No. 21-468

IN THE
Supreme Court of the United States

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

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE, *et al.*,
Respondents.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The National Association of Manufacturers, National Cattlemen's Beef Association, and National Federation of Independent Business submit this brief as *amici curiae* in support of Petitioners.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this brief's filing.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12.7 million men and women, contributes $2.71 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Amici support the humane production of pork products and oppose animal cruelty. *Amici* have a strong interest in this case because Proposition 12 regulates the conduct of farmers, processors, wholesalers, and retailers nationwide. In addition, Proposition 12, if allowed to stand, may embolden other States to regulate beyond their borders, resulting in a complex web of inconsistent and competing extraterritorial regulations in the agriculture, food, and other industries. The Ninth Circuit's decision threatens to fragment these interstate markets, creating inefficiencies that can impose significant costs on industry and consumers.

SUMMARY OF THE ARGUMENT

"[T]he Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (internal quotation marks omitted). State laws violate the Commerce Clause when they regulate extraterritorially or substantially burden out-of-state producers absent a sufficient and legitimate local interest. *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 578–579 (1986). Proposition 12 does both.

The Ninth Circuit nonetheless upheld the law by breaking with this Court's cases. The Ninth Circuit abandoned this Court's extraterritorial-regulation cases by holding that Proposition 12—whose entire purpose is to force non-California entities to change how they produce pork—does not regulate commerce occurring outside of the State's borders. And the Ninth Circuit gutted this Court's balancing test for laws that incidentally burden interstate commerce by

declaring that an additional cost on producers can never be a relevant burden on interstate commerce, even when the costs are the result of producers having to change interstate ways of doing business or end interstate business altogether.

Further, allowing the Ninth Circuit's erroneous decision to stand spells havoc for the Nation's food supply. If California can enact laws controlling the production of out-of-state pork, Texas can dictate how California grows avocados and tomatoes. States and localities could also rely on the logic underlying California's sales ban to justify setting nationwide standards for virtually any geographically favored industry that is disfavored elsewhere. Allowing States to impose their own policy preferences on farmers, processors, wholesalers, and retailers nationwide will fracture national markets into regional and local affairs. That future is precisely what the Framers intended the Commerce Clause to prevent.

The court of appeals' decision should be reversed.

ARGUMENT

I. CALIFORNIA'S EXTRATERRITORIAL AND UNDULY BURDENSOME PROHIBITION OF PORK SALES VIOLATES THE DORMANT COMMERCE CLAUSE.

The Constitution provides that "Congress," and Congress alone, "shall have Power * * * To regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cls. 1, 3. This Court has recognized that the Constitution's grant of affirmative power to Congress carries with it a prohibition, known as the dormant Commerce Clause, that is "a limitation on state regulatory powers" that interfere with interstate

commerce. *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 330 (1996).

Although local regulation will often and inevitably have some effects on interstate commerce, the Clause limits States' and localities' ability to "erect barriers against interstate trade." *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986) (internal quotation marks omitted). The dormant Commerce Clause thus "prevents the States from adopting protectionist measures" and "preserves a national market for goods and services." *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2459 (2019).

The dormant Commerce Clause's protections are not limited to state laws that discriminate against interstate commerce. The Clause also protects the "national 'common market,' " *Hunt* v. *Washington State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977), from state laws that, while not drawing distinctions between interstate and intrastate commerce, impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The court of appeals' opinion runs roughshod over both aspects of the dormant Commerce Clause. The court of appeals' judgment conflicts with this Court's cases holding that a state law violates the dormant Commerce Clause when it regulates conduct occurring in other States. And it guts this Court's balancing test for facially neutral laws, refusing to recognize costs to out-of-state entities as a burden on interstate commerce, no matter how great and no matter how disruptive to national supply chains.

A. This Court's Cases Confirm That Proposition 12 Unconstitutionally Regulates Extraterritorial Conduct.

1. This Court's cases limiting a State's ability to regulate extraterritoriality doom Proposition 12. The extraterritoriality doctrine prohibits States from "regulating commerce occurring wholly outside [their] borders." *Healy*, 491 U.S. at 332. No matter how wise California or New York or Texas or Vermont may believe a particular policy to be, "one State's power to impose burdens on the interstate market * * * is not only subordinate to the federal power over interstate commerce * * * but is also constrained by the need to respect the interests of other States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 570–571 (1996).

This principle has deep roots in the Constitution's structure and the Nation's history. State sovereignty is a cornerstone of our constitutional compact and reflects our Country's "union of States, equal in power, dignity and authority." *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911). "The sovereignty of each State * * * implie[s] a limitation on the sovereignty of all of its sister States"—a limitation that is inherent in "the original scheme of the Constitution." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980); *see also Franchise Tax Bd. of California* v. *Hyatt*, 139 S. Ct. 1485, 1497–98 (2019). Thus, "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881); *see also New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914) (calling this territorial limit an "obvious[ ]" and "necessary result of the Constitution"). When "States pass beyond their own [territorial] limits * * * there arises a conflict of sovereign power * * * which renders

the exercise of such a power incompatible with the rights of other States, and with the [C]onstitution of the United States." *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827) (opinion of Johnson, J.); *see also Boyle* v. *Zacharie*, 31 U.S. (6 Pet.) 635, 643 (1832) (Story, J.) (confirming that Justice Johnson spoke for the *Ogden* majority).

Proposition 12's sales ban ignores these bounds on California's authority. That law is the latest—and most consequential—assertion of California's authority over its sister States' regulation of agriculture and food production: It requires out-of-state farmers, producers, and distributors to spend hundreds of millions of dollars to restructure their operations nationwide, simply because California endorsed a particular policy preference. Pet. App. 214a (¶ 342). One State's power to regulate beyond its borders, directly or otherwise, does not stretch that far, for a State's power to address "local needs" does not override "the overriding requirement of freedom for the national commerce." *Great Atl. & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371 (1976); *see also* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance and Procedure* § 11.1 (May 2022 update) ("When local legislation thwarts the operation of the common market of the United States, the local laws have exceeded the permissible limits of the dormant commerce clause."). In short, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994); *see Healy*, 491 U.S. at 336.

Proposition 12 does just that. By regulating the manner in which pork farmers house and breed sows,

Proposition 12 effectively controls every step of the national pork supply chain. It is common for a sow in, say, Iowa to give birth to piglets, which are then sold to a second facility for feeding, and to a third for finishing. Once they reach the appropriate weight, the pigs are sent to a fourth facility, often in another State—for instance, Illinois—for slaughter and butcher. That processing facility may divide the butchered pork among various wholesalers, retailers, and secondary processors. For example, a wholesaler in Kansas might purchase the loin and sell it to a retailer in California; a retailer in Texas might purchase the pork belly; and a secondary processor in Wisconsin might purchase the shoulder butt to make sausages.

This particular supply chain is hypothetical, but the interstate transactions it describes are not uncommon. And as this supply chain demonstrates, by regulating the California-based retailer's purchase, Proposition 12 will inevitably affect multiple wholly out-of-California transactions. That violates the Commerce Clause. *See Healy*, 491 U.S. at 336. To comply with Proposition 12, the breeding farm in Iowa must alter how it houses the sow; the feeding and finishing facilities in Iowa must segregate Proposition 12-compliant pigs; the processing facility in Illinois must track the origins of each pig it butchers; and the wholesalers and retailers in Kansas and California must track the origins of each whole cut of pork. *See* Pet. Br. 14–16.

These out-of-state impacts far exceed the kind of incidental requirements associated with labeling regimes and other facially neutral laws. Because the "practical effect of th[is] regulation is to control" commercial transactions that "take[ ] place wholly outside of the State's borders, whether or not the commerce

has effects within the State," Proposition 12 "exceeds the inherent limits of [California's] authority." *Healy*, 491 U.S. at 336 (internal quotation marks omitted).

This Court has already rejected attempts, like those made by Proposition 12's proponents, to justify extra-territorial laws on the ground that it could improve the in-state products' quality. *But see* Pet. Reply App. 74a (California admitting that it could not "confirm, according to its usual scientific practices, that the specific minimum confinement standards" in Proposition 12 "reduce the risk of human food-borne illness"). In *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523–524 (1935), New York argued that excluding from the New York market Vermont milk that had been purchased at prices below New York's minimum would result in more-sanitary milk being imported into the State. "[F]armers who are underpaid will be tempted to save the expense o[f] sanitary precautions," New York had argued, and "[t]his temptation will affect the farmers outside New York as well as those within it." *Id.*

The Court held that New York's argument was both unsupported by evidence and constitutionally irrelevant. *Id.* at 524. The Court explained that "the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain." *Id.* New York can bar the sale of spoiled milk, of course, but it cannot "condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business." *Id.* And just as New York in *Baldwin* could not "put pressure of that sort upon others to reform their economic standards," California here cannot put pressure on others to reform their animal-husbandry standards. *Id.* If there were an animal-welfare problem outside of

California that needed addressing, "the Legislature of [other States] and not that of [California] must supply the fitting remedy." *Id.*

2. Proposition 12 also creates a significant risk that links in the out-of-state pork supply chain will face conflicting regulations, which reinforces the law's impermissibly extraterritorial effect. *See Healy*, 491 U.S. at 336–337. And the risk is more than hypothetical. Fifteen States explained in an amicus brief in support of Petitioners below that Proposition 12 is "a substantial departure from [their] current practices." States C.A. Amicus Br. 2.

A sow can only be housed one way at a given time, so if a farmer, feeder, finisher, processor, wholesaler, or retailer is located in a State that imposes a conflicting mandate—perhaps that no pork processed or sold in that State may come from gilts bred before they are seven months old and that gilts must be housed in group pens until they are bred—the business will be forced to choose between complying with its home-state regulation or Proposition 12. *Compare* Cal. Health & Safety Code § 25991(a), *and* C.A. ER 100 (explaining that to comply with Proposition 12, six-month-old gilts must be housed individually), *with* Pet. App. 175a–176a (¶¶ 91-92) (explaining that farmers typically house gilts in group pens until they are bred at seven or eight months). That is a difficult—and potentially impossible—choice.

This Court relied on similar concerns about extraterritorial control and regulatory disunity in striking down an Arizona law regulating the length of trains running through the State. *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1945). Arizona limited trains' lengths to 14 passenger cars or 70

freight cars, while most States had no limitation at all. *Id.* at 773–774. Train operators accordingly had to break up longer trains outside of Arizona to pass through the State, but even that solution often was not possible. *Id.* As a result, "the Arizona law often control[led] the length of passenger trains all the way from Los Angeles to El Paso," well beyond Arizona's borders. *Id.* at 774–775. Proposition 12 works in the same impermissible way; although it purports to restrict only California sales, the realities of the interconnected pork supply chain mean that Proposition 12 will require changes in States far from the West Coast. *See supra* p. 8.

Southern Pacific further emphasized that "[i]f one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation." 325 U.S. at 775. In the train-length context, the Court noted that States had proposed "maximum freight train lengths of from fifty to one hundred and twenty-five cars, and maximum passenger train lengths of from ten to eighteen cars." *Id.* at 774. Trains cannot, as a practical matter, constantly be broken up and reformed each time they pass through a State, so the only feasible alternative is "to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state." *Id.* at 773.

Proposition 12 imposes an even greater burden on farmers than the train-length laws this Court found impermissible in *Southern Pacific*. A train operator could at least theoretically modify its trains for every State they entered. But a farmer can only raise a particular sow in a single way. He is left with only

Southern Pacific's second choice: Conforming his practices to the least common denominator of the States in which his cuts may be sold, if one even exists. And as in *Southern Pacific*, that outcome imposes a "serious impediment to the free flow of commerce" offensive to the dormant Commerce Clause. *Id.* at 775.

California has no more power to regulate beyond its borders than Indiana or Massachusetts. If it did, California could freely subject people nationwide to regulations that conflict with the policies adopted by their own States. This Court should reiterate these straightforward constitutional truths and reverse.

4. The Ninth Circuit admitted that this Court's cases include "broad statements" indicating that the dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the [regulating] State." Pet. App. 7a. (quoting *Healy*, 491 U.S. at 336–337 and brackets in original). But the court of appeals dismissed this Court's longstanding principles as "so sweeping" that they "cannot mean what they appear to say." *Id.* (quoting Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1090 (2009)).

The court of appeals' reason for writing off this Court's holdings? Its apparent belief that "[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that direction." *Id.* at 19a. Yet reports of the Clause's death are greatly exaggerated. Although some individual justices have criticized the dormant Commerce Clause, it has "deep roots." *Comptroller of the Treasury of Md.* v. *Wynne*, 575 U.S. 542, 549

(2015). As the Court explained back in 1945, "[f]or a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, * * * affords some protection from state legislation inimical to the national commerce." *Southern Pac. Co.*, 325 U.S. at 769. "[I]n such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Id.*

The dormant Commerce Clause is thus "one of the oldest continuously applied doctrines in American constitutional law." Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L. J. 37, 39 (2005). And the Court continues to apply the Clause to find state laws unconstitutional. *See, e.g.*, *Tennessee Wine & Spirits*, 139 S. Ct. at 2474–75 (Tennessee liquor-distribution regulation); *Wynne*, 575 U.S. at 564–571 (Maryland taxation scheme); *Granholm* v. *Heald*, 544 U.S. 460, 484–493 (2005) (New York and Michigan wine direct-shipment regulations). The Court should do so again here and find Proposition 12 unconstitutional.

B. The Court Of Appeals' Opinion Guts This Court's *Pike* Balancing Test.

The court of appeals' decision upholding Proposition 12 also guts this Court's test from *Pike* v. *Bruce Church*, 397 U.S. 137 (1970) for facially neutral regulations that incidentally effect interstate commerce. If Proposition 12—which imposes millions in costs in return for no benefits—can pass *Pike* balancing, then any law can. This Court should reverse to confirm that *Pike* balancing continues to have teeth and reject

the Ninth Circuit's rule that compliance costs on out-of-state parties do not qualify as burdens on interstate commerce.

1. Facially neutral regulations that incidentally burden interstate commerce are permissible only if the State has a "legitimate" interest in that regulation, and "the local benefits" of the regulation "clearly exceed[ ]" the "burden on interstate commerce." *Brown-Forman*, 476 U.S. at 579; *see Pike*, 397 U.S. at 142. This standard is more forgiving than the strict scrutiny that applies to discriminatory laws, but Proposition 12 still cannot hurdle it.

Proposition 12 is not California's first foray into America's larder. The past 15 years have seen a dramatic uptick in far-reaching food regulation from a small group of States, California chief among them. Indeed, the regulatory impulse for "wealthy, powerful states" to exercise their "outsized influence" to adopt preferred regulatory regimes that are effectively binding not just "within the home state but also [o]n others who trade with that state" is so linked to the Golden State that scholars refer to it as the "California Effect." Baylen J. Linnekin, *The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 Chap. L. Rev. 357, 373 (2010). To date, California's increasingly ambitious efforts to reshape the nation's food chain in the State's own image have had mixed success, with some regulations enjoined and others allowed to go into effect. *Compare, e.g.*, *National Meat Ass'n* v. *Harris*, 565 U.S. 452 (2012) (holding California meat-processing regulations designed to restructure slaughterhouse operations preempted by the Federal Meat Inspection Act),

and National Meat Ass'n v. *Brown*, No. CVF-08-1963 LJO DLB, 2009 WL 426213, at *11 (E.D. Cal. Feb. 19, 2009) (same, and declining to reach Commerce Clause argument in light of preemption holding), *with Association des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013) (rejecting constitutional challenges to force-feeding ban in foie gras production).

The court of appeals here upheld Proposition 12 because, in its view, "cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce for purposes of the dormant Commerce Clause." Pet. App. 18a. But that is not consistent with this Court's cases, including *Pike* itself. In *Pike*, the Court held unconstitutional an Arizona cantaloupe-packing regulation that would impose a $200,000 burden on the plaintiff packer while not furthering much, if at all, the regulation's goal of burnishing the reputation of Arizona's cantaloupe growers. 397 U.S. at 145–146. That the plaintiff cantaloupe packer *could* comply with the Arizona regulation at great cost—as perhaps pork producers could comply with Proposition 12 at great cost to themselves and to pork consumers—did not insulate Arizona's regulation from review.

Proposition 12's problem is not just that it costs market participants additional money—as much as 9.2% more money—to comply with. *See* Pet. App. 18a. Proposition 12 also "impose[s] * * * a straitjacket on * * * compan[ies] with respect to the allocation of [their] interstate resources." *Pike*, 397 U.S. at 146. California's demand for pork requires approximately 673,000 breeding sows, but California farms house only about 1,500 breeding sows. Pet. App. 151a (¶ 20);

see Pet. App. 25a (acknowledging that "California's in-state sow breeding does not supply the demand of pork consumption in the state"). In other words, *99.8%* of sows affected by Proposition 12 are located out-of-state. And that eye-popping statistic does not account for the numerous *other* stages of the out-of-state supply chain that Proposition 12 will inevitably affect. *See* Pet. Br. 45–46. For example, even if only one-third of a farmer's or packer's products are sold in California, the farmer might have to—because of packers' demands—restructure his entire production process to comply with Proposition 12. *See* Pet. App. 338a–339a (explaining that a farmer must ensure all of his sows are housed in compliance with Proposition 12, even though only about one-third will produce pork that is eventually sold in California). California has therefore used its regulatory power to effect the farmer's allocation of resources outside of California and used in interstate commerce, forcing him to conform *all* of its product to the Golden State's standards.

Pike was no revolution. In *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 525–530 (1959), the Court found unconstitutional an Illinois law—unique in the Nation—requiring curved mudflaps on trucks and trailers traveling its roadways. To be sure, shippers could comply with the law at a cost of up to $45,840 per shipper. *Id.* at 525. But the Court still weighed the putative safety benefits of the curved mudflaps against their burdens on interstate shippers and concluded that the "heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems * * * to pass the permissible limits even for safety regulations." *Id.* at 530. Under *Bibb*, too, the Ninth Circuit was wrong to say that a law whose burden is increased costs on out-of-state

producers is categorically immune from dormant Commerce Clause scrutiny.

Bibb, like *Pike*, emphasized that courts should not view increased compliance costs solely in monetary terms. *Bibb* noted that Illinois mudguard law would curtail the practice of "interlining," in which an originating carrier will transfer an entire trailer of goods to a new carrier's tractor rather than loading the goods into a new trailer at the transfer point. *Id.* at 527–528. The Court explained that if the originating shipper never operates in Illinois, it would never place Illinois-compliant mudguards on its trailers. *Id.* But if the receiving interline shipper *does* operate in Illinois, it will need to stop doing business with the originating shipper because it "cannot compel the originating carriers to equip their trailers" with curved mudflaps. *Id.* The Court viewed that outcome as a "massive * * * burden on interstate commerce." *Id.*

Yet that is same kind of burden Proposition 12 imposes here. California pork sellers or distributors that wish to sell into California must remain Proposition 12 compliant. Sellers and distributors are therefore put to the untenable choice of either not doing business with farmers that cannot certify Proposition 12 compliance or somehow compelling farmers to bend to California's will. *See supra* p. 8 (describing the supply chain for pork products). Proposition 12 thus imposes the same massive burden on interstate commerce that this Court found unconstitutional in *Bibb*.

It is no surprise that California's law will result in a restructuring of pork supply chains across the nation. That is, after all, the whole point of these paternalist, "California-knows-best" style laws. "The California effect has meant that the state's food regulations and

bans extend far beyond its borders, either because its regulations or bans encourage other states or the federal government to adopt them, or because they force producers to change their offerings nationwide, or because they force the regulated industry to seek preemptive nationwide regulation." Linnekin, *supra*, at 384–385. That necessarily disrupts the "natural functioning of the interstate market," *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 127 (1978) (internal quotation marks omitted), and imposes "barriers to the free flow of both raw materials and finished goods." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976).

The Ninth Circuit was wrong to hold that Proposition 12 passes *Pike* balancing because producers can comply by spending the cash and effort to change their processes and passing along those costs to consumers. Under the proper balancing test—which the Ninth Circuit never performed—Proposition 12 imposes too great a burden relative to its dubious benefits to pass constitutional muster.

II. ALLOWING PROPOSITION 12 TO TAKE EFFECT WOULD GREEN-LIGHT SIMILAR REGULATORY EFFORTS NATIONWIDE.

Allowing Proposition 12 to stand will be an invitation to States and localities across the country to engage in similar regulatory efforts in the agriculture and food sectors, and beyond. The resulting regulatory race to the bottom would be harmful to our national economy and leave us "with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Tennessee Wine & Spirits*, 139 S. Ct. at 2460.

1. California has no inherent right to impose its preferred regulatory policies on the rest of the nation. Although the federal government sometimes expressly authorizes the State to adopt its own regulatory standards on certain topics of unique interest, *cf.* 42 U.S.C. § 7543(e)(2)(A) ("authoriz[ing] California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines" that are more stringent than "Federal standards"), California has no similar authority when it comes to pork production. And absent that authority, California—like every other State and locality—is bound by the Commerce Clause, which prohibits laws like Proposition 12 that regulate beyond its borders and unduly burden out-of-state producers.

That makes sense. If California can assert legal control over out-of-state meat production, then Indiana can do the same when it comes to Kentucky's e-cigarette manufacturers, and North Dakota can regulate New York's art transactions. As these examples demonstrate, this impulse is not limited to food. States could rely on a similar theory to regulate supply chains in virtually any industry. Under the Ninth Circuit's approach, the Commerce Clause would not stop New Jersey from asserting its say over how Michigan makes cars, simply because some of those cars are eventually sold by Garden State dealerships. Nor would it prevent Texas from laying claim to how the clothing supply chain must operate in North Carolina, because some of the clothing will be later sold by Lone Star retailers. Now multiply that disruption by 50, because if California or New Jersey or Texas is permitted to impose a prohibition, so can every other State.

These risks are not hypothetical. Proposition 12 will force out-of-state pork farmers, feeders, finishers, processors, wholesalers, and retailers to choose between spending significant sums of money to update their entire supply lines to conform with California's view of appropriate standards, creating separate production and distribution lines for this one State, or withdrawing from the highly lucrative California market. There is a serious risk that other localities will follow California's suit, but not identically so, resulting in a patchwork of regulatory requirements that will effectively eliminate the national pork market. *See* Linnekin, *supra*, at 366–367, 385, 387 (explaining that, after California banned trans fats, "dozens of discordant state laws" followed).

Small businesses will be worst hit by these discordant laws. Large firms, with their economies of scale and sophisticated supply-chain-management, legal, and compliance teams, may well find a way to navigate a post-Proposition 12 world, albeit at significant cost to themselves and the consumers they serve. But independent firms seeking to sell to a national market—easier than ever thanks to the Internet—will not have the resources to comply with States' many and varying method-of-production laws. *Cf.* Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* iv (Sept. 2010), https://bit.ly/3mQP74u (finding that small businesses have a 36% per-employee higher cost of compliance than large businesses). Their only recourse will be to limit their sales, sell to a larger firm, or leave the market entirely. *See* Pet. App. 213a (¶ 341) (alleging that costs of compliance with Proposition 12 will drive independent sow farmers out of business, increasing industry consolidation).

2. These are precisely the fears that motivated the Commerce Clause's creation. As James Madison explained, allowing States to restrict commerce and impose requirements on producers and suppliers beyond their borders "tends to beget retaliating regulations." *See* James Madison, *Vices of the Political System of the United States*, *in* 2 Writings of James Madison 361, 363 (Gaillard Hunt ed., 1901). Alexander Hamilton likewise worried that, if allowed to "multip[y] and extend[ ]," "[t]he interfering and unneighborly regulations of some States" would become "serious sources of animosity and discord." The Federalist No. 22 (Alexander Hamilton); *see also* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1885–86 & n.29 (2011) (collecting other examples of the founders' "references to the nation's commercial woes, including discord among the states"); Letter from James Monroe to James Madison (July 26, 1785) (explaining that allowing the States to pursue separate commercial policies "establish'd deep-rooted jealousies & enmities between them" which, if allowed to persist, "will become instrumental in their hands to impede & defeat those of each other").[2]

For nearly 200 years, this Court has heeded the Framers' concerns and prevented States from regulating beyond their borders, and acting in a way that burdens interstate commerce absent a sufficiently strong and legitimate local interest. *See Tennessee Wine & Spirits*, 139 S. Ct. at 2459 (summarizing the origins of this Commerce Clause concept); *see also, e.g.*, *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U.S.

[2] *Available at* https://bit.ly/2SWWhGD.

662 (1981). The Ninth Circuit's decision breaks with that long tradition, and the Court should reverse it.

CONCLUSION

For the foregoing reasons, as well as those in Petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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