiotic-free, and
14 beta-agonist-free. I have no idea what that
15 means.

16 (Laughter.)

17 JUSTICE SOTOMAYOR: But I know it's
18 there. I've seen it in supermarkets, okay? So
19 some tracing is already happening. This is
20 already recognized in your complaint.

21 MR. BISHOP: No. With all due
22 respect, Justice Sotomayor, you're talking about
23 two different things there.
24 Twenty-eight percent of the market uses group
25 housing after confirmation of pregnancy.

1 What -- what Prop 12 does is to
2 prohibit the most critical period for individual
3 confinement, which is the period after weaning
4 through the confirmation --

5 JUSTICE SOTOMAYOR: You're missing my
6 point.

7 MR. BISHOP: -- of pregnancy. No, but
8 that -- that --

9 JUSTICE SOTOMAYOR: No, no --

10 MR. BISHOP: So it's not 28 percent.
11 So let me tell you what --

12 JUSTICE SOTOMAYOR: Let me finish my
13 question.

14 MR. BISHOP: So --

15 JUSTICE SOTOMAYOR: Let me finish my
16 question.

17 California's 13 percent of the market.
18 It's a huge market. But there are people -- you
19 have to concede there are some people who can
20 sell there. They're already labeling themselves
21 as organic or crate-free or antibiotic-free or
22 something free.

23 What is the critical difference? How
24 much of the market does the producers in Iowa
25 have to control? All of it?

1 MR. BISHOP: No. No, here's --

2 JUSTICE SOTOMAYOR: Or just a small
3 part of it?

4 MR. BISHOP: No, no --

5 JUSTICE SOTOMAYOR: And why does that
6 make a difference? Because no one's forcing
7 them to sell to California. They can sell to
8 any other state that they prefer to sell to.

9 MR. BISHOP: Your Honor, nationwide,
10 13,500 pigs are slaughtered each day that comply
11 or about comply with Prop 12. California needs
12 65,000 pigs a day to satisfy its proper --

13 JUSTICE SOTOMAYOR: And so its people
14 are going to go without pork?

15 MR. BISHOP: Half a million pigs are
16 slaughtered in the state every day. What's
17 organic Prop 12 is a tiny, tiny proportion.
18 It's sold in Whole Foods --

19 JUSTICE SOTOMAYOR: You still haven't
20 --

21 MR. BISHOP: -- for \$8 a pound.

22 JUSTICE SOTOMAYOR: -- you still
23 haven't answered my question. What's the line
24 that we draw to say that this is an
25 impermissible control by California of others

1 when it's giving it a choice to say sell my way
2 or don't sell my way? If you want to sell my
3 way, you can sell here. If you don't, sell in
4 New York.

5 MR. BISHOP: Well, we think the rule
6 derived from your cases, from Baldwin, from
7 Healy, from Brown-Forman, from Carbone, is the
8 one that I've expressed, that -- that it
9 violates the Commerce Clause to condition
10 in-state sales on out-of-state producers
11 operating a particular way.

12 And there's very good reasons for that
13 in the reasons for the -- for the -- for the
14 adoption of the Commerce Clause in the first
15 place, to avoid balkanization, to avoid
16 California imposing its philosophical views in
17 other states, and to -- and to avoid trampling
18 on the sovereign prerogative of other states.
19 And a rule like this does all of those.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: Mr. Bishop, suppose I
22 asked you to for a moment ditch the
23 extraterritoriality argument and just go to Pike
24 balancing. What would your position sound like?

25 MR. BISHOP: That Prop 12 has a very

1 significant effect on interstate commerce, that
2 essentially what will happen, as we've explained
3 in the briefs, is that farmers won't have --
4 most farmers won't have any choice but to adopt
5 this form of -- of raising sows, and the reason
6 for that is that farmers don't know where the
7 offspring, where the meat from the offspring of
8 their sows is going --

9 JUSTICE KAGAN: And on the other side?

10 MR. BISHOP: -- until much, much
11 later. I'm sorry, Your Honor?

12 JUSTICE KAGAN: And on the other side?
13 You know, there's a balance, two sides.

14 MR. BISHOP: Yeah, there's a balance,
15 and -- and California, we think, has given up
16 its safety -- any claim to -- to a genuine
17 safety rationale here. But that would be a
18 matter for --

19 JUSTICE KAGAN: Are you saying that
20 California has no distinctly moral interest
21 here?

22 MR. BISHOP: It -- it has a moral
23 interest that it can satisfy in state but not
24 one that by these conditions on sales --
25 conditioning sale on what is done elsewhere.

1 JUSTICE KAGAN: So, within Pike
2 balancing, there's a little bit of a per se rule
3 of its own, which is that moral interests cannot
4 justify conduct out of state? Is that the idea?

5 MR. BISHOP: Well, I -- I think that
6 that's sort of an essential -- you can say
7 that's in Pike balancing. I mean, it's an
8 essential feature of our horizontal federalist
9 system, which is that each state is sovereign
10 within its own territory.

11 And the reason this gets brought into
12 the Commerce Clause is because the framers were
13 concerned about the sort of balkanization that
14 arises when -- when states adopt these rules.

15 JUSTICE KAGAN: And -- and, again,
16 just to make sure I understand your position,
17 you're saying that California could adopt a
18 complete ban on the product --

19 MR. BISHOP: Yes.

20 JUSTICE KAGAN: -- under your initial
21 territoriality rule? But also under Pike, it
22 can't -- but can't do --

23 MR. BISHOP: Yes. And --

24 JUSTICE KAGAN: -- what California is
25 doing here?

1 MR. BISHOP: But there are other
2 things that it can do. I mean, Justice
3 Sotomayor mentioned labeling. Labeling is
4 commonplace. You know, San Francisco requires a
5 label on meat disclosing what --

6 JUSTICE KAGAN: Well, gosh, that seems
7 to regulate out-of-state conduct too.

8 MR. BISHOP: Well, no -- well, no,
9 it really -- I mean, the label can be put on in
10 state, but it's really just a question of, you
11 know, putting a stamp on a -- a stamp on a -- on
12 a package. It really -- it's something that --

13 JUSTICE KAGAN: That's trivial?

14 MR. BISHOP: -- that's not
15 substantial.

16 JUSTICE KAGAN: Is that the idea?

17 MR. BISHOP: Yeah, it's trivial. I
18 think it's trivial.

19 JUSTICE KAGAN: Okay.

20 MR. BISHOP: And what it does is it
21 allows California not to be complicit, if they
22 don't want to be complicit in raising pork the
23 way we raise it, then they have the information
24 in front of them to make that decision whether
25 to buy it or not.

1 JUSTICE KAGAN: Thank you.

2 MR. BISHOP: And also, you know,
3 whether to -- to -- to pay \$8 a pound for pork
4 at Walmart or 5.25 a pound at -- at -- at Whole
5 Foods or 5.25 a pound at Walmart.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: Mr. Bishop, just to
9 follow up on Justice Kagan's line of questioning
10 where we've kind of laid out the costs and
11 benefits in our balancing test that you're
12 asking us to do, why isn't that just a form of
13 enshrining non-textual economic liberties in --
14 into the Constitution, something this Court -- a
15 project this Court disavowed a long time ago?

16 We're going to have to balance your
17 veterinary experts against California's
18 veterinary experts, the economic interests of
19 Iowa farmers against California's moral concerns
20 and their views about complicity in animal
21 cruelty.

22 Is that any job for a court of law? I
23 mean, the Commerce Clause, after all, is in
24 Article I, which would allow Congress to resolve
25 any of these questions.

1 MR. BISHOP: Well, I would say two
2 things in response. One is the courts have not
3 had difficulty applying the Pike test.

4 JUSTICE GORSUCH: Well, with respect
5 --

6 MR. BISHOP: I mean, we have not seen
7 a slew --

8 JUSTICE GORSUCH: -- let's put that
9 aside because I think a lot of lower court
10 judges would disagree with you.

11 MR. BISHOP: Well, I mean, we don't
12 see a lot of state laws struck down under Pike
13 balancing. When you do, it's generally because
14 the state has completely failed, if you look at
15 Kassel and Bibb and those cases, the state has
16 completely failed to make a case for the
17 necessity of the law.

18 But, you know, doctrinally, Your
19 Honor, you said that the -- the Dormant Commerce
20 Clause, which is -- you know, is just a label
21 for an interpretation of the Commerce Clause
22 that this Court has --

23 JUSTICE GORSUCH: Well, you -- you've
24 picked on a line of cases dating to 1935 that is
25 maybe the most dormant line of our Dormant

1 Commerce Clause jurisprudence.

2 MR. BISHOP: Well -- well, Your Honor,
3 you -- I mean, you've said that these -- that
4 these principles may be misbranded, but at this
5 point, the misbranding goes pretty deep, right?
6 I mean, the -- the -- this interpretation of the
7 Commerce Clause dates back to -- to Cooley.

8 The other ways in which the --
9 preventing the balkanization, preventing the
10 trampling of states' territorial sovereignty
11 that the doctrine is -- is -- is supposed to
12 protect against.

13 The other sources in the Constitution,
14 the P&I clause has been interpreted not to --
15 you know, not to apply to corporations. The
16 export and import clause has been interpreted
17 to -- to apply only to foreign trade.

18 Maybe the Court got it wrong when it
19 said that the Commerce Clause -- under the
20 Commerce Clause, Congress doesn't have exclusive
21 authority over true interstate commerce, but
22 it's too late to fix all of those things.

23 JUSTICE GORSUCH: Okay. Let me ask
24 another line --

25 MR. BISHOP: So the only way to

1 achieve --

2 JUSTICE GORSUCH: -- line -- line of
3 questioning. I'm sorry to interrupt, but I do
4 want to respect others' time.

5 Protecting interstate commerce, I
6 would have thought as an old -- just from an
7 antitrust mindset that we wouldn't be concerned
8 about protecting particular firms, but we'd be
9 concerned about protecting consumers at the end
10 of the day. And -- and a similar analysis might
11 apply here, it seems to me.

12 Your -- your complaint definitely
13 alleges harm to large pork producers in certain
14 places who would have difficulty segregating out
15 pieces of -- of pork. That -- I understand
16 that.

17 Less clear to me is whether you've
18 plausibly alleged harm to competition or harm to
19 interstate commerce itself. We have other pork
20 producers who say they're perfectly happy to
21 step into the void that your firms don't wish
22 to -- to fill and -- and to segregate out pork
23 parts, including, I think, Perdue is saying
24 that. And we also have one of your own members
25 attesting that prices will not increase to

1 consumers outside of California because they
2 won't bear it. And we have economists saying
3 the same thing on the other side, agricultural
4 economists.

5 So in what way have you plausibly
6 alleged harm to interstate commerce or consumers
7 rather than to your member firms?

8 MR. BISHOP: Well, we are here on
9 motion to dismiss, and what we have alleged is,
10 first of all, that prices -- prices cannot be
11 contained. The price increase from Prop 12
12 cannot be contained within California because,
13 at the time the farmer raises the sow, it
14 doesn't know where six months later the pork is
15 going to be sold to.

16 In a farm, we sell everything except
17 the oink is the phrase, so the blood, the fat,
18 the collagen, everything is sold, and it's sold
19 around the world in response to demand. Every
20 piece of that pig is going to bear the costs,
21 the significant costs of raising pork the way
22 that California demands.

23 As to the -- as to the -- you know,
24 the trace -- the difficulty of sort of tracing,
25 the organic market, Niman Farms, which is the --

1 the -- filed the amicus brief here, part of
2 Perdue, these are a tiny, tiny proportion, as I
3 said, 13,500 pigs a day slaughtered all around
4 the country compared to the 500,000 that are
5 slaughtered to supply the 350 million people in
6 this country with reasonably priced pork.

7 So this is not and we would prove at
8 trial that this is not something you -- you
9 suddenly -- you suddenly adapt to.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: To the extent we
13 have historically overinterpreted the Commerce
14 Clause, I think you were getting at something
15 that the amicus briefs also point out, is that
16 you couldn't correct that without correcting
17 also a historical underinterpretation perhaps of
18 the export/import clause and the privileges and
19 immunities clause. And Justice Thomas and
20 Justice Scalia wrote about the export/import
21 clause, and others have written about the
22 privileges and immunities clause.

23 Correct?

24 MR. BISHOP: Yes. I mean, my -- it
25 seems to me that it's just -- it's too late, all

1 right? Maybe -- maybe the problem with --

2 JUSTICE KAVANAUGH: But -- but even if
3 it's not too late, you can't do one without
4 correcting the others, it would seem to me, or
5 else you're going to --

6 MR. BISHOP: Yes. It's -- it's deeply
7 -- there -- there are -- there are very few so
8 deeply entrenched principles in American
9 constitutional law as the Dormant Commerce
10 Clause going back to Cooley, and it serves --

11 JUSTICE KAVANAUGH: But the point
12 there --

13 MR. BISHOP: -- a very important
14 function.

15 JUSTICE KAVANAUGH: -- is the
16 principle behind it is embedded in our
17 Constitution, even if mislabeled.

18 MR. BISHOP: Yes.

19 JUSTICE KAVANAUGH: You couldn't just
20 say, oh, let's get rid of all those cases
21 because they're mislabeled without thinking
22 about the other clauses --

23 MR. BISHOP: Exactly right.

24 JUSTICE KAVANAUGH: -- might pick up
25 that same principle.

1 MR. BISHOP: Exactly, Your Honor.

2 JUSTICE KAVANAUGH: Okay. And second,
3 there are a lot of far-reaching arguments in
4 this case, but it seems to me, picking up on
5 Justice Alito's question, the -- Pike is a
6 long-standing precedent. You have a complaint
7 that alleges a claim under Pike that's on its
8 face sufficient.

9 Isn't that just the easiest way to
10 resolve this for now and we can --

11 MR. BISHOP: Well --

12 JUSTICE KAVANAUGH: -- deal with a lot
13 of these far-reaching arguments down the road?

14 MR. BISHOP: -- we don't think the
15 extraterritoriality is far-reaching. I mean,
16 the way to think about -- I think the way to
17 think about it is, as I've said, it's -- it just
18 means that you get into that first step of Pike
19 without having to go through all the factual
20 considerations that, you know, Justice Alito has
21 referred to as being potentially problematic.

22 If -- if you are conditioning sales on
23 -- on businesses in other states operating a
24 different way so that that rule is all about
25 what happens out of state, then per se you get

1 into that top --

2 JUSTICE KAVANAUGH: Okay. I've --

3 MR. BISHOP: -- top level.

4 JUSTICE KAVANAUGH: Thank you.

5 JUSTICE BARRETT: Counsel, I want to
6 ask you about extraterritoriality. So can you
7 tell me why you answered Justice Kagan that the
8 labeling wouldn't matter?

9 I mean, if it's a per se rule that you
10 can't control what's going on in other states,
11 and you said, well, it's just insignificant,
12 it's de minimis, but wouldn't the per se rule,
13 the principle, still apply?

14 MR. BISHOP: Well, I -- I don't think
15 so. I mean, I think the de minimis point is --
16 you know, is an important one. This does have
17 to be a -- you know, a real impact on -- on
18 commerce and almost always, with a
19 extraterritorial law, it is.

20 But simply --

21 JUSTICE BARRETT: So it's not a per se
22 rule it would be balancing. I mean, you're --
23 the principle that you're asking for -- and I
24 guess this kind of goes to Justice Jackson's
25 question about what exactly is the principle

1 that you're articulating here.

2 It seems to me that you're not just
3 saying, well, if it controls markets and -- or
4 the way that production is conducted in other
5 states, it's if it does so in a significant way
6 or a burdensome way?

7 MR. BISHOP: No, no. If it does that
8 at all, then it's impermissible. But the --

9 JUSTICE BARRETT: Well, then why
10 doesn't the labeling do it?

11 MR. BISHOP: The labeling doesn't
12 affect the way that the operation is run, the
13 way that the pig is raised. If you are -- if
14 you have to put a label on -- all you have to do
15 is put a label on that says, you know, this does
16 not comply with Prop 12 or this was raised in 24
17 feet, it's -- it's -- it's a factual statement
18 --

19 JUSTICE BARRETT: Well, it seems to me
20 --

21 MR. BISHOP: -- about how you raised
22 the --

23 JUSTICE BARRETT: -- that you're still
24 then having to weigh it in. But -- but let me
25 shift gears and just ask a different question

1 also about extraterritoriality.

2 It seems to me -- you know, Justice
3 Gorsuch was pointing out that this line of
4 cases, the Baldwin line, is the most dormant of
5 the Dormant Commerce Clause cases, and I think
6 his point was that Baldwin was decided in 1935,
7 before Darby, before Wickard, and the idea of
8 what constituted interstate commerce was very
9 different then. We were trying to draw lines
10 between intrastate and interstate commerce that
11 don't exist anymore.

12 We have these three cases that are in
13 the pricing context, and it seems to me that
14 you're asking for an extension of those. I
15 mean, I get that you can draw on the principle
16 and the reasoning of those cases and the dicta,
17 but it would still be an extension. And I'm
18 wondering, how many laws would fall? I mean,
19 California has higher emissions standards on
20 automobiles than many other states. Does that
21 fall?

22 MR. BISHOP: No. No. Absolutely not.
23 I mean --

24 JUSTICE BARRETT: Why?

25 MR. BISHOP: -- that -- that is --

1 that -- that's -- that's entirely federalized.
2 The -- they have a waiver from the -- the
3 federal government regulates emissions, and
4 California has a waiver from the federal
5 government for that. If you look at the --

6 JUSTICE BARRETT: What if they didn't?
7 What if -- I understand California has some new
8 legislation --

9 MR. BISHOP: Well --

10 JUSTICE BARRETT: -- about electric
11 cars and electric vehicles and by 2035, that
12 would be --

13 MR. BISHOP: -- again, all -- and all
14 done under waivers. But take -- I mean, take
15 the equities of --

16 JUSTICE BARRETT: Okay. Well -- well,
17 let's assume -- I guess what I'm saying is
18 Justice Kagan gave you the example of the
19 firewood and the pesticide. If they have a
20 waiver about emissions, fine. There must be
21 many, many state laws that regulate
22 extraterritoriality, extra- -- outside of their
23 territory in the way that you are saying is
24 impermissible. So would this have --

25 MR. BISHOP: No.

1 JUSTICE BARRETT: -- far-reaching
2 consequences?

3 MR. BISHOP: No, it wouldn't have
4 far-reaching consequences. Let -- two examples.
5 Apple, in -- in Apple, that -- that involved
6 the -- you know, the rule that you have to -- in
7 order to sell electricity in Colorado, you have
8 to buy 20 percent of the power from renewable
9 sources. Clearly, that has a very important
10 safety impact in Colorado. Air pollution
11 anywhere is universal. So, I mean, those rules
12 are not going to fall.

13 The sort of rule that will fall is the
14 Seventh Circuit's rule -- the one the Seventh
15 Circuit considered in Legato Vapors, where
16 Indiana, on a safety rationale, tells vape
17 companies how -- exactly how they have to
18 operate if they want to sell into -- into
19 Indiana.

20 I mean, it is notable that there are
21 -- there are not cases like this in the books.
22 There are cases like Baldwin and Brown-Forman
23 and Carbone, which we think are very much on
24 point, but the -- the closest by far is Legato
25 Vapors, where the Seventh Circuit struck down

1 that Indiana law.

2 JUSTICE BARRETT: Okay. Let me just
3 ask, because I don't --

4 MR. BISHOP: States don't do this.

5 JUSTICE BARRETT: Okay. I -- I don't
6 want to take up too much time, so let me just
7 ask you one last clarifying question.

8 In your interchange with Justice
9 Kagan, did I understand you right when -- to say
10 that morals, just when you're doing Pike
11 balancing, can't count as a state interest as
12 opposed to safety and health?

13 MR. BISHOP: Right, because, if the --
14 if -- if they could, then the common -- the
15 common national market would just fall apart
16 because Texas can say you have to certify that
17 -- that everything was produced by lawful
18 residents. Oregon can say, unless you provide
19 particular healthcare, which we think is -- you
20 know, X is included in the healthcare plan,
21 we're not going to buy those -- those products.

22 JUSTICE BARRETT: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yes. So I just have

1 one set of questions about extraterritoriality
2 and one quickly about Pike balancing.

3 So you've said repeatedly, I think,
4 that extraterritoriality is about the burden.
5 Am I right about that? It's about -- the sort
6 of rule that you want us to establish is related
7 to the burden part of the Pike balancing?
8 Didn't you say that?

9 MR. BISHOP: Extraterritoriality is a
10 shortcut into burden, into the --

11 JUSTICE JACKSON: Yes, for -- for
12 establishing the burden. But the problem I
13 think you might have is that if that's the case,
14 then you're about to lose the benefit of a per
15 se rule or a bright-line rule because, as
16 Justice Kagan pointed out, the burden might vary
17 depending upon whether it's California versus
18 Rhode Island, that you can't have a per se rule
19 that relates to the effect because then we've
20 got to figure out how much control, how
21 significant is this regulation, as opposed to
22 the rules in -- or the way in which the rule
23 played out in -- in Brown and Healy, where it
24 was about the nature of the regulation, not its
25 effect.

1 So I worry that you really aren't
2 talking about a per se rule. It's more always,
3 as Justice Barrett pointed out, really a
4 balancing.

5 MR. BISHOP: No, it's a per se -- it
6 is a per se rule. I mean, it does have a -- a
7 per se test, which is that if you -- you cannot
8 condition in-state sales on out-of-state changes
9 in business operations. If you do that, then
10 you look at what the state's rationale is on the
11 other side, but always, because a rule like that
12 has one goal, and that is controlling conduct --

13 JUSTICE JACKSON: Right, but it's --

14 MR. BISHOP: -- in other states.

15 JUSTICE JACKSON: -- but it's not
16 about the degree of control. It's just if you
17 do that kind of thing. Is that what you're
18 saying?

19 MR. BISHOP: Yes.

20 JUSTICE JACKSON: All right. So with
21 -- my other set of questions is about the Pike
22 balancing. So let me ask you, would there be a
23 problem under Pike if, instead of banning sales
24 based on morality concerns or whatever else,
25 California allowed the sales but required the

1 pork to be labeled?

2 You've said a couple times that you
3 suggested that labeling was fine.

4 MR. BISHOP: Labeling is fine. It
5 happens all the time. You know, you walk into
6 the market, organic --

7 JUSTICE JACKSON: Right.

8 MR. BISHOP: -- is labeled, it's --
9 it's --

10 JUSTICE JACKSON: So, if it's fine,
11 let me just ask you to react a little bit to
12 this thought: I'm wondering whether the problem
13 is that Pike balancing might not be nuanced
14 enough. Justice Gorsuch suggests, you know,
15 we've got to do the balancing and that's a
16 problem.

17 But it seems to me that the Pike
18 balancing has courts looking on the one hand to
19 the burden, on the other hand to the benefit,
20 but not whether there's a way to achieve that
21 benefit in a less burdensome way.

22 And -- and -- and so I would wonder
23 whether the Pike balancing actually is amenable
24 as it now stands or whether it needs to be
25 corrected to allow for an assessment of a state

1 that has a morality concern, for example, that
2 it considers to be a benefit.

3 Do courts or should courts analyze
4 whether or not that benefit could be achieved in
5 a less burdensome way?

6 MR. BISHOP: Well, there -- there is a
7 less burdensome factor in Pike itself. I mean,
8 the Pike test ends with -- by asking the
9 question whether the state's goals could be
10 promoted as well with a lesser impact on
11 commerce. So there is a sort of
12 least-restrictive means type element to the Pike
13 -- to the Pike test.

14 But morality should not be part of
15 that because, you know, we live in a very
16 divided nation and these are --

17 JUSTICE JACKSON: Right, but why not?
18 What if -- so the morality, as Justice Sotomayor
19 says, is animal welfare. We have science, says
20 the state. We really believe that, you know,
21 these animals should not be kept in pens in this
22 way.

23 Why couldn't that be a reason that the
24 state says so any animals that come in from Iowa
25 we're going to label --

1 MR. BISHOP: Oh.

2 JUSTICE JACKSON: -- as non-compliant,
3 you know, to our moral views about how this
4 should be done?

5 MR. BISHOP: Yeah. Labeling --
6 labeling can be required.

7 JUSTICE JACKSON: But there's -- but
8 it would be based on morality. It's just the
9 way in which they're achieving the --

10 MR. BISHOP: Yes, a state is perfectly
11 entitled to enforce its morals in state. I
12 mean, that's what Justice Brandeis said,
13 right --

14 JUSTICE JACKSON: Yeah.

15 MR. BISHOP: -- with his, you know,
16 experimentation. The states can -- can -- can
17 experiment as much as they like. They can be
18 laboratories, but the laboratory is the state.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Kneedler.

23

24

25

1 ORAL ARGUMENT OF EDWIN S. KNEEDLER
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MR. KNEEDLER: Mr. -- Mr. Chief
5 Justice, and may it please the Court:

6 Taking the allegations in the
7 complaint as true, Proposition 12's sales ban is
8 invalid under Pike because it imposes a
9 substantial burden on interstate commerce
10 without serving a legitimate local public
11 interest. Proposition 12 imposes a trade
12 barrier based on conduct beyond California's
13 borders. It fails to respect the autonomy of
14 California's sister states. It invites conflict
15 and retaliation and threatens the balkanization
16 of the national economic union.

17 California's disagreement with the
18 manner in which pigs are housed in other states
19 is not a cognizable local interest of California
20 that could support the imposition of such a ban.

21 A state's interest in protecting the
22 health and safety of its residents can support a
23 state law if that local interest is substantial
24 and not outweighed by its effects on commerce.
25 But the state here has taken the position that

1 Proposition 12 does not rest on any scientific
2 determination of such a basis, and Petitioners
3 also plausibly allege that Proposition 12 does
4 not substantially advance such an interest.

5 The judgment of the court of appeals
6 there should be reversed on the basis of Pike.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Kneedler,
9 couldn't you circumvent or avoid this problem
10 completely by having national legislation, and
11 then you would just simply have a preemption
12 issue?

13 MR. KNEEDLER: Yes, Congress could
14 certainly act in this field. And I -- I would
15 point out, for example, that with respect to
16 labeling, the -- the Meat -- National Meat
17 Inspection Act regulates labeling. Labeling has
18 to be approved by USDA, and so the content of
19 the labeling could be localized, could be --
20 could be national.

21 And, in fact, USDA has approved labels
22 such as cage-free or Proposition 12 compliant,
23 but it requires an explanation of what that
24 means in order that the consumer can understand.

25 So the -- the -- the state's interest

1 in allowing its citizens to exercise their right
2 not to be morally complicit if an individual
3 consumer believes that is furthered by the
4 labeling provisions that USDA has approved and
5 would be prepared to approve.

6 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
7 you mentioned the state's interest in health and
8 safety. Does that extend to moral values of the
9 state beyond health and safety?

10 MR. KNEEDLER: Well, the -- the -- the
11 state can certainly have moral -- rest on moral
12 values or its determination of them for
13 regulating conduct within the state. But the
14 question with respect to the raising of pigs in
15 other states, that -- the -- the -- how the
16 moral issue should be weighed there as against
17 economic, as against countervailing interests on
18 behalf of the pigs, is something that that state
19 should regulate, not California.

20 CHIEF JUSTICE ROBERTS: But what if
21 they're totally unrelated? You can't sell eggs
22 in California unless, you know, you have a
23 certain amount of energy, I guess it could be
24 related at some level, whatever, something
25 totally unrelated to eggs.

1 Is -- is that all right?

2 MR. KNEEDLER: No, I -- I would think
3 not. I mean, I -- I think that the -- under --
4 under Pike balancing, there would have to be
5 some legitimate basis for the -- for imposing
6 such a burden on interstate commerce.

7 CHIEF JUSTICE ROBERTS: Well, the
8 legitimate basis is not some unrelated moral
9 objective?

10 MR. KNEEDLER: No, I -- I think a
11 moral objective --

12 CHIEF JUSTICE ROBERTS: In other
13 words, the state is trying to drive conduct in
14 the other state, just as it is here, but without
15 any connection to a particular industry or
16 activity.

17 MR. KNEEDLER: Well, I think, if it is
18 trying to regulate conduct in other states,
19 whether related or not related, where it doesn't
20 have a concrete, on-the-ground, scientifically
21 based, in the case of health and welfare, basis,
22 I -- I -- I think that's invalid under Pike
23 balancing, whether it's a related or unrelated
24 issue abroad.

25 The Court made this point in Baldwin

1 when it said in -- in responding to the argument
2 that perhaps the way farms are run in Vermont
3 are not adequate, the Court said, if the manner
4 of -- of farms being operated in Vermont is
5 deficient, that's up to the legislature of
6 Vermont, not up to the legislature of New York
7 to address.

8 CHIEF JUSTICE ROBERTS: The cases that
9 you -- I think the cases that you cite most
10 frequently in your brief or at least cite a lot,
11 I think, can be distinguished on the grounds
12 that they're dealing with the arteries of
13 commerce. Kassel, you know, you have to change
14 the length of the truck, trucks, interfering
15 with the movement of commerce as opposed to
16 production.

17 Is that a fair distinction?

18 MR. KNEEDLER: Well, a -- a number of
19 those -- I think it's particularly strong, but
20 part of the reason that's so is because a
21 limitation on truck length or on train length or
22 on mud flaps inevitably has the effect of
23 controlling conduct in another state because
24 changes would have to -- have to be made at the
25 border or before it reaches the border.

1 CHIEF JUSTICE ROBERTS: Well, that's
2 why I'm suggesting maybe you're overreading them
3 because it is inevitably going to have an -- an
4 impact on interstate commerce.

5 MR. KNEEDLER: But the Court has not
6 limited its Pike balancing, for example, to that
7 sort of case at all. In fact, Carbone, for an
8 example, is a case sort of the mirror image of
9 Baldwin -- Baldwin, which had to do with a sales
10 restriction on milk produced out of state.

11 Carbone was a -- a local ordinance
12 that restricted the export of a product out of
13 the state, and it had the effect of -- of -- an
14 effect on interstate commerce that was not a
15 channel of commerce and it was not a pricing
16 issue.

17 And the Court held that it was an
18 impermissible basis for the state, among other
19 things, for the -- excuse me -- locality to
20 regulate the disposition of waste because of
21 concerns about environmental impacts in another
22 state. That would be for that other state to
23 determine, not -- not the City of Clarkstown
24 that was involved in -- in Carbone.

25 JUSTICE ALITO: Under --

1 JUSTICE KAGAN: Mr. --

2 JUSTICE ALITO: -- under Pike, do you
3 think that a state's safety interests are
4 treated -- should be treated differently from
5 its moral interests?

6 MR. KNEEDLER: Yes. If -- if -- if it
7 is -- if the moral interest is a moral interest
8 in objecting to the way -- to conduct that
9 occurs in another state, yes, because we think
10 there has to be, you know, concrete evidence
11 showing an in-state, you know, tangible impact
12 on the citizens' state.

13 And, for example, the -- the director
14 of the state agency involved here, while
15 acknowledging there was no scientific basis for
16 the -- for this as a matter of safety or health,
17 said still California citizens might benefit
18 from knowing that the pigs that come into the
19 state have been humanely handled in the way
20 Californians discussed.

21 JUSTICE ALITO: Does that distinction
22 really work? Because I understand that part of
23 California's argument and part of the reason why
24 the voters of California adopted this provision
25 was to avoid the feeling of moral complicity

1 that they would experience if they consumed --
2 if they purchased and consumed pork that had
3 been produced in what they regard as an inhumane
4 way.

5 So, in the case -- if -- if the pork
6 presents a safety problem, it's a safety problem
7 that -- that the people, the consumers in
8 California, would experience. If it presents a
9 moral problem, it's a -- a moral damage -- it's
10 a moral danger that they -- they don't want to
11 incur.

12 MR. KNEEDLER: Well, as I was
13 explaining before, the labeling alternative,
14 Pike -- Pike, as has been pointed out, contains
15 a sort of less restrictive means sort of
16 standard or -- or -- or safety valve.

17 And labeling allows those citizens of
18 California who -- who want to avoid purchasing
19 pork because they believe they would be morally
20 complicit in conduct that they think is improper
21 in another state, enables them to do so. So
22 it -- it's -- it's tailored to the interest in
23 allowing individual citizens in California to
24 exercise their moral choice.

25 JUSTICE KAGAN: I mean, just to take

1 an extreme example of this, Mr. Kneedler,
2 suppose we imagine ourselves back into slavery
3 days.

4 Would it have been impermissible for a
5 state to have said we're not going to traffic in
6 products that have been produced by slavery?

7 MR. KNEEDLER: I -- I think the logic
8 of our position would say yes, but that -- that
9 was at a much earlier -- earlier time, both in
10 Commerce Clause and, of course, now we have the
11 Thirteenth Amendment that -- that would prohibit
12 -- and -- and that conduct is prohibited in
13 the -- in the state where it occurs. This is
14 the important thing to recognize.

15 JUSTICE KAGAN: Right. I was
16 presuming -- I was imagining ourselves back into
17 a world where it wasn't, but I -- I -- I take
18 the point.

19 How about, you know, you've -- you
20 also have said total product bans are -- are
21 permissible. But some total product bans are
22 based on moral feelings or even sort of feelings
23 of disgust, like a ban on horse meat. There's
24 nothing dangerous about eating horse meat.
25 People in Iceland do it all the time.

1 There's a kind of yick, disgust
2 factor, a kind of moral factor. So could a
3 state not do a ban on horse meat?

4 MR. KNEEDLER: No. I think, of
5 course, a state acting within -- within its own
6 territory can act on moral or other bases. And
7 a lot of laws have moral underpinnings.

8 JUSTICE KAGAN: Well, this is a ban on
9 the importation of horse meat for sale.

10 MR. KNEEDLER: Well, I -- I -- I
11 think, on the -- on the premise that you're
12 explaining, it would be -- it would be a total
13 ban on horse meat because the state has said
14 it's yucky to -- to allow it.

15 JUSTICE KAGAN: Right, but -- but --
16 but it's a moral interest that's involved, and
17 -- and the people who are going to be affected
18 are all of these out-of-state producers and
19 horse people.

20 MR. KNEEDLER: Well, there is an
21 incidental effect on commerce in that respect,
22 but -- but I think the important distinction is
23 the state's judgment and its action is focused
24 on conduct within the state.

25 There will be no horse meat in this --

1 in this state. And, in fact --

2 JUSTICE KAGAN: Well, there won't be a
3 sale of horse meat, just as there won't be a
4 sale of pork produced in a certain way. I guess
5 I just don't really understand the distinction.
6 It naturally seems like, you know, the greater
7 includes the lesser.

8 MR. KNEEDLER: But there are
9 situations in which the greater does not include
10 the lesser, such as when --

11 JUSTICE KAGAN: I'm trying to figure
12 out why this is one of them.

13 MR. KNEEDLER: Well, I -- I -- I think
14 one of them is -- or the important one is -- is
15 the interstate Commerce Clause addresses whether
16 the state is trying to address interstate
17 commerce as opposed to a domestic issue. And
18 this case turns on the fact that the product was
19 produced in a certain way out of state and then
20 is brought into the state. That is interstate
21 commerce.

22 If the state is simply regulating the
23 production or the consumption of a product
24 within the state, that is not -- that is not
25 regulating interstate commerce. It may have an

1 incidental effect on commerce because people
2 won't ship it to the state anymore, but the
3 important thing is that it's regulating within
4 the state on the basis of valid state interests.

5 But, when it comes to moral judgments,
6 a state can make moral judgments for its own
7 people, but, when it comes to conduct in another
8 state, that's for that state's legislature to
9 decide.

10 In fact, a lot of laws can be -- can
11 be explained or -- or described as based on
12 moral determinations. Minimum wage laws, for
13 example. And this was true in Baldwin. The
14 Court made clear that a court could not limit
15 the import of goods from another state on the
16 ground that the workers were not paid a certain
17 amount.

18 Or I would say parallel to the housing
19 of the pigs here, if -- if California objected
20 to the importation of pigs because the workers
21 who worked at the pig farms were not housed
22 properly, that would be -- that would be wrong
23 too because that would be making -- that would
24 be resting California law on a judgment about
25 whether conduct in another state is proper or

1 not.

2 JUSTICE BARRETT: Mr. Kneedler, can I
3 ask you a question? I had understood your brief
4 to really focus on Pike balancing --

5 MR. KNEEDLER: Yes.

6 JUSTICE BARRETT: -- and to dismiss
7 the -- say we not -- we need not reach the
8 extraterritoriality point. The way that you're
9 describing Pike balancing in response to Justice
10 Kagan's questions seems like it very much
11 incorporates extraterritoriality into the
12 analysis because your answers have been very
13 focused on the fact that California was trying
14 to do something to reach outside of its borders
15 and regulate conduct in -- in Iowa.

16 What benefit would we get from
17 considering that part of Pike balancing rather
18 than just its own line of the Dormant Commerce
19 Clause?

20 MR. KNEEDLER: Well, I -- I -- I -- I
21 think the points I was making actually fit into
22 both sides of the -- of the Pike balancing.
23 Pike balancing, when it comes to the enacting
24 state's interest, the Court said it has to be a
25 legitimate local public interest. And

1 California does not have a cognizable local
2 interest in California in the conduct that is
3 occurring elsewhere.

4 So it's -- so the point I made about
5 California regulating conduct outside the state
6 is built in in that respect. But also, when
7 California is, by -- by virtue of a sales ban,
8 excluding products from other states, that is --
9 that is a pretty direct imposition on interstate
10 commerce. It's effectively a trade barrier by
11 saying it's not -- it's not a tariff because it
12 doesn't -- you don't have to pay more, but it's
13 excluding the product altogether by -- by the
14 avenue of a -- of a sales ban.

15 JUSTICE JACKSON: Mr. Kneedler --

16 JUSTICE BARRETT: So was Justice
17 Kagan's example of just banning horse meat
18 altogether. I mean, it seems like that would be
19 a trade barrier as well, right?

20 MR. KNEEDLER: Well, but it's -- it's
21 -- it's not -- its basis is not a trade barrier.
22 Its basis is not this product was produced out
23 of state and is coming into the state. Its
24 basis is entirely on the local -- focusing
25 entirely on the -- on the consumption or -- or

1 sale within the state.

2 JUSTICE JACKSON: But, Mr. Kneedler,
3 is that really a line that you can draw?
4 Because it seems like it is totally based on the
5 state's subjective interest in the particular
6 circumstances.

7 Like in both cases, the horse meat
8 isn't coming in, to use Justice Kagan's analogy.
9 In Scenario 1, you say the state says we don't
10 want any horse meat because, say, you know, the
11 science is such that we don't like horse meat
12 and we're not going to offer it. And you say
13 that's okay, even though it has impacts from all
14 the horse farmers around the country.

15 But, in Scenario 2, if the state says
16 we don't like the horse meat because the way --
17 of the way the horses were raised in Kentucky,
18 that's not okay. And I'm just wondering if
19 that's something that we can really take account
20 of in a reasonable, you know, per se kind of
21 way.

22 MR. KNEEDLER: I'm not -- we're not
23 proposing a per se rule. We believe this case
24 should be decided under Pike balancing. But --

25 JUSTICE JACKSON: But, even under Pike

1 balancing, how do we draw the line between those
2 two scenarios based solely on whether the state
3 is saying we don't like it because of what -- of
4 the way in which these animals were raised
5 versus we don't like it because we think the
6 animals are going to harm our people?

7 MR. KNEEDLER: Again, I think it's the
8 distinction between -- and it reflects the
9 horizontal federalism that -- that is spread
10 throughout the Constitution. California has to
11 respect the autonomy of its sister states, its
12 sister states' ability to regulate conduct
13 within its borders. And if Kentucky thinks that
14 the -- a particular method of raising horses is
15 okay, that's up to Kentucky.

16 But the horizontal federalism and
17 autonomy of the states allows California, for
18 example, to say we don't want horse meat in our
19 state at all, irrespective of interstate
20 commerce. In that situation, the law doesn't
21 turn on -- doesn't -- its operative -- its
22 operation does not turn on interstate commerce
23 --

24 JUSTICE JACKSON: And it doesn't --

25 MR. KNEEDLER: -- whereas this law

1 does.

2 JUSTICE JACKSON: -- turn on the
3 effect? It doesn't -- the effect is identical
4 in both places in terms of the, you know, burden
5 on the people who would otherwise sell into the
6 state, but that's not the critical piece of
7 this?

8 MR. KNEEDLER: In the -- in the total
9 ban, it's an incidental effect on out-of-state
10 people. On the -- where the law itself turns on
11 the -- the fact, the manner in which it was
12 produced out of state, then that is -- that
13 brings interstate commerce into it, and that --
14 that raises the Pike issue.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas?

17 Justice Alito?

18 JUSTICE ALITO: Yes. Excuse me,
19 Chief.

20 Mr. Kneedler, this law applies to pork
21 that is shipped into the United States from
22 Canada and Mexico, doesn't it?

23 MR. KNEEDLER: Yes.

24 JUSTICE ALITO: Does the United States
25 have any position on whether regulating that is

1 consistent with federal treaty law?

2 MR. KNEEDLER: I --

3 JUSTICE ALITO: Is that consistent
4 with NAFTA?

5 MR. KNEEDLER: I -- I don't know the
6 answer to that. I don't know that the
7 government has taken a position on that, but --
8 but NAFTA and other trade agreements are
9 examples of concerns about trade restrictions
10 that are not price-based. And so we think the
11 -- the Commerce Clause also should not be
12 price-based for similar reasons.

13 JUSTICE ALITO: Well, I know this is
14 unfair, so you can just tell me that it's --
15 it's not within the arguments presented to us,
16 but could California ban the importation from
17 Mexico or Canada of any products that were not
18 produced in a factory that complies with U.S.
19 environmental laws?

20 As I said, it's --

21 MR. KNEEDLER: I --

22 JUSTICE ALITO: -- you can just --

23 MR. KNEEDLER: -- I -- no, I -- I
24 don't think so. I mean, that would -- that
25 would raise questions under the foreign Commerce

1 Clause and the -- and -- and some of the issues
2 that this Court has considered before with
3 respect to a state regulating with respect to
4 things that -- that happen in a foreign country.

5 That -- there's an additional concern
6 under our constitutional structure for that sort
7 of thing.

8 JUSTICE ALITO: So, if the Dormant
9 Commerce Clause applies to foreign commerce, do
10 you think there should be a heightened standard?
11 Would it be tougher to -- for a state to satisfy
12 a -- to -- to survive a Dormant Commerce Clause
13 challenge when the challenge concerns
14 international commerce?

15 MR. KNEEDLER: I -- I think there may
16 well be. In fact, if -- if a -- if a state law
17 is expressly directed at interstate commerce,
18 then, you know, it's singling out foreign -- not
19 interstate -- foreign commerce. It's singling
20 out foreign commerce for special treatment,
21 which I think, under the Constitution and under
22 the framers' intent, would be a -- would be a --

23 JUSTICE ALITO: All right. Thank you.

24 MR. KNEEDLER: -- serious problem.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Mr. Kneedler, if
3 Petitioner did not claim that there were these
4 unique tracing and separation problems, already
5 could do the tracing, could do the separation,
6 would you still say that there was a substantial
7 burden on interstate commerce? And if so --

8 MR. KNEEDLER: Yes. Our --

9 JUSTICE SOTOMAYOR: -- why?

10 MR. KNEEDLER: -- our position does
11 not turn on -- does not turn on whether a
12 product can be traced. Our position turns on
13 the fact that the conduct on the farm would have
14 to be changed to comply --

15 JUSTICE SOTOMAYOR: Is that because --

16 MR. KNEEDLER: -- which would in turn
17 have costs. But --

18 JUSTICE SOTOMAYOR: Well, so any cost
19 is a substantial burden on interstate commerce?

20 MR. KNEEDLER: No. I mean, under --
21 under Pike balancing, if there is a
22 substantiated legitimate local public interest,
23 that -- that would prevail unless --

24 JUSTICE SOTOMAYOR: So whether --

25 MR. KNEEDLER: -- it's greatly

1 exceeded --

2 JUSTICE SOTOMAYOR: So you are going
3 -- you're asking us to do what Justice Gorsuch
4 said, give moral objection zero or maybe .5
5 importance, and a dollar increase in production,
6 the balance then goes against the law?

7 MR. KNEEDLER: Well, I -- I think
8 there would probably be a -- you wouldn't -- you
9 wouldn't have to get there because, if the
10 burden is trivial, the case -- the suit wouldn't
11 be brought, but it -- but it wouldn't be --

12 JUSTICE SOTOMAYOR: Has there ever --

13 MR. KNEEDLER: -- it may not be a
14 cognizable claim in that situation.

15 JUSTICE SOTOMAYOR: Any of our cases
16 in Pike, even in extraterritoriality, can you
17 point to one where just increased cost has
18 created an objectionable interstate burden?

19 MR. KNEEDLER: Well, the Court in Pike
20 itself discussed the fact that the -- that the
21 requirement there would effectively impose a
22 requirement on the company to build a warehouse
23 for \$200,000 in Arizona in order to be able to
24 ship its cantaloupes out of -- out of state.

25 And there have been other situations,

1 some of the other -- I think Kassel, several
2 other cases have focused on costs.

3 JUSTICE SOTOMAYOR: So give me that --
4 give me that line. Explain it to me. How much
5 cost?

6 MR. KNEEDLER: I think it -- I think
7 it's difficult to quantify, but let -- let me
8 make a -- an important antecedent point. Costs
9 are a manifestation of the burden on interstate
10 commerce.

11 But, when California law requires a
12 foreign producer to change its operation because
13 California disagrees with the way it's done,
14 that is itself a burden on interstate commerce.
15 It will, in turn, cost a lot of money, but --
16 but in terms of regulating interstate commerce,
17 you --

18 JUSTICE SOTOMAYOR: So why do we let
19 consumer demand do it?

20 MR. KNEEDLER: I'm sorry?

21 JUSTICE SOTOMAYOR: Why do we let
22 consumer demand do it? I mean, consumer demand
23 is requiring changes in production.

24 MR. KNEEDLER: Well, as I say, the --
25 the -- the state -- producers can voluntarily do

1 that. They can ship their product into
2 California. And, as I say, USDA --

3 JUSTICE SOTOMAYOR: They can -- they
4 can voluntarily do that even under the state
5 regulation. They can choose to or not choose
6 to.

7 MR. KNEEDLER: Yes. But -- but -- but
8 I --

9 JUSTICE SOTOMAYOR: They can forego
10 the California market or they can stay in it.

11 MR. KNEEDLER: But I -- but I -- I
12 think that that's -- that would prove far too
13 much because, if you have a trade barrier
14 preventing the shipment of a product from one
15 state to another, the -- the -- the shipper in
16 the other state can always say, I won't ship
17 there. I'll just -- I'll just trade elsewhere.

18 That's not an answer to the Commerce
19 Clause's concern about a -- about a national
20 economic union, not its concern with
21 balkanization and its respect for horizontal
22 autonomy of -- of the respective states.

23 I also want to point out --

24 JUSTICE SOTOMAYOR: You've answered my
25 question. Thank you.

1 MR. KNEEDLER: Oh, okay.

2 CHIEF JUSTICE ROBERTS: Justice Kagan.

3 JUSTICE KAGAN: Mr. Kneedler, maybe
4 I'm misunderstanding, but your argument here
5 today seems stronger than your argument in the
6 briefs, and I just want to say why I think that
7 and -- and have you respond to it.

8 I had understood in your briefs that
9 you were putting a lot of weight on the fact
10 that this is in the pleading stage and you were
11 just saying: Look, the pleading requirements
12 have been satisfied. We should go on and do the
13 hard work at summary judgment or at trial or
14 something.

15 And if I understand your answers to a
16 lot of these questions, I honestly don't
17 understand how you think California could win at
18 summary judgment or at trial.

19 So I guess my question to you is, is
20 that fair? Is your argument basically
21 California can't win and, if not, what it could
22 say to win?

23 MR. KNEEDLER: Well, first of all, our
24 brief made two points about the asserted local
25 interests of California. With respect to the

1 moral interest, we, I think, pretty clearly said
2 that California's moral opposition or
3 philosophical opposition really --

4 JUSTICE KAGAN: Can't count.

5 MR. KNEEDLER: -- can't count.

6 JUSTICE KAGAN: And I guess what --
7 what -- what really led to this question was
8 your answer to Justice Sotomayor when you -- on
9 the one hand, you say the moral can't count.
10 There -- there is then the health. And we
11 haven't really talked about that much.

12 But then, in answering Justice
13 Sotomayor, you said it really doesn't matter if
14 Petitioners are right about the tracing and
15 about, you know, whether they could segregate
16 different kinds of products. That just doesn't
17 matter because there's a sort of per -- you
18 know, there just -- there's just an effect on
19 production processes. I suppose this gets into
20 Justice Barrett's comment that it's -- it's just
21 getting to sound a lot more per se.

22 MR. KNEEDLER: No, I -- I didn't mean
23 to say that costs are irrelevant. I think costs
24 are an important factor under -- under Pike
25 balancing, and the costs at least here that are

1 alleged are -- you know, are substantial.

2 But I also think that the -- that
3 the --

4 JUSTICE KAGAN: But the costs that are
5 alleged are substantial because Mr. Bishop has
6 this point about the difficulty of segregation
7 given the nature of the industry.

8 If that turns out not to be true, does
9 California then win? Can California then win?

10 MR. KNEEDLER: I mean, there's still
11 the cost of the individual pork producers having
12 to reconfigure their farms. And so the ability
13 to trace is only part of the -- part of the
14 question.

15 But -- and that there's allegations
16 and -- and declarations supporting the complaint
17 that explain what would be entailed in expanding
18 to 24 square feet or -- or pen -- group pens
19 rather than individual pens.

20 The -- the -- the adverse effects that
21 may have on both the productivity and health of
22 the sows, I mean, there are a lot of competing
23 considerations.

24 JUSTICE KAGAN: Would it be fair to
25 say that you think California should lose this

1 case?

2 MR. KNEEDLER: No, we have not taken a
3 position on whether their health and safety
4 rationale would -- would prevail. But the fact
5 that California has not relied on that and --
6 and the plausible allegations we think in the
7 complaint do -- do require that the plaintiffs
8 be given a chance to prove their case.

9 But -- but this statute is also
10 unusual in that it is trying to project
11 California's law into other states, which, for
12 example, Carbone, not just Baldwin, said was a
13 problem.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: Mr. Kneedler, you --
18 you place a lot of stress on the fact that there
19 would be increased costs to certain producers
20 out of state.

21 But what if all of those costs are
22 borne by California consumers who are willing to
23 pay a higher price for a certain kind of
24 product, pork products produced in compliance
25 with their laws?

1 Is there any reason -- would that pose
2 a problem under your theory? Let's say all of
3 the costs are borne by California consumers.

4 MR. KNEEDLER: I -- I -- I don't think
5 -- excuse me. I don't think in the main that
6 the Pike analysis would -- would turn on how the
7 costs played out. I mean, for example, you
8 could have a --

9 JUSTICE GORSUCH: So -- so, if that's
10 the case, then -- then this is really an
11 argument about protecting certain modes of
12 production by certain manufacturers out of state
13 rather than letting the market play out. Even
14 if some other persons might come into the market
15 or might already be in the market who are happy
16 to participate in California's system and
17 fulfill that need at a higher price, we still
18 have an interstate commerce problem?

19 MR. KNEEDLER: Well, the first point I
20 wanted to make is a tariff might increase the
21 cost, and consumers in California might be
22 willing to pay it, but that doesn't render it
23 okay under the Commerce Clause.

24 JUSTICE GORSUCH: Okay. All right.

25 MR. KNEEDLER: But --

1 JUSTICE GORSUCH: No, I just want to
2 understand your argument. So even if California
3 consumers pay all of the cost of this law, all
4 of it, it's still a problem?

5 MR. KNEEDLER: Yes, because --
6 because, again, California is -- in -- in this
7 instance --

8 JUSTICE GORSUCH: Okay.

9 MR. KNEEDLER: -- is regulating
10 conduct outside the state.

11 JUSTICE GORSUCH: And I want to pick
12 up on that, all right, and the moral objection.
13 You keep coming to the idea that they're trying
14 to regulate something outside of the state.

15 But, as I understand California's
16 position charitably, it's that Californians,
17 63 percent of them, voted for this law. They
18 don't wish to have California be complicit, even
19 indirectly, in -- in -- in livestock practices
20 that they find abhorrent, wherever they occur,
21 in California or anywhere else.

22 Why isn't that a correct understanding
23 of California's asserted moral interest and why
24 isn't that an in-state moral interest?

25 MR. KNEEDLER: First of all, it's

1 individuals who ordinarily have moral objections
2 to start with.

3 JUSTICE GORSUCH: Oh, no, I thought --
4 well, hold on. Hold on.

5 MR. KNEEDLER: And a state can --

6 JUSTICE GORSUCH: Do -- can states --

7 MR. KNEEDLER: A state -- a state --

8 JUSTICE GORSUCH: Okay. All right.

9 MR. KNEEDLER: -- a state --

10 JUSTICE GORSUCH: So let's put that
11 aside then.

12 MR. KNEEDLER: But -- but a -- a state
13 can enact a law regulating conduct within the
14 state on the basis of morals.

15 JUSTICE GORSUCH: So we can put that
16 aside.

17 MR. KNEEDLER: But -- but, when it
18 comes to conduct outside the state, that would
19 open a -- a -- a huge invitation and -- and --
20 and I think greatly undermine the Commerce
21 Clause because a lot of regulation can be
22 described --

23 JUSTICE GORSUCH: So, if all pig
24 producers --

25 MR. KNEEDLER: -- as based on morals.

1 JUSTICE GORSUCH: -- were in
2 California, this law would be okay. It's just
3 because pig producers are by and large mostly
4 out of state that it poses a problem?

5 MR. KNEEDLER: Well, California has
6 independently imposed a -- a ban on pork
7 production under these standards within the
8 state.

9 JUSTICE GORSUCH: I'm asking -- I
10 understand that. But answer my question if you
11 will. If pork producers were in state, this law
12 would be okay. It's just because they're out of
13 state that it poses a problem?

14 MR. KNEEDLER: Yes.

15 JUSTICE GORSUCH: Okay.

16 MR. KNEEDLER: And --

17 JUSTICE GORSUCH: But -- but, if
18 that's the case, again, why -- why is it
19 uncharitable -- why isn't it uncharitable to
20 suggest that they're trying to regulate
21 out-of-state conduct when they may just be
22 saying we don't wish to participate in this at
23 all wherever it occurs --

24 MR. KNEEDLER: Oh, I -- I -- I -- I --
25 I --

1 JUSTICE GORSUCH: -- whether it's
2 slavery or horse meat or pig production?

3 MR. KNEEDLER: -- I think that is --
4 you know, I think that is their asserted
5 interest in the end. What I'm saying is that --
6 that the Commerce Clause and -- and our system
7 of horizontal federalism generally can really
8 not allow for that because it would -- it would
9 create the very balkanization of not just
10 commercial regulation but retaliatory
11 non-commercial regulation between the states as
12 one state tries to limit sales, and sales are a
13 way of -- of regulating, prohibiting sales is a
14 way of regulating, by -- by prohibiting sales in
15 the state of anything that comes from a state
16 where it was produced in a way they don't agree
17 with.

18 Produced by union labor, produced by
19 non-union labor, produced -- not paying a
20 sufficient minimum wage, not paying enough for
21 milk, as in Baldwin, not disposing of their
22 waste in a -- in a way that the enacting state
23 finds -- finds reasonable, all those could be
24 described in moral terms.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: Two questions.
3 One, the flip side of Justice Thomas's question.
4 If Congress and the President agreed with
5 California's moral judgment, could they pass a
6 law regulating how pigs are housed, at least
7 pigs that are involved in the interstate market?

8 MR. KNEEDLER: Sure. Yes. I mean,
9 that would -- they could definitely do that.

10 JUSTICE KAVANAUGH: And, second, you
11 said this law is unusual. Can you elaborate on
12 that? How unusual is it? And from the
13 perspective of the United States, is it
14 concerned about how usual it will become if
15 California's law is upheld here?

16 MR. KNEEDLER: Yes, it -- as I was
17 just explaining, I think there would be a
18 concern about inviting state laws regulating
19 conduct in another state. And the fact that
20 it's done through sales as opposed to an
21 outright prohibition -- I mean, this Court made
22 a similar point in the -- in the National Meat
23 Association case 10 years ago, the preemption
24 case, where the Court said California could not
25 implement its preferred policies with respect to

1 pork coming out of slaughterhouses by making
2 their regulation on sales rather than a -- than
3 a prohibition.

4 So the sales that -- the local sales
5 can't be enough to justify the action. So what
6 we have here is basically an attempt by
7 California to regulate what is happening in
8 other states. And, as I said, it -- that --
9 that is a -- a proposition that once -- once
10 unleashed would be -- would be difficult to
11 contain.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: Just one question,
16 Mr. Kneedler.

17 I asked Mr. Bishop how many laws this
18 might affect if -- if we said that it was not
19 permissible. So, if this fails either the
20 extraterritoriality principle or Pike balancing,
21 how many other laws would fall, that it might
22 affect? And he said California's -- as I
23 understood him to say, California's is
24 essentially an outlier. States haven't tried to
25 do this.

1 You were talking about what might
2 happen in the future if we allowed California to
3 do it, opening up a can of worms of retaliation.

4 What about the question I asked Mr.
5 Bishop? Are there other laws like this? Is it
6 really the case -- you know, Justice Kagan was
7 giving the example of the pesticide and the
8 firewood -- treatment of firewood. I mean, are
9 -- would we have to worry about calling into
10 question a lot of laws that are pretty common?

11 MR. KNEEDLER: No, I -- I -- I don't
12 think so. With respect to the specific
13 conduct -- context here, there are states that
14 ban raising pigs that are using gestation pens,
15 let's say. Most of those are just limited to
16 the state where the pigs are being raised.
17 Massachusetts also has an extra ban.

18 But, in -- in -- in other cases, for
19 example, in the -- in the firewood case, the
20 state has a legitimate interest, unlike here, we
21 think on a moral basis, has a legitimate
22 interest in protecting against the entry of
23 firewood if there -- if there are pests in there
24 that might infect local --

25 JUSTICE BARRETT: Because all the

1 cases that you're aware of or that would be
2 normal rest on safety and health rationales
3 rather than morals legislation, that this really
4 is --

5 MR. KNEEDLER: Right. That they --

6 JUSTICE BARRETT: -- a unique effort
7 in the moralist context?

8 MR. KNEEDLER: Right. Yes. They
9 would be judged under Pike -- under Pike
10 balancing, and -- and if there is a legitimate
11 state interest and there was not a less invasive
12 way to -- to control the problem, then the --
13 the state -- state may well be able to do that.

14 But there may be other ways to protect
15 against the entry of injurious products into the
16 state, but that would -- that -- that's what
17 Pike balancing is for and the way we think the
18 Court should decide the case.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: Yes. Mr. Kneedler,
22 you've said a couple of times that the Commerce
23 Clause cannot allow for what it is that
24 California is doing in this situation, and that
25 sounds pretty categorical to me.

1 And I know that you have been trying
2 to disclaim any reliance on the sort of
3 extraterritoriality principle, that you say we
4 should proceed under Pike balancing. But -- but
5 I also hear you making a claim that sounds to me
6 like an extraterritoriality principle, and can I
7 just focus your attention on that for a second?

8 I think that the Petitioners have
9 actually introduced two different kinds of
10 extraterritoriality principle. In their briefs,
11 they say that the rule should be that a state
12 may not enact laws that have the practical
13 effect of controlling conduct. And I worried
14 about that when I read the brief because, to the
15 extent we're talking about effect, then it
16 introduces all kinds of questions, how much, how
17 significant, and it doesn't sound like a
18 bright-line rule anymore to me.

19 But here today the Petitioners kind of
20 move away a little bit from the controlling
21 effect idea, and they say the per se rule should
22 be essentially focused on the nature of the
23 regulation, that the state law that conditions
24 sales on out-of-state businesses operating in a
25 certain way is the principle. And that's the

1 one that you seem to be agreeing with.

2 To the extent that you say that the
3 problem is that a state who has a morality
4 interest can't have a morality interest that is
5 directed at the manner in which another state is
6 conducting its business or other businesses are
7 operating, why isn't that the same thing that
8 the Petitioners are saying with respect to their
9 extraterritoriality principle and, therefore,
10 doesn't the government agree with them?

11 MR. KNEEDLER: Well, with respect to a
12 regulation like this -- and when I said what --
13 what -- allowing California to do what it's
14 doing would be a serious problem, I was focusing
15 on the -- on the moral justification, which is
16 -- which is a philosophic or a political
17 disagreement with what's happening in another
18 state, which we think is not, to use the
19 language of Pike, a legitimate local public
20 interest of California.

21 JUSTICE JACKSON: But isn't that the
22 same thing he's saying when he says --

23 MR. KNEEDLER: Well, this is a place
24 --

25 JUSTICE JACKSON: -- it's conditioning

1 -- yeah.

2 MR. KNEEDLER: -- this is a place
3 where I think that the two arguments might
4 converge.

5 JUSTICE JACKSON: Okay.

6 MR. KNEEDLER: And, in fact, in -- in
7 this Court's decision in Wayfair, the Court said
8 that the Commerce Clause has two principal
9 prohibitions, a prohibition against
10 discrimination and a prohibition against undue
11 burdens, and these are subject to exceptions and
12 variations.

13 So the extraterritoriality principle,
14 as it becomes stronger in a case like this,
15 putting health and safety to one side, could be
16 seen as an independent argument, which is the
17 way Petitioners are presenting it, and -- and
18 you could read language in Baldwin or Healy to
19 say that, or -- or simply a particularly strong
20 version of Pike balancing where you're -- where
21 you're comparing the effect on interstate
22 commerce to what, under this rationale, is an
23 insubstantial or nonexistent in-state interest.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 General Mongan.

2 ORAL ARGUMENT OF MICHAEL J. MONGAN

3 ON BEHALF OF THE STATE RESPONDENTS

4 MR. MONGAN: Mr. Chief Justice, and

5 may it please the Court:

6 Proposition 12 bars the in-state sale
7 of certain pork products. California voters
8 chose to pay higher prices to serve their local
9 interest in refusing to provide a market to
10 products they viewed as morally objectionable
11 and potentially unsafe.

12 The Commerce Clause does not prohibit
13 that choice. Prop 12 is not protectionist or
14 discriminatory. It doesn't implicate the rule
15 in Baldwin and Healy because it doesn't control
16 prices in other states. And it doesn't violate
17 the general principle against regulating wholly
18 extraterritorial commerce.

19 That principle has not been understood
20 to bar states from setting standards for how the
21 goods sold within their borders are manufactured
22 or produced. States routinely enact that kind
23 of law. And, Justice Barrett, at least 24
24 states have done so to serve local moral
25 interests. Sales restrictions often have

1 upstream out-of-state effects, but they're
2 permissible as long as the condition on in-state
3 sales focuses on the actual process for
4 producing the goods sold in the regulating
5 state.

6 In this case, Prop 12's sow housing
7 restrictions are tied to the production process
8 for California-bound pork. They only address
9 the particular breeding sows that are literally
10 the mechanism for creating that pork. And the
11 market already treats that aspect of the
12 production process as a basis for
13 differentiating between products. That's why
14 stores sell crate-free pork.

15 Prop 12 places no restrictions on how
16 out-of-state businesses produce pork for sale in
17 other states, and Petitioners' own allegations
18 show that producers can continue selling pork to
19 other states using different production methods.

20 If Petitioners think Prop 12 raises
21 policy concerns, the solution the framers
22 provided was for them to ask Congress to
23 regulate under the express terms of the Commerce
24 Clause, not for courts to expand the Dormant
25 Commerce Clause.

1 JUSTICE THOMAS: Mr. Mongan, does it
2 matter whether or not you focus directly on the
3 upstream effects, that that's the point of the
4 legislation, as opposed to a collateral effect
5 of your legislation?

6 MR. MONGAN: Your Honor, what matters
7 is whether the state is regulating with respect
8 to the goods sold within its borders and setting
9 production standards, manufacturing standards
10 for those goods.

11 JUSTICE THOMAS: So it doesn't matter
12 that the purpose could be to have the upstream
13 effect?

14 MR. MONGAN: Well, Your Honor, I
15 think, in -- in this case, and -- and what will
16 often be the case, is that these laws are
17 motivated by in-state local interests. And,
18 here, there is two interests that were reflected
19 in the ballot materials. One of them is a -- a
20 local interest and the state not wanting its
21 stores and markets to be complicit in selling a
22 product that a substantial majority of the
23 voters view as immoral, and many consumers and
24 retailers as well, as evidenced by the shift to
25 crate-free pork.

1 JUSTICE THOMAS: How far would you
2 carry that? Could you -- other than beyond the
3 health and safety concerns that you might have
4 here, you'd say moral concerns.

5 Could it extend to a state that has,
6 for example, different political views on
7 certain issues that are important to your
8 voters?

9 MR. MONGAN: I don't think so, Your
10 Honor, if I'm understanding the hypothetical
11 correctly.

12 So, for example, if a state were to
13 bar the importation of goods from another state
14 because that state has a particular policy, that
15 would be a facially discriminatory law. It
16 would be equivalent to an embargo. And that's a
17 paradigmatic Dormant Commerce Clause problem.

18 It's quite different from a neutral
19 in-state sales restriction of the type which is
20 quite common across the country that allows all
21 producers to freely compete so long as they
22 produce goods that satisfy the --

23 JUSTICE KAGAN: But, Mr. Mongan --

24 MR. MONGAN: -- the relevant
25 standards.

1 JUSTICE KAGAN: -- a lot of policy
2 disputes can be incorporated into laws like
3 yours. So Mr. Kneeder gave examples of a few.

4 You know, one, California can do laws
5 that you have to be pro-labor. And Texas can do
6 laws saying -- pro-labor union. And Texas can
7 do laws that say you have to be anti-labor
8 union, you know, close shop, open shop. You
9 could -- you could have states making
10 immigration policy, essentially, through these
11 laws.

12 You could have states doing a wide
13 variety of things through the mechanism of
14 saying, well, unless you comply, you can't sell
15 goods in our market.

16 And, you know, we live in a divided
17 country, and the -- the -- the balkanization
18 that the framers were concerned about is surely
19 present today. And I think that the -- that the
20 real power of Mr. Kneeder's examples were, you
21 know, do we want to live in a world where we're
22 constantly at each others' throats and, you
23 know, Texas is at war with California and
24 California at war with Texas?

25 MR. MORGAN: Right, I -- I certainly

1 understand the concern, Your Honor. I think
2 that there is and should be a constitutional
3 check on that, which is that a state regulation
4 of a product has to be sufficiently tied to the
5 actual process of producing that product.

6 And I think a lot of the hypotheticals
7 that my friend pointed to that you've just
8 recited, in addition to likely having some
9 preemption problems, which I'm happy to speak
10 to, but also deal with an in-state sales
11 condition that is not sufficiently tied to
12 production.

13 JUSTICE BARRETT: But where does that
14 come from? I mean, you -- you're saying that in
15 response to Justice Kagan, you've said a couple
16 times that -- you've emphasized that this
17 restriction on how the pork -- how the pigs are
18 raised is tied to the product itself, but why is
19 that necessary?

20 I mean, you know, your friend on the
21 other side said, well, you know, you could have
22 things that tied -- tied the availability of the
23 market to the production of certain health
24 services.

25 So could you have California pass a

1 law that said we're not going to buy any pork
2 from companies that don't require all their
3 employees to be vaccinated or from corporations
4 that don't fund gender-affirming surgery or that
5 sort of thing?

6 What -- what's the importance and
7 where does it come from of this tie to the
8 product itself?

9 MR. MONGAN: So, Your Honor, as to
10 those hypotheticals, and then if I can get back
11 to the first part of the question, I think those
12 would be problematic because what you have there
13 is a condition on in-state sales that's focused
14 on a general company-wide policy with respect to
15 all of that company's activities wherever it
16 does business, including the production of
17 products for totally different states. It's not
18 focused on production of the goods that are
19 coming into the regulating state.

20 I think that this is a principle that
21 the lower courts have recognized in cases like
22 Legato Vapors, that when you condition the sale
23 of a product coming in on that type of wholly
24 unrelated restriction, then you're not really
25 regulating the product. You are -- it's

1 tantamount to a regulation of a wholly
2 out-of-state activity.

3 And there's some support for this as
4 well in -- in the Brown-Forman decision that was
5 obviously focused on price controls, but the
6 Court made clear you can't condition the
7 privilege of selling liquor into New York on a
8 restriction on how liquor is sold in
9 out-of-state sales to consumers out of state and
10 it'll be consumed out of state.

11 JUSTICE BARRETT: But couldn't
12 Californians have a moral interest in saying
13 they don't want to be complicit and open their
14 supermarket shelves to the wares of a company
15 that mistreats its employees, for example, by
16 not providing certain forms of healthcare?

17 MR. MONGAN: So I -- I -- I certainly
18 could imagine a state articulating that type of
19 moral interest, but I don't think that stating
20 the moral interest is the end of the
21 constitutional analysis.

22 Of course, there can be all sorts of
23 constitutional checks on in-state sales
24 restrictions under the Supremacy Clause or the
25 First or Second or Fourteenth Amendment, and for

1 purposes of the Commerce Clause or -- or -- or a
2 general principle against regulating wholly
3 extraterritorial activity, I think the line I've
4 described is a -- is a sensible one because, on
5 the one hand, states have to be able to regulate
6 the products coming into their borders, but, on
7 the other hand, I think we would all recognize
8 that it would be problematic if states can
9 condition the sales of those products on
10 restrictions of wholly unrelated out-of-state
11 purchasers.

12 JUSTICE ALITO: What about --

13 JUSTICE KAVANAUGH: I mean, wholly
14 unrelated is doing a ton of work in your answers
15 to Justice Barrett. So what about a law that
16 says you can't sell fruit in our state if it's
17 produced -- handled by people who are not in the
18 country legally? Is that state law permissible?
19 And if not, how is it different from this law?

20 MR. MONGAN: So I -- I want to get to
21 the constitutional question. I think there
22 would be an important threshold question there
23 of INA preemption, and that does underscore --

24 JUSTICE KAVANAUGH: Put that aside.

25 MR. MONGAN: Right, Your Honor.

1 JUSTICE KAVANAUGH: Put that aside
2 because I can flip it to any number of other, as
3 Justice Kagan said, social issues if you want me
4 to.

5 MR. MONGAN: I certainly understand
6 that. So, if the question is, you know, could
7 you adopt a regulation that says the particular
8 goods that are coming into this state have to be
9 produced by a -- you know, or -- or -- or have
10 to be worked on by people who are lawfully
11 documented individuals, I -- I don't think I see
12 a Dormant Commerce Clause problem there.

13 I'm not sure that it's different from
14 some other restrictions that have been on the --
15 the books with respect to, for example, the sale
16 of goods produced by child labor.

17 Now I'm sure there's a lot of people
18 in California who might not be happy with that
19 law, but I think --

20 JUSTICE KAVANAUGH: And so minimum
21 wage, same answer?

22 MR. MONGAN: No, I -- I would give a
23 somewhat different answer on -- on the minimum
24 wage question. The hypothetical that my friend
25 raised in -- in his brief I think would be

1 pretty plainly invalid under the rule in Baldwin
2 and Healy because what you really have there is
3 a law seeking to control the -- to limit the
4 price of labor inputs in out-of-state
5 transactions and tie it to the price of labor
6 inputs in in-state transactions, and that's the
7 type of dynamic where --

8 JUSTICE KAVANAUGH: Union membership?

9 MR. MONGAN: Pardon?

10 JUSTICE KAVANAUGH: Union membership?

11 MR. MONGAN: So, again, I think a
12 court would ask there, is there a sufficient
13 nexus between that and the actual production
14 process for a particular good. And I suspect
15 that that would be a hard law for a state to
16 defend because a court would know that this --

17 JUSTICE KAVANAUGH: The word
18 "complicity" can do a ton of work, and that
19 word's been used quite a bit here.

20 MR. MONGAN: So -- so I understand
21 that, but I think that the important analytical
22 point there from my perspective is that -- that
23 that goes to the moral interest that's
24 articulated but that that's not the end of the
25 analysis.

1 And I think, certainly, with respect
2 to Prop 12, I -- I -- I recognize that there are
3 some tough line-drawing exercises with respect
4 to some of these borderline hypotheticals. You
5 don't have them with respect to Prop 12.

6 And I think this is a sensible and
7 necessary line to sort of differentiate between
8 the situations where states are directly setting
9 standards for products coming into their borders
10 and the -- the more -- much more problematic
11 scenarios that my friends are pointing to.

12 JUSTICE ALITO: I -- I don't
13 understand the distinction that you're drawing.
14 Could you try to just -- maybe it's just not
15 getting through to me -- explain it to me?

16 What is the difference?

17 MR. MONGAN: So --

18 JUSTICE ALITO: A state says, we don't
19 want a particular product to come into our
20 borders because we think it was produced in an
21 immoral way.

22 MR. MONGAN: So -- so, Your Honor,
23 perhaps --

24 JUSTICE ALITO: Why doesn't that apply
25 equally to a -- a law that says you can't bring

1 any products into our state if they were
2 produced by employees who did not have the right
3 to work, the right to -- not to join a union?

4 MR. MONGAN: So -- so, Your Honor,
5 perhaps I can answer by pointing to some of the
6 concrete examples that Justice Barrett was
7 asking about because there are a number of -- of
8 these morals-focused laws and they're not just
9 the categorical bans like on horse meat and
10 ivory.

11 JUSTICE ALITO: No, it would help me
12 more if you could state the principle rather
13 than giving me examples.

14 MR. MONGAN: Right. I -- I -- I think
15 that the principle is that it should be
16 uncontroversial that a state may regulate the
17 products sold within their borders --

18 JUSTICE ALITO: Right.

19 MR. MONGAN: -- and that that extends
20 -- and it does in many different examples -- to
21 the packaging, production process, the -- the
22 manufacturing process for those goods.

23 I -- I think that it is sensible to
24 draw a line of the type that the Seventh Circuit
25 drew in Legato Vapors if you're conditioning

1 in-state sales on restrictions that are much
2 more attenuated from the actual production
3 process. And I think the union hypothetical,
4 for example, that goes to a general matter of
5 the relations between labor and employees and --
6 and -- and not to the particulars of how a
7 product --

8 JUSTICE ALITO: More -- more
9 attenuated?

10 MR. MONGAN: -- is produced.

11 JUSTICE ALITO: What does that mean?
12 How do you draw -- how do you know when it
13 becomes too -- too attenuated?

14 MR. MONGAN: Well, I think a court
15 would look to whether it is -- the regulation is
16 actually geared to the mechanics of the
17 production process or whether it is addressing,
18 for example, some general corporate policy that
19 applies, you know, much more broadly and is
20 several steps removed from the production
21 process. So --

22 JUSTICE KAGAN: And why is that the
23 relevant inquiry? I mean, even if we could
24 figure out which falls on which side, why is
25 that the relevant inquiry?

1 MR. MONGAN: I -- I think it's a
2 relevant inquiry, Your Honor, because the Court
3 has recognized that there is, whether it's under
4 the Commerce Clause or otherwise, a general
5 principle against states regulating wholly
6 extraterritorial commerce.

7 And I would submit that I think a lot
8 of the troubling hypotheticals are scenarios
9 where, yes, there is a regulation of a -- a
10 good, but the actual condition that's placed as
11 a restriction on the in-state sale of that good
12 is going to some activity that is fairly under
13 --

14 JUSTICE KAGAN: You're basically
15 saying that the way we should think about this
16 is to use an anti-leveraging principle, that a
17 state can't use its power as a consumer or as --
18 you know, as a market to leverage policy views
19 that are unconnected with the marketing of a
20 product?

21 MR. MONGAN: I -- I -- I think I would
22 describe it as a -- as a principle that focuses
23 on the -- the particular production process for
24 -- for a product. And, yes, that would be the
25 concern motivating that principle.

1 CHIEF JUSTICE ROBERTS: Would --

2 MR. MONGAN: But, Your Honor --

3 CHIEF JUSTICE ROBERTS: I'm sorry, go
4 ahead.

5 MR. MONGAN: Oh. Well, I just wanted
6 to make the point that this is not unique to
7 California. I -- I would point the Court to
8 Professor Snead's amicus brief, where he
9 discusses this type of interest, including with
10 respect to morals-based policies, such as the
11 law that Arizona and seven other states have
12 banning the sale of eggs from hens that don't
13 have enough space, or Louisiana's law --

14 CHIEF JUSTICE ROBERTS: Right. You've
15 been talking of -- as -- as if the morals aspect
16 was the significant part of the inquiry. But
17 wouldn't your case be a lot harder if there were
18 a non-de minimis number of pork producers in
19 California?

20 MR. MONGAN: Your Honor, I guess -- is
21 the question going to the -- to potential
22 concerns about discrimination?

23 CHIEF JUSTICE ROBERTS: Well, many of
24 our cases can arguably be distinguished on the
25 ground that they were concerned with

1 protectionism.

2 MR. MONGAN: Right. Right.

3 CHIEF JUSTICE ROBERTS: And if there
4 are pork producers in California who are going
5 to be subject to this law, it's a way for
6 California to make sure those producers aren't
7 undermined by producers who don't have to comply
8 with it.

9 MR. MONGAN: That's -- that's right,
10 Your Honor. And the core focus of this doctrine
11 is on protectionism. And so I think, in a
12 situation like that, although the law is
13 facially neutral, a court would look to the
14 particular circumstances to see if there's
15 discriminatory effects of the type the Court
16 found in Hunt. Of course, my friends have
17 disclaimed any protectionism or discrimination
18 claim here, and I don't see how that would be
19 viable under the particular circumstances.

20 And as to extraterritoriality
21 considerations, I think that the Court has made
22 quite clear that in cases like Exxon and Walsh,
23 the fact that a state is regulating even with
24 respect to an industry that doesn't have a
25 presence in that state is not a Dormant Commerce

1 Clause problem.

2 CHIEF JUSTICE ROBERTS: Well, how do
3 we decide -- you keep emphasizing the number of
4 people in California who voted in favor of the
5 referendum. What if there are a substantial
6 number who voted for moral reasons and a
7 substantial number who voted for economic
8 reasons? How should we analyze that? Or, you
9 know, obviously, what if we can't tell?

10 MR. MONGAN: Well, I -- I certainly
11 understand that. That's a common problem with
12 looking at the purposes of legislation.

13 I -- I think, in this case, it is
14 clear on the face of the statute and in the
15 ballot materials, which under California law is
16 powerful evidence of voter intent, that there
17 are these two rationales that -- that we have
18 discussed.

19 CHIEF JUSTICE ROBERTS: So if it's --
20 you analyze a situation where you can't tell the
21 basis for the reason, and as we've been
22 discussing, you think it may be more vulnerable
23 if it's a protectionist reason rather than a
24 moral reason.

25 How do we parse that -- that statute?

1 MR. MONGAN: Well, so, Your Honor, I
2 think that's one of the challenges that the
3 Court has wrestled with in the Dormant Commerce
4 Clause arena, and, obviously, focusing on
5 legislative purpose is perhaps more disfavored
6 now than it once was in some of the earlier
7 cases. But, if you look at a case like Hunt,
8 it's looking at objective manifestations of
9 protectionism. You have a situation where there
10 are out-of-state competitors who have
11 established a competitive advantage, and the
12 features of the statute is meant to neutralize
13 that advantage. But we don't have anything like
14 that here, Your Honor.

15 JUSTICE JACKSON: But how -- how --
16 how does the principle that you articulate
17 relate to the concerns of the Dormant Commerce
18 Clause? I mean, I had understood that part of
19 the concern was that when states do the kind of
20 thing that you're talking about, even if they
21 are doing so to protect the products in -- for a
22 moral reason that are being sold into the state,
23 it still has a significant impact on interstate
24 commerce and that that's really what the
25 Constitution cares about.

1 So I'm -- I'm a little worried about
2 the line that you draw between conditions --
3 between the types of conditions, conditions that
4 are related to the product versus conditions
5 that aren't, as it relates to the purposes of
6 the Dormant Commerce Clause.

7 MR. MONGAN: So -- so two points, Your
8 Honor. I mean, I think my friend spoke about
9 the history, the framing history, of the -- the
10 Commerce Clause. I think the concern there was
11 very clearly with discriminatory, facially
12 discriminatory statutes like embargoes and
13 customs duties and the like. That's the type of
14 dynamic described by the narrow rule in Baldwin
15 and Healy. And we don't have anything like that
16 here.

17 The line that I have been describing,
18 I think, is a reflection of the general
19 principle against regulating wholly
20 extraterritorial conduct. The plurality in
21 Edgar pointed to that as a Commerce Clause
22 principle, and a number of lower courts,
23 including our own circuit, have applied it as
24 such. And it's a means of differentiating
25 between the large number of valid in-state sales

1 restrictions and some of the more problematic
2 hypotheticals that we have -- that we have heard
3 today.

4 JUSTICE JACKSON: So you're suggesting
5 that it's only impermissible if it's wholly
6 extraterritorial as identified by it being a
7 condition that is not related at all to the
8 actual product that's coming into the state? Is
9 that the line that you're --

10 MR. MONGAN: Your Honor, I think
11 that's about right. I mean, I'd point the
12 Court, for example, to the Legato Vapors case
13 that my friend referenced in the Seventh
14 Circuit. So there you have an in-state sale
15 condition on vaping products, but the feature
16 that most concerned the Seventh Circuit was that
17 it was requiring out-of-state manufacturers to
18 enter into a particular security contract with a
19 particular private term for a -- a firm for a
20 five-year term.

21 And the Court had no difficulty saying
22 that's not really regulating the product that's
23 sold in the state. It's tantamount to a -- to a
24 regulate of -- regulation of something that is
25 wholly out of state.

1 JUSTICE JACKSON: And it doesn't
2 matter at all to you whether the state's attempt
3 to advance its interest with respect to this
4 product affects the entire market, reshapes the
5 way -- I mean, I think --

6 MR. MONGAN: Right.

7 JUSTICE JACKSON: -- the problem that
8 I'm having a little bit with -- with your side
9 of this case is that we're only at the motion to
10 dismiss stage. I know that there are likely to
11 be some disputes about the extent to which this
12 ultimately does impact, and how much, the -- the
13 market, but at this stage, it seems to me that
14 the Court has to accept that the regulation at
15 issue here is going to have this substantial
16 impact on the operation of this market, and you
17 seem to be indicating that that's not a viable
18 thing from the standpoint of analyzing whether
19 there is some sort of interstate commerce
20 problem.

21 MR. MONGAN: Your Honor, if I -- if I
22 could spend a moment on that --

23 JUSTICE JACKSON: Yes.

24 MR. MONGAN: -- because I think this
25 is very important and we've heard some rhetoric

1 today. We are at the motion to dismiss stage,
2 and we do have to focus on the specific
3 complaint allegations.

4 Those allegations acknowledge at
5 paragraph 58 that producers are free to choose
6 whether or not they shift to this production
7 method. They've identified in their
8 declarations eight of their own members who have
9 definitively announced they're not shifting.

10 The allegations, paragraphs 297 to
11 299, and the declaration acknowledge that
12 segregation and tracing is available. And if
13 you can segregate and trace, that means that you
14 can pass along the increased costs of production
15 to the in California --

16 JUSTICE JACKSON: Right. They're
17 available, but that's not the way the market is
18 right now according to the complaint, and so
19 some changes are going to have to be made. And
20 I guess I'm just wondering why it isn't
21 plausible to believe that the changes that are
22 going to be made would be a burden on the
23 industry?

24 MR. MONGAN: Well, Your Honor, I don't
25 even think that that is consistent with the

1 allegation in the declarations. They have
2 acknowledged that this can be done and is being
3 done. I'd point you to Pet. App. 287a. This is
4 a declaration from one of their members talking
5 about how he currently segregates: "My hogs are
6 marked with my farm identification number that
7 permits them to be segregated from other
8 product." That's for producing crate-free pork.
9 And he's told in his contract with the end
10 supplier that he's going to be paid a price per
11 unit.

12 JUSTICE JACKSON: Right, but you're
13 going to the evidence. I thought we were at the
14 motion to dismiss stage.

15 MR. MONGAN: Well, I think --

16 JUSTICE JACKSON: I mean, I understand
17 that there might be declarations that say
18 something different, but we're supposed to be
19 confined to the corners of the complaint with
20 respect to what is happening in this industry.

21 MR. MONGAN: I certainly understand
22 and agree with that, Your Honor, but I think
23 even within the corners of the complaint, the
24 declarations attached to the complaint,
25 paragraphs 297 to 299, acknowledge that this is

1 feasible and available.

2 And it's evident in the market, which
3 is why we have crate-free pork and organic pork
4 available in -- in grocery stores. And they
5 acknowledge the crate-free pork part of the --
6 of the industry.

7 So I don't -- I think the burden
8 ultimately here is one that will fall on
9 California consumers, and that's not a burden
10 that should weigh heavily, if at all, in any
11 Pike balancing.

12 JUSTICE ALITO: Suppose the
13 pork-producing states and pork-consuming states
14 get mad at you because of this and they decide,
15 okay, fine, turnaround is fair play, so we're
16 going to adopt regulations concerning the
17 production of agricultural products that are
18 produced almost exclusively in California.

19 Would that be okay? For example,
20 could a state say, we're really concerned about
21 water shortages, so we're going to prohibit the
22 shipment through our territory or the sale
23 within our borders of any almonds where the
24 trees are irrigated? Could they do that?

25 MR. MONGAN: Your Honor, if it's

1 focused on the sale within their borders, I
2 think that the logical conclusion of our
3 position is that they could do that. And I -- I
4 think that there's likely to be political checks
5 for that type of -- of law if it raises concerns
6 in the marketplace.

7 I mean, one thing is, if you adopt a
8 regulation that is just too burdensome to comply
9 with, then the industry will stop serving a
10 state and the state has to decide do we want our
11 regulation or do we want pork.

12 JUSTICE ALITO: Are you unconcerned
13 about all this? Is California unconcerned about
14 all this because it is such a giant, you can
15 wield this power, Wyoming couldn't do it, most
16 other states couldn't do it, but you can do it?
17 You can bully the other states, and so you're
18 not really that concerned about retaliation? Is
19 that part of your position?

20 MR. MONGAN: No, Your Honor, that's
21 certainly not how I would put it. I think that
22 this is a concern held by California and many
23 other states, including states who are
24 pork-producing, like Michigan and Illinois, who
25 filed an amicus brief on our side, and it goes

1 to core features of state sovereign authority to
2 control the -- the products that are sold within
3 our borders.

4 JUSTICE ALITO: Well, one of the
5 arguments I -- I'd like you to respond to this
6 that's made by Petitioner and some of -- some of
7 their amici, is that big companies can comply
8 with this, no problem, but what this is going to
9 do is shut out of the market all the small
10 companies.

11 MR. MONGAN: So, Your Honor, if I can
12 offer a formal response to that focused on the
13 complaint and -- and then a -- a more practical
14 response.

15 They have alleged that. I think what
16 this Court made clear in the Exxon case is that
17 that type of concern is not the type of burden
18 that the Dormant Commerce Clause is concerned
19 with. It goes to the -- the nature of -- of
20 delivery and the methods of operation in an
21 industry.

22 I think that the practical response is
23 that's actually not what we're seeing and that
24 -- that smaller pork producers can choose
25 whether to get a substantial premium for

1 producing this type of specialty product or
2 crate-free pork or continue producing for other
3 states, 49 other states, exactly as many of
4 their own members, as the complaint
5 acknowledges, have decided to do.

6 CHIEF JUSTICE ROBERTS: Justice
7 Thomas?

8 Justice Alito?

9 Justice Kagan?

10 Justice Gorsuch?

11 JUSTICE KAVANAUGH: Do you accept Pike
12 as a precedent of this Court, or are you asking
13 for it to be overruled?

14 MR. MONGAN: We are not asking it to
15 be overruled, Your Honor. We --

16 JUSTICE KAVANAUGH: That's -- thank
17 you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 Justice Jackson?

21 Thank you, counsel.

22 Mr. Lamken.

23

24

25

1 ORAL ARGUMENT OF JEFFREY A. LAMKEN
2 ON BEHALF OF THE HUMANE SOCIETY OF THE UNITED STATES,
3 ET AL., RESPONDENTS

4 MR. LAMKEN: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 Proposition 12 -- excuse me, the
7 Dormant Commerce Clause's dormant aspect focused
8 on protectionism, discrimination, interferences
9 with the instrumentalities of interstate
10 commerce. Proposition 12 concededly is none of
11 those things.

12 It prohibits the sale within
13 California of pork that Californians find
14 immoral and unsafe regardless of where it
15 originates.

16 Proposition 12 reflects a moral
17 tradition that has been respected for millennia
18 that consuming meat that is a product of animal
19 cruelty is itself immoral. California chose to
20 rid its markets of those -- some of those
21 immoral products, and the framers did not sub
22 silentio prohibit states from banning immoral
23 products by hiding in -- hiding that
24 revolutionary limit in a negative implication in
25 a clause that simply is an affirmative grant of

1 authority to Congress, nor do they impose more
2 demanding health and safety proof requirements.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Counsel, how broadly
5 would you define "immoral"?

6 MR. LAMKEN: So, Your Honor, I think,
7 when it comes to the product, you would look at
8 the closeness of the relationship between the --
9 the regulation and the product itself.

10 In this case, it is very closely
11 bound. You can look at three considerations in
12 particular. First, the market distinguishes
13 between these products. They distinguish -- and
14 regulators as well -- between crate-raised pork
15 that's inhumane and humanely raised pork.

16 JUSTICE THOMAS: No, I mean the term,
17 a definition of the term "immoral," of the word
18 "immoral."

19 MR. LAMKEN: Yeah. So I think, in
20 general, that would be my second consideration,
21 is you -- one of the things you might look at is
22 looking at whether this is a traditional basis
23 for regulation, if it's something that
24 distinguishes a product from being moral versus
25 immoral.

1 And, here, it's historically bound.
2 The major religions, humanity has recognized for
3 millennia that products can be immoral because
4 they are a product of animal cruelty, in
5 particular, for -- in particular food.

6 And so that is one of the features we
7 do. But we'd also look at whether the market
8 recognizes things as distinct products based on
9 their morality. And the market here and
10 regulators here distinguish inhumanely raised
11 crated-pork from humanely raised pork.
12 Companies look at it. You have companies like
13 from Burger King to Whole Foods make that
14 distinction. Regulators make the distinction.

15 The USDA's FSIS regulates labels.

16 JUSTICE JACKSON: But you're
17 suggesting --

18 MR. LAMKEN: It excludes --

19 JUSTICE JACKSON: -- you're suggesting
20 as though that distinction is universally held,
21 and if it were, I would think the market would
22 have already accounted for it everywhere.

23 The problem as I hear your other
24 friend saying is that Iowa, for example,
25 disagrees. Iowa does not believe that its porks

1 are being held -- and I'm saying this
2 hypothetically, I don't know what Iowa actually
3 believes -- but assume we have a state that --
4 that -- that thinks it's not immoral to hold
5 their sows in a particular way.

6 To what extent does California get to
7 control what Iowa does with respect to the
8 housing of its pork?

9 MR. LAMKEN: It does not. But the
10 question in this case is, who decides the pork
11 that appears on California grocery shelves
12 that's purchased and consumed by Californians?
13 To say that when another state has a lesser
14 standard, it decides what appears on California
15 grocery shelves --

16 JUSTICE JACKSON: But why can't -- why
17 can't California solve for its morality issue in
18 a different way, in a less burden -- if we
19 assume that it's really going to create a burden
20 to allow California to ban all Iowa pork on the
21 grounds that California disagrees with how Iowa
22 produces pork, why shouldn't the balance to the
23 extent we're making one be to simply allow
24 California to express its morality interest
25 through a less burdensome means, like

1 segregating Iowa's pork when it comes in,
2 putting a big label over it that says this is
3 immorally produced or whatever, and that won't
4 hurt Iowa as much? Why can't we say that that's
5 the way this should be?

6 MR. LAMKEN: So I should be clear that
7 if it were a distinction between Iowa pork and
8 other pork, that would be discriminatory. You
9 don't get to distinguish based on the origin in
10 a state, but distinguish between crate-free pork
11 and immoral inhumane pork.

12 JUSTICE JACKSON: All right, fine.
13 Whatever -- whatever the distinction is, the
14 question is, why does California get to ban it?
15 When it has all of the implications on commerce
16 with respect to the supply chain upstream, why
17 isn't the -- the solution that California just
18 gets to announce?

19 MR. LAMKEN: Yes. So I think
20 there's two -- the answer is in two parts. The
21 first is that California has an interest in
22 banning immoral products from its own markets.
23 And it doesn't serve that interest to say, well,
24 we'll put labels on it because it doesn't ban it
25 from the market. It's still in --

1 JUSTICE JACKSON: But wait, why does
2 it ban it? Isn't that just not trusting
3 California consumers? If they -- if they agree,
4 right, there was a problem earlier about, like,
5 how do we know how many consumers agree or
6 disagree with the morality interest, wouldn't it
7 best be served and we would know based on
8 labeling it, and if it doesn't get sold, then
9 there we are?

10 MR. LAMKEN: Well, it still leaves
11 California's markets available for products that
12 California has deemed immoral. But it also
13 doesn't serve California's other interest, which
14 is ensuring that all Californians have access to
15 morally acceptable pork even if they don't have
16 the resources, they don't have the luxury of
17 studying labels or going to the Whole Foods
18 market on La Cienega. This ensures that all
19 pork in California meets a certain level of
20 moral acceptability --

21 JUSTICE BARRETT: Mr. Lamken, can I
22 ask you about that moral -- I'm sorry to
23 interrupt. I see your time's running out. You
24 told Justice Thomas that the definition of
25 "moral" -- and so you're -- you're saying to

1 Justice Jackson things about, you know,
2 California's moral interest.

3 You told Justice Thomas that your
4 definition of morality would be rooted in
5 cultural traditions and that sort of thing.

6 Is your suggestion that states can
7 only regulate based on morals -- that sounds a
8 lot like the substantive Due Process Clause,
9 right? They're supported by the history and
10 traditions of the American people but that other
11 kinds of morals legislation that were maybe more
12 edgy or new would not be a permissible basis?

13 MR. LAMKEN: No, Your Honor. But I
14 think when you're asking -- and I think this is
15 the nexus question that the Court was asking
16 about. When you're asking is California
17 regulating the product that's being sold in
18 California, or is it so divorced from the nature
19 of the product, its regulation, that what it's
20 doing is reaching across state lines and
21 attempting to control something that's wholly
22 out of state, which, mind you, I don't think
23 it's a Dormant Commerce Clause because -- issue
24 because it extends beyond commerce. California,
25 for example, couldn't regulate high school

1 curriculum in Texas, even though it has nothing
2 to do with commerce.

3 But, when you're making that
4 distinction, you would look at the closeness of
5 the fit between, is this product somehow
6 immoral? And things you would look at in
7 deciding whether it affects the morality of the
8 product is, one, you would look at is this a
9 market and a regulatory distinction that's
10 regulated? Which is precisely the case here.
11 You would look at, is this a distinction that's
12 historically recognized? And this is a deeply
13 rooted historical distinction that we understand
14 that our food can be moral or immoral based on
15 whether it's the product of animal cruelty.

16 And, third, you might look at whether
17 or not this is a common feature through state
18 law generally. And, for example, here, nine
19 states, from Louisiana to Nevada to Virginia,
20 ban the in-state sale of cosmetics that are
21 tested on animals. Congress --

22 JUSTICE ALITO: Now I don't -- I don't
23 understand the distinction you're drawing
24 between regulations that go to the nature of the
25 product and regulations that control the way in

1 which the product is -- is produced.

2 Put aside the -- the health issues,
3 the safety issues. Let's assume for the sake of
4 argument that -- that pork produced in the way
5 it's mostly produced is just as safe as pork
6 produced in accordance with California
7 regulations.

8 If you analyze the pork -- you have
9 two pork chops. One is -- one is, you know,
10 made one -- produced one way. One is produced
11 the other way. The product is exactly the same.

12 MR. LAMKEN: Your Honor, that -- how
13 the product is produced and whether it's done in
14 a humane fashion does distinguish the products.
15 Consumers recognize it as a difference. The
16 United States of America recognizes it as a
17 difference. For example, it bans blood
18 diamonds, conflict diamonds, but not ordinary
19 diamonds. We can -- we ban things that are made
20 by slave --

21 JUSTICE ALITO: No, I --

22 MR. LAMKEN: -- in slave countries but
23 not others.

24 JUSTICE ALITO: -- I understand all of
25 that. I just don't understand how you're going

1 to draw a distinction between --

2 MR. LAMKEN: I --

3 JUSTICE ALITO: -- between the
4 California law and, for example, a law that says
5 you can't sell a product in our state if it was
6 produced by -- by workers who did not have the
7 right to work.

8 MR. LAMKEN: Yeah, and I -- and I
9 think the answer -- you draw the line on this.
10 You'd look at for, example, the right to work
11 example. You'd first ask, do consumers, do
12 regulators look at that as a typical distinction
13 that makes one product different from another?
14 They typically don't.

15 The next question is, do you -- is
16 this something with a deep historical tradition
17 that you would recognize that it somehow infects
18 the product and makes the product itself
19 immoral? That's not going to happen with --

20 JUSTICE ALITO: It seems to me --

21 MR. LAMKEN: And third --

22 JUSTICE ALITO: -- you're asking for a
23 categorization of moral objection, so the old
24 ones -- you know, the old ones are okay, but new
25 ones are not really?

1 MR. LAMKEN: You'd also look at how
2 often it happens, whether it's regular in the
3 law that that type of category occurs. And as I
4 pointed out, nine states deal with animal --
5 animal testing. Congress distinguishes. Eight
6 states ban eggs from caged hens. Nine states
7 ban aborted -- aborted fetal tissue but not
8 fetal tissue that's not from abortions.

9 Look at the alternative here. The
10 alternative is that states cannot ban goods
11 based on their morality. The alternative is, if
12 a state thinks it's ethical to eat pork but
13 unethical to eat inhumanely, cruelly raised
14 pork, it can only ban pork entirely?

15 JUSTICE JACKSON: But why is that --

16 MR. LAMKEN: That is --

17 JUSTICE JACKSON: -- why is that --
18 why is that problematic? I'm just -- I'm just
19 trying to understand how a moral objection gets
20 you all the way to banning. Why wouldn't a
21 state be able to advance its moral interest by
22 identifying those goods and services that don't
23 comport with the state's moral views?

24 I understand health and safety, right,
25 because, if you have a health and safety

1 problem, then the state says we can't let people
2 have access to these goods because it's going to
3 hurt them.

4 But I think you have a different set
5 of issues when you're talking about a moral
6 objection and whether or not it's bad to prevent
7 a state from banning a product on that ground
8 when you have this alternative to --

9 MR. LAMKEN: And I -- I think the
10 answer is the states, just like the United
11 States, are allowed to say certain products have
12 a factor to them that renders them immoral and
13 they will deny the access to that product to
14 their markets.

15 JUSTICE KAGAN: So, in other words, 60
16 --

17 CHIEF JUSTICE ROBERTS: Thank you.
18 I'll get to you in a second.

19 Mr. Lamken, we've heard a lot about
20 morality. I think people in some states, maybe
21 the ones that produce a lot of pork, in Iowa or
22 North Carolina or Indiana, may think there's a
23 moral value in providing a low-cost source of
24 protein to people, maybe particularly at times
25 of rising food prices.

1 But, under your analysis, it's
2 California's view of morality that prevails over
3 the views of people in other states because of
4 the market power that they have. So, I mean,
5 isn't that a consideration we should take into
6 effect in --

7 MR. LAMKEN: So --

8 CHIEF JUSTICE ROBERTS: -- analyzing
9 this under the Commerce Clause? If, in fact,
10 moral values are going to be given weight at
11 least as significant as economic ones, why isn't
12 that something that we should be sensitive to
13 under the Commerce Clause?

14 MR. LAMKEN: And each of those states
15 is able to produce pork and consume pork in the
16 fashion they choose. This is a law that
17 addresses only the pork that is consumed in the
18 state of California. There's no --

19 CHIEF JUSTICE ROBERTS: Yeah, but the
20 reality -- the reason they have this law is,
21 one, because they don't have pork producers in
22 California. So nobody is going to be hurt from
23 that point of view.

24 And, two, they want to affect conduct
25 in other states. They want pork producers in

1 Iowa and North Carolina and Indiana to have to
2 produce pork the way they want them to, not
3 necessarily even the way they want their own
4 pork producers to produce, because they don't
5 have any pork producers or a de minimis amount.

6 MR. LAMKEN: Your Honor, the -- first,
7 Exxon makes clear that what the Commerce Clause
8 protects -- protects is interstate commerce, not
9 particular methods of production or organization
10 of industry.

11 And that makes sense. As Lopez makes
12 clear, what matters here and what the core of
13 the Commerce Clause is the instrumentalities and
14 the movement of products in interstate commerce.
15 Once you move to protecting the methods of
16 production and the cost of production, you've
17 now moved to affecting commerce in a sort of
18 Wickard versus Filburn kind of way. But that
19 Wickard versus Filburn kind of way just doesn't
20 have a role when it comes to cutting off state
21 authority.

22 And if we do -- if we do otherwise, we
23 start making those judgments, this Court puts
24 itself back in the role that it once took in
25 Lochner of trying to effect and trying to

1 decide, gee, how good is the state's limit, do
2 we agree with the state limits, or is there
3 another state limit? And what California's law
4 does is it controls solely within California.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MR. LAMKEN: At most 13 percent.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 Justice Alito?

10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: Are you giving up
12 on the health and safety aspects of your claim?

13 MR. LAMKEN: Absolutely not, Your
14 Honor.

15 JUSTICE SOTOMAYOR: You spent all of
16 your argument on the moral issue.

17 MR. LAMKEN: That -- that is a product
18 of having 10 minutes, Your Honor. But I think
19 the health and safety, the key point on that is
20 that Petitioners have a burden -- a huge burden
21 under this Court's Maine versus Taylor decision,
22 and that is they have to show that it's not even
23 plausible, that it's not arguable that there's a
24 health and safety interest here.

25 And the complaint doesn't come close

1 to pleading that, because, first, it admits
2 right at the outset, the complaint at the outset
3 admits that there is -- and I'm going to quote
4 if I find it -- that --- this is Pet. App. 228,
5 paragraph 440. It admits that higher stocking
6 density, so this is the intense confinement,
7 correlates with higher salmonella rates for
8 growing pigs.

9 There's no reason to think that's
10 irrational when you move from growing pigs to
11 sows. And the American Health Association and
12 the Physicians' Committee explained the -- the
13 mechanism by which this is a huge health impact,
14 which is intense confinement causes stress which
15 has immunosuppressive effects not just for the
16 sows but for the piglets.

17 And is it irrational for California to
18 believe, is it beyond debate, have the facts in
19 the complaint satisfied and shown that they're
20 entitled to relief and shown that California
21 just simply has no rational basis here for
22 thinking that this has an effect? It does not
23 come close.

24 There's a burden, a price, under Rule
25 8 to get past the complaint stage, and that is

1 that you have to show you're plausibly entitled
2 to relief. To be entitled to relief here,
3 Petitioners need to show that it's not even
4 arguable that there's a health effect. They do
5 not even come close, Your Honor.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: Mr. Lamken, I -- I
8 guess what troubles me is that this is a
9 pleading stage case. So let's assume that moral
10 interests count in the analysis. Let's just --
11 I'm not saying I'm -- I necessarily think that,
12 but let's assume it.

13 And let's assume that moral interests
14 can extend beyond labeling, that people can say
15 labeling is not enough. We actually want to
16 prevent those mis- -- you know, those benighted
17 people from eating this product regardless,
18 whether they know what it is.

19 So moral interests count. Moral
20 interests extend beyond labeling. Still, you
21 have this complaint which alleges -- and then
22 whatever you want to say about the health
23 interests.

24 On the other hand, you have a
25 complaint that alleges great costs to the pork

1 farmers outside of California, almost all of
2 whom are outside of California, and the entire
3 industry. And I take Mr. Mongan's point that
4 the complaint is considerably more nuanced than
5 the briefs in this case, but you could imagine a
6 complaint that basically made the points in the
7 briefs, you could imagine the pork producers
8 amending their complaint to sound more like
9 Mr. Bishop's brief than the complaint that they
10 actually wrote.

11 And in that case, wouldn't we have to
12 say, okay, this is the pleading stage, it goes
13 back, somebody can do Pike balancing, it's very
14 hard, you know, what exactly are we balancing,
15 these incommensurable things? But that's what
16 our doctrine indicates should happen, so
17 somebody should do that balancing.

18 MR. LAMKEN: Right. Your Honor, I
19 think there's two points. The first is that I
20 don't think they could -- well, second point
21 is -- I'm going to come to, which is that's not
22 this complaint, which is what the Court has
23 before it. But before I get to that's not this
24 complaint, actually, I --

25 JUSTICE KAGAN: Let's assume it's not

1 this complaint. Let's assume a better complaint
2 or a -- not a better complaint necessarily.
3 Let's assume a stronger complaint.

4 MR. LAMKEN: Right. So Exxon makes
5 clear the particular structure or methods of
6 operation are not what the Commerce Clause
7 protects. The fact that costs might go up for
8 production is divorced from the essence of the
9 Commerce Clause itself, which is about the
10 interstate movement of goods. Can you have that
11 trade?

12 When you step further away from that
13 and you say I'm worried about how much it costs
14 to make the pork in other states, you've now
15 stepped away from the core of the Commerce
16 Clause, the interstate movement of goods, the
17 channels of commerce, the instrumentalities of
18 commerce that Lopez makes clear, and you're now
19 in the land of, well, this is something that
20 affects commerce, affects commerce in a
21 Wickard/Filburn kind of way.

22 That's just too far to read an
23 implicit negative implication from
24 constitutional text as a limit on what state
25 authority can do. That goes too far. And I

1 think Exxon makes that quite clear.

2 But even apart from that, under
3 Twombly, the -- the allegations need to make
4 sense --

5 JUSTICE KAGAN: I guess what strikes
6 me about this case, Mr. Lamken, is that both
7 sides want to exclude things from the Pike
8 analysis, right? Mr. Bishop wants to exclude
9 all moral interests, as does Mr. Kneedler. And
10 you want to exclude a world of economic harms
11 because you think that that's not really what
12 the Commerce Clause is all about.

13 And isn't Pike just saying you get to
14 throw them all in the mix and it's really hard,
15 but somebody has to make the judgment and it
16 hasn't been made yet in this case?

17 MR. LAMKEN: No, Your Honor, I think
18 Exxon made that judgment, that you don't say,
19 well, gee, it's going to be very expensive to
20 force everybody who is out of -- in Exxon, all
21 the burdens fell on out-of-state refiners. Oh,
22 gee, this is restructuring the operation. No,
23 Maryland gets to make the determination that it
24 does not want refiners to be operating gas
25 stations.

1 Likewise here, California gets to make
2 the judgment as to what's sold within the state.
3 It may drive up costs for Californians. It may
4 mean that pork farmers serving Californians pay
5 more or costs -- it costs more for them. But
6 that's simply an effecting commerce type of
7 thing. That's not an interstate commerce
8 problem. It's an effecting commerce problem,
9 and I don't think courts should be in the middle
10 of making that sort of determination from a
11 negative implication from an affirmative grant
12 of authority to Congress.

13 But here, under Twombly, even if you
14 just look at Twombly, Twombly says your
15 rationale needs to make -- your theory needs to
16 make economic sense. It has to comport with
17 common economic understanding.

18 And with California being 13 percent
19 of the market, it does not comport with common
20 economic understanding that somehow the whole
21 market is going to be shifted, as opposed to
22 some producers serving California and some
23 producers choosing to serve the other 87 --

24 JUSTICE KAGAN: Thank you.

25 MR. LAMKEN: -- percent of the market.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 Justice Kavanaugh?

4 Justice Barrett?

5 Justice Jackson?

6 JUSTICE JACKSON: Can I just get a
7 quick clarification of the burdens at this
8 stage, sort of piggybacking on what Justice
9 Kagan said.

10 I understood you to say that the
11 complaint has to show that it is not plausible
12 that California has a health and safety concern
13 under these circumstances. I -- I didn't think
14 that that's what was going on. I thought the
15 complaint had to show that it is plausible that
16 the burden outweighs any possible health
17 interest that California has.

18 MR. LAMKEN: Well, certainly, when
19 you're looking at -- I think the government's
20 argument here was that there's simply no health
21 and safety interest, that the complaint is
22 sufficient to show that. And I don't think
23 that's true.

24 The standard under --

25 JUSTICE JACKSON: Assuming -- isn't

1 the -- isn't the only thing that they have to
2 show is, under Pike balancing, whatever the
3 burdens are that they allege, plausibly outweigh
4 whatever benefits or interests that California
5 might have?

6 MR. LAMKEN: Okay, but once you have a
7 health and safety interest, they must show facts
8 that plausibly show that California does not
9 have a legitimate health and safety interest,
10 that it's not even arguable.

11 California is not required to wait for
12 people to get sick, die, or end up in the
13 hospital before it regulates. Maine versus
14 Taylor is very clear about that.

15 JUSTICE JACKSON: All right. Thank
16 you.

17 MR. LAMKEN: And that was just as
18 discriminatory.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. LAMKEN: Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Mr. Bishop,
23 rebuttal.

24

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1 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP
2 ON BEHALF OF THE PETITIONERS

3 MR. BISHOP: Just very, very short,
4 Your Honor. I've heard a lot about Exxon, but
5 Exxon is solely about in-state restrictions. It
6 had absolutely nothing to do with this case.

7 Now I don't think that General
8 Mongan's attempt to distinguish Prop 12 from
9 other policy director conditions on sale works
10 at all. I heard nothing that distinguishes Prop
11 12 from a law that says you cannot sell any food
12 in this state unless it's produced by workers
13 paid our minimum wage, offered certain medical
14 care, who can belong to unions.

15 Those are all conditions directly
16 related to the production of the product, which
17 occurs out of state. And I heard no definition
18 of attenuated conditions that is workable.

19 And what I ask the Court to focus on
20 is what our nation's interstate market looks
21 like if California can condition sales on its
22 moral or policy views and every other state can
23 do the same.

24 We'll be back to the preconvention
25 picture where you have balkanized markets and

1 discord among the states, probably a lot worse
2 now than in pre-convention times given the
3 political differences among us.

4 And that destroys the twin purposes of
5 the Commerce Clause, which this Court said in
6 Healy are to maintain the national economic
7 union and preserve the territorial sovereignty
8 of the states. We will not have a national
9 economic union if California can impose its
10 moral views this way.

11 And just one -- one final point. I
12 heard a lot of fighting the complaint. We have
13 a 450-paragraph complaint, supported by
14 declarations that says that there are immense
15 costs involved for the industry, immense harm to
16 pigs that will result from complying with --
17 with -- with Prop 12 and no safety benefit.

18 I have a dozen pork farmers in court
19 today who would testify at trial that they are
20 being forced by distributors and packers and
21 retailers to comply with Prop 12 in a way that
22 they think kills pigs, that harms their workers,
23 that makes it extremely difficult for them to --
24 to -- to operate their farms in the way that
25 they think is efficient and safe for workers and

1 pigs. And we believe we're entitled to a trial
2 to show that.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.

6 (Whereupon, at 12:15 p.m., the case
7 was submitted.)

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