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 INTERVENOR RESPONDENTS

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QUESTION PRESENTED

California voters overwhelmingly approved Proposition 12 to prohibit sales, within the State of California, of certain products from farm animals that have been subjected to extreme and unsanitary conditions of confinement. The initiative sought to "eliminate inhumane and unsafe products from * * * abused animals from the California marketplace" and "reduce[ ] the risk of people being sickened by food poisoning." Proposition 12 applies only to products sold in California and applies even-handedly to products whether they originate inside or outside the State. It does not apply to products sold outside California. Pork producers can thus raise and sell pork outside California from farm animals confined contrary to Proposition 12's standards. Representing large pork packers and producers, petitioners filed this action alleging that Proposition 12 violates the Commerce Clause. The question presented is:

Whether petitioners stated a claim that California's non-discriminatory, in-state sales prohibition violates the Commerce Clause because of its alleged incidental effects on the industry's preferred structure and methods of operation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, each of the intervenors The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook states that no company owns 10% or more of its stock.

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BRIEF FOR INTERVENOR RESPONDENTS

STATEMENT

This case concerns whether the Commerce Clause prohibits States from enacting non-protectionist, non-discriminatory laws regulating the food sold within their borders.

I. CALIFORNIA'S PROPOSITION 12

In November 2018, Californians overwhelmingly voted to amend the State's Health and Safety Code to prohibit *in-state sales* of certain products made from farm animals that have been subjected to extreme and unsanitary conditions of confinement. The Official Voter Information

Guide—a powerful indicator of "'voter[] intent,'" *People* v. *Canty*, 90 P.3d 1168, 1175 (Cal. 2004)—explains that Proposition 12 "eliminate[s] inhumane and unsafe products from * * * abused animals from the California marketplace" and "reduces the risk of people being sickened by food poisoning." Pet. App. 202a (¶270). "Scientific studies," it observes, "repeatedly find that packing animals in tiny, filthy cages increases the risk of food poisoning." Pet. App. 202a (¶272). The law "eliminate[s] * * * from the California marketplace" products from sows "crammed inside tiny cages for their entire lives." Pet. App. 201a-202a (¶270). Proposition 12's text declares that it "prevent[s] animal cruelty" and addresses "threat[s]" to "the health and safety of California consumers," including "the risk of foodborne illness" posed by "extreme methods of farm animal confinement." Prop. 12, §2.

Proposition 12 prohibits businesses from selling, "within the state," products from "covered animal[s] * * * confined in a cruel manner," including sows "kept for purposes of commercial breeding" and their "offspring." Prop. 12, §§3-4 (codified Cal. Health & Safety Code §§25990(b), 25991(a), (f)). It defines "cruel" confinement to encompass confinement "that prevents" sows "from lying down, standing up, fully extending [their] limbs, or turning around," or that provides fewer "than 24 square feet of usable floorspace per pig." *Id.* §4 (codified §25991(e)(1), (3)). The law also prohibits farmers inside California from using such practices. *Id.* §3 (codified §25990(a)).

California's law followed about a year after the USDA prohibited extreme animal confinement in the federal "organic" food program. Pork sold as "organic," the USDA determined, had to come from pigs given "sufficient space and freedom to lie down, turn around, stand up, fully

stretch their limbs, and express natural behaviors." USDA, Organic Livestock and Poultry Practices, 82 Fed. Reg. 7042 (Jan. 19, 2017). Although those rules were withdrawn before Proposition 12's enactment, the USDA has since re-proposed them. USDA, Agric. Mktg. Serv., Proposed Rule to Amend Organic Livestock and Poultry Production Requirements, — Fed. Reg. — (Aug. 5, 2022), https://public-inspection.federalregister.gov/2022-16980.pdf ("USDA Proposed Organic Rule"). The USDA explained that allowing animals sufficient space "may be positively associated with improved health and well-being, may be better for the environment, and may result in healthier livestock products for human consumption." *Id.* at 12-13.

II. Proceedings Below

A. Petitioners' Challenge to Proposition 12

Representing large pork producers, petitioners challenged Proposition 12 as inconsistent with the dormant Commerce Clause. Proposition 12's proponents—the undersigned respondents—intervened. Pet. App. 22a.

Petitioners admit that Proposition 12 is not protectionist. Pet. Br. 2 n.2. They concede that Proposition 12 addresses *only* pork sold (or raised) in California. They argue, however, that Proposition 12 in "practical effect" impermissibly regulates practices outside California. Pet. Br. 19. According to petitioners, segregating pork products based on sow housing conditions is difficult. Pet. App. 205a-206a (¶ 297), 214a (¶ 348). Petitioners insist that, as a result, "[e]nd of chain suppliers who sell pork into California"—*i.e.*, petitioners' members—"will likely force their pork suppliers to produce *all* product[s]" in compliance with Proposition 12. Pet. App. 206a (¶ 299). Farmers outside California, petitioners urge, will need to meet Proposition 12's standards "to sell * * * to packers

who supply" customers both inside and outside California. Pet. App. 206a (¶301), 214a-215a (¶¶342-349).

The complaint does not dispute that the pork industry already traces and segregates pork products to (for example) meet retailer and consumer demand for humanely raised and organic meat. See Barringer Br. 3-4, 12-17, 21-30. Federal regulations recognize that pork is often marketed with "claims regarding the raising of animals," such as "no antibiotics" and "crate free," which require segregating and tracing. 9 C.F.R. §412.1(c), (e); Prior Label Approval System: Generic Label Approval, 78 Fed. Reg. 66,826, 66,827-66,829 (Nov. 7, 2013). Prior regulations (recently reproposed) imposed housing requirements for pork sold as "organic." See pp. 2-3, *supra*. Pork marketed as "crate free" likewise can be traced to commercial sow farms that already avoid confinement conditions Proposition 12 addresses. Barringer Br. 25-26 & nn.93-94.

The complaint and affidavits incorporated by reference admit that producers *can* produce and segregate pork that complies with Proposition 12 and pork that does not. Petitioners allege, for example, that Proposition 12 may require "[e]nd of chain suppliers" "to carefully segregate products." Pet. App. 206a (¶299). In affidavits referenced in the complaint, Pet. App. 208a-209a (¶312), NPPC members Smithfield and Clemens—some of the Nation's largest packers and producers—represent that they "would have no choice but to segregate pigs that are the offspring of Proposition 12 compliant breeding sows from the offspring of sows that are not." Darrell Decl. (Smithfield) ¶¶3, 14, *N. Am. Meat Inst.* v. *Becerra*, No. 19-cv-08569, Dkt. 15-7 (C.D. Cal. Oct. 4, 2019); see Rennells Decl. (Clemens) ¶¶3, 14, *N. Am. Meat Inst.*, Dkt. 15-9 (similar).

Pork producers can also decline to meet California's standards by selling only in other States. Pet. App. 165a,

169a (¶58(g), (k)) (farmers contemplating forgoing California sales). "Pork packers," the complaint explains, "will decide whether to remain in the California market." Pet. App. 343a (¶4(c)). According to the complaint, complying with Proposition 12 increases production costs by $13 per pig. Pet. App. 214a (¶343). But the complaint admits that pork for non-California markets need not meet Proposition 12's standards and bear corresponding costs. Packers selling in California "will buy only pigs from farms that meet Proposition 12's requirements * * * for at least *as much of their production* as is required *to supply their California* sales." Pet. App. 343a (¶4(c)) (emphasis added). Pork for other States—which petitioners allege to be 87% of nationwide demand—is not subject to Proposition 12 or its costs. Pet. App. 205a (¶292).

Petitioners' members thus see no significant adverse impact on their operations:

- Hormel "confirmed that it faces no risk of material losses from compliance with Proposition 12."[1]
- Tyson represented that Proposition 12's impact is "not significant" for Tyson, which "can do multiple programs simultaneously, including" Proposition 12-compliant programs.[2]

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[1] *Hormel Foods Company Information About California Proposition 12*, Hormel (Oct. 6, 2020), https://www.hormelfoods.com/newsroom/in-the-news/hornews/hormel-foods-company-information-about-california-proposition-12/.

[2] Tyson Foods, *Third Quarter 2021 Earnings* 15 (Aug. 9, 2021), https://s22.q4cdn.com/104708849/files/doc_financials/2021/q3/08-11-21_Tyson-Foods-080921.pdf.

- Smithfield has stated it "will comply with" Proposition 12.[3]

See Intervenors Br. in Opp. 16-17 & nn.7-8 (cataloguing market-participant and NPPC concessions).

The complaint acknowledges California's goal of "eliminat[ing]" immoral products generated through extreme cruelty "from the California marketplace." Pet. App. 202a (¶ 270). But petitioners dispute California's judgment that confinement conditions so extreme that sows spend virtually their entire lives unable to move or turn around are "cruel." Pet. App. 221a-224a (¶¶ 389-410). On health and food safety, the complaint acknowledges "studies suggest[ing] that lower [confinement] density correlates with lower salmonella rates among growing pigs," but faults Proposition 12 for not citing "studies establish[ing] that a move from 16 to 24 square feet per sow in open housing impacts health." Pet. App. 228a (¶¶ 440-441). While the complaint states that federal inspections "ensure" pork is safe, Pet. App. 225a-226a (¶ 420), it does not deny that foodborne illness from pork sickens consumers more than *500,000* times per year, causing thousands of hospitalizations and scores of deaths. J.L. Self et al., *Outbreaks Attributed to Pork in the United States, 1998-2015*, 145 Epidemiology & Infections 2980, 2980 (2017). The USDA's proposed "organic" rules explain that giving animals sufficient space "may be positively associated with improved health and well-being * * * and may result in healthier livestock products for human consumption." USDA Proposed Organic Rule, *supra*, at 12-13.

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[3] Smithfield Foods, Inc., *2021 Sustainability Impact Report* 22 (2021), https://www.smithfieldfoods.com/getmedia/7ecf12e2-da3b-4d31-8796-d07e38b39e51/2021-Sustainability-Impact-Report.pdf.

B. The District Court's Decision

The district court rejected petitioners' effort to characterize Proposition 12 as extraterritorial. Pet. App. 31a. "Only * * * out-of-state producers who sell directly to California need to follow" Proposition 12's standards—and only for the pork sold in California. Pet. App. 31a. Putative "'upstream effects'" do not render the law "'necessarily extraterritorial.'" Pet. App. 30a.

The district court rejected petitioners' argument that Proposition 12's "incidental" effects on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "Supreme Court precedent establishes that there is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating." Pet. App. 34a (quotation marks omitted) (citing *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978)). The Commerce Clause "'protects the interstate market, not particular interstate firms.'" Pet. App. 34a (quoting *Exxon*, 437 U.S. at 127-128).

C. The Court of Appeals Affirms

The court of appeals agreed that petitioners failed to allege impermissible extraterritorial effects. Pet. App. 6a-16a. Proposition 12 is non-discriminatory and unlike the putatively extraterritorial laws—*e.g.*, "'price-control or price-affirmation statutes'"—this Court has invalidated. Pet. App. 8a (quoting *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 669 (2003)).

Proposition 12, moreover, regulates only in-state pork sales; it does not "regulate[ ] conduct that is wholly out of state." Pet. App. 10a; see Pet. App. 14a. Petitioners' predicted "upstream effects" would result from petitioners'

operational preferences—preferences the Commerce Clause does not privilege. Pet. App. 10a-11a.

Petitioners' complaint also failed to plead facts that plausibly support judicially imposing "'national uniformity in regulation.'" Pet. App. 14a-16a. And petitioners' *Pike* claim failed as well. Pet. App. 16a-19a. "[I]ncrease[d] compliance costs, without more, do not constitute a significant burden on interstate commerce." Pet. App. 17a.

SUMMARY OF ARGUMENT

I. The Commerce Clause is an express grant of authority to Congress. Petitioners attempt to extend the "dormant" aspect of that clause—an implied limit on state authority—well beyond the Commerce Clause's historical grounding.

A. The Commerce Clause's adoption was—and this Court's dormant Commerce Clause precedents are—driven by concerns about protectionism and discrimination. Proposition 12 concededly is neither protectionist nor discriminatory. It resembles no statute implicating such concerns.

B. Petitioners would construe the dormant Commerce Clause to guarantee uniform, nationwide regulation of the pork industry. But the Commerce Clause rarely preempts an entire field of regulation, and only where necessary to prevent interference with the movement of *instrumentalities* of interstate commerce, such as interstate trucks and trains. Proposition 12 does not regulate such instrumentalities. It is for Congress to decide whether uniform nationwide regulation is necessary.

While petitioners invoke "horizontal federalism" and "state sovereignty," their approach eviscerates both interests. It prevents California from deciding what appears on California grocery shelves. Instead, the preferences of

Iowa or other pork-producing States would project into California to control what Californians eat. Petitioners would impose a regime in which *all* States must abide by the least-restrictive measures adopted by *any* State. It threatens to displace the States' traditional police power in favor of national uniformity.

II.A. Petitioners' "extraterritoriality" arguments fail. Proposition 12 regulates only sales of pork *in California*. It says nothing about pork raised and sold in other jurisdictions. Producers may raise pork that complies with Proposition 12 for sale in California; pork that does not for sale elsewhere; or both. Petitioners' arguments about "material" upstream effects would create a form of *Pike* balancing that does not balance but instead ignores state interests. They threaten to broadly foreclose States from enacting their own standards.

B. Petitioners fail to plead facts plausibly showing Proposition 12 is somehow impermissibly extraterritorial. Their contentions that every producer will be forced to comply with Proposition 12, for all pigs, contradict their own allegations and basic economic principles.

C. Proposition 12 directly furthers California's in-state interests of protecting the health of Californians and eliminating inhumane and thus immoral products from the California marketplace. The complaint does not come close to pleading facts that preclude the State from making those judgments.

III.A.-B. Petitioners' *Pike* challenge fails. Petitioners allege no cognizable burden on interstate commerce. *Pike* does not protect an industry's preferred structure or methods. States may prevent immoral products from being trafficked within their territories. And California's health-and-safety purposes are substantial, as the USDA

recognizes. Petitioners have not proved those interests so irrational as to constitutionally immunize petitioners from compliance.

ARGUMENT

Petitioners seek to unmoor the Commerce Clause from its text, structure, and historical underpinnings to create a new and unbounded constitutional requirement of regulatory uniformity. Raising pigs "'by [its] nature,'" they assert, "'imperatively demand[s] a single uniform rule, operating equally'" throughout "'the United States.'" Pet. Br. 27 (quoting *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018)). That assertion would have been risible at the Nation's founding. It remains so today. The facts pleaded in the complaint do not come close to plausibly establishing it. Petitioners' professed preference to operate nationally uniform production lines does not constitutionally privilege that desire or invalidate California's authority to regulate what Californians buy and consume inside California.

Proposition 12 seeks to prevent California's markets from being used to traffic products its citizens deem immoral—food produced by subjecting animals to the most extreme and cruel confinement conditions—and contrary to Californians' health-and-safety interests. The notion that the Commerce Clause forecloses state authority to make such judgments is radically ahistorical. The Framers adopted the Commerce Clause to address state *protectionism* and commercial *discrimination* under the Articles of Confederation. Proposition 12 is neither protectionist nor discriminatory. It looks nothing like the statutes this Court has invalidated in the past.

Ignoring the Commerce Clause's origins in redressing discrimination and protectionism, petitioners' theory broadly threatens States' authority over products sold

within their territories. Virtually any state legislation governing in-state sales will affect out-of-state suppliers or threaten some disuniformity in otherwise "national markets." Pet. Br. 22. The Commerce Clause's response is not to deem such prohibitions "extraterritorial" and therefore prohibited. It is: "[W]elcome to the American federal system, where companies that do business with people who are in multiple states must comply with the laws of those multiple states." Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, Tex. L. Rev. at 26 (forthcoming), https://ssrn.com/abstract=4142647.

Petitioners' contrary view sets any notion of "extraterritoriality" on its head. Petitioners would deny California authority to decide standards for pork sold *in California*, for *Californians* to consume, whenever the pork originates elsewhere. They would instead project Iowa's (or other States') standards into California to control what ends up on California grocery shelves.

Petitioners' argument reduces to a distorted version of balancing under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). But the supposedly "excessive" burden they allege is not "on interstate commerce" but on their desire to operate (when convenient) without regard to state product standards. They wrongly downplay California's compelling interest in ridding its markets of products deemed immoral and harmful to public health—public health concerns reflected in proposed USDA regulations.

I. Petitioners Seek To Dramatically Expand The Dormant Commerce Clause Beyond Its Text And Origins

"The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination." *Wayfair,* 138 S. Ct. at

2093-2094. Petitioners concede that Proposition 12 neither is protectionist nor discriminates against out-of-state goods. Pet. Br. 2 n.2. Nor does Proposition 12 impose requirements for pork products made and sold outside California. Petitioners are therefore forced to recharacterize the dormant Commerce Clause as an unwritten super-preemption provision that precludes States from enacting non-protectionist regulations within their own territories when industry participants prefer an undifferentiated "nationwide market." History, precedent, and federalism principles foreclose that view.

A. Text and History Confine the Commerce Clause Principally to Eliminating Discrimination and Protectionism

The Commerce Clause provides that "Congress shall have Power * * * [t]o regulate Commerce * * * among the several States." U.S. Const., Art. I, § 8, cl. 3. That language *grants* authority *to Congress* over *interstate* commerce. It is not naturally read to "limit the power of States to regulate commerce" within their own territories. *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). When the Constitution limits state authority over particular aspects of commerce, it does so expressly. See, *e.g.*, U.S. Const., Art. I, § 10 ("[I]mpairing the Obligation of Contracts").

This Court has nonetheless "interpreted the Commerce Clause as an implicit restraint on state authority" in limited circumstances. *United Haulers*, 550 U.S. at 338. That "so-called 'dormant' aspect of the Commerce Clause," *ibid.*, is not a license to override States to satisfy industry preferences. The Framers adopted the Commerce Clause to address a specific source of disunion under the Articles of Confederation—the States' practice of "discriminating against one another's trade, thus under-

mining one of the principal benefits of a common economic union." Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* 151 (2016). The Clause's goal was to "curb[ ] state protectionism" and discrimination. *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2460 (2019). The scope of any *inferred* limit on in-state regulatory authority should be consonant with that historical purpose.

1. Under the Articles of Confederation, Rhode Island taxed "New-England rum." Act of Feb. 1783, R.I. Acts, at 45. Virginia imposed duties on imported goods, Act of Nov. 1781, Va. Acts, ch. 40, § 6, at 511, extending them to "vessels coming within this State from any of the United States," Act of May 1782, Va. Acts, ch. 39, § 14, at 164. Connecticut "laid heavier duties on imports" from Massachusetts than from Great Britain. Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), *in* 2 *The Writings of James Madison* 218 (G. Hunt ed. 1901); see Klarman, *supra*, at 23-24; *Dep't of Revenue* v. *Davis*, 553 U.S. 328, 363 (2008) (Kennedy, J., joined by Alito, J., dissenting) ("Under the Articles of Confederation the States enacted protectionist laws.").

Edmund Randolph warned that such protectionism had prompted retaliatory measures, leading to "jealousy, rivalship, and hatred." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 82 (Jonathan Elliot ed. 1836). Hamilton warned that States' protectionist "regulations of trade" could lead to "reprisals" and "war[ ]." *The Federalist* No. 7, at 63 (Clinton Rossiter ed. 1961). Concerns about protectionism and discrimination permeate the debates leading to the Constitution's adoption. See, *e.g.*, James Madison, *Vices of the Political System of the United States* (1787), *in* 2 *Writings of James Madison*, *supra*, at 361-362; *The Federalist* No.

22, at 144 (Hamilton); Statement of Gouverneur Morris (Aug. 21, 1787), *in* 4 *Writings of James Madison*, *supra*, at 259; *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994). Concerned about States' "Discrimination in favour of their Own Citizens," Pennsylvania implored the Annapolis Convention to address state duties "upon Goods imported in Vessels" from "other parts of the Union * * * greater than those laid on Goods imported in Vessels belonging to the enacting State." Letter from Tench Coxe to Virginia Commissioners (Sept. 13, 1786), *in* 9 *The Papers of James Madison* 124-126 (Robert A. Rutland et al. eds. 1975).

As Madison explained, the Commerce Clause thus "grew out of the abuse of the power by the importing States in taxing the non-importing." Letter from James Madison to J. C. Cabell (Feb. 13, 1829), *in* 3 *Records of the Federal Convention of 1787*, at 478 (Max Farrand ed. 1911); see Statement of Charles Pinckney (Feb. 14, 1820), in 3 *Records of the Federal Convention*, *supra*, at 444. The Clause could "relie[ve] * * * the States which import and export through other States from the improper contributions levied on them by the latter," and the "unceasing animosities" those levies "nourish[ed]." *The Federalist* No. 42, at 267-268 (Madison). Scholarship on that history is extensive and overwhelming.[4]

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[4] See, *e.g.*, Grant Nelson & Robert Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations But Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1, 23 (1999); Brandon Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 60 (2005); Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1093 (1986); Jack Goldsmith & Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 788 (2001).

Petitioners contend that the Commerce Clause targeted "'the tendencies toward economic Balkanization that had plagued relations * * * among the States.'" Pet. Br. 23 (quoting *Hughes* v. *Oklahoma*, 441 U.S. 332, 325-326 (1979)). But petitioners overlook that the Clause was directed to a specific threat: *protectionist and discriminatory* legislation. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 475 (1941). Federal control over interstate commerce was mentioned *nine times* during the Convention. *Id.* at 470-471 & nn.169-175 (citing 2 *Records of the Federal Convention*, *supra*, at 308, 360-361, 418, 441, 451-452, 504, 588-589). *All nine* times, speakers noted that it would protect against "hostile" or "discriminatory commercial regulations by states," such as "export duties" and "tolls on * * * interior waterways." *Ibid.*

Petitioners' soundbites from Framing-era sources, Pet. Br. 23-25, do not suggest otherwise. Petitioners' own amici invoke historical evidence that the Framers targeted protectionist and discriminatory legislation. *E.g.*, Chamber of Commerce Br. 4, 10-13. They assert other concerns (*e.g.*, "extraterritorial measures," *id.* at 4), but offer zero historical support. Petitioners invoke Madison's supposed concern that "allowing states to impose requirements on commercial actors beyond their borders 'tends to beget retaliating regulations.'" Pet. Br. 24 (quoting Madison, *Vices*, *supra*, at 363). But the phrase "allowing states to impose requirements on commercial actors beyond their borders" originates with petitioners, not Madison. The actual quote states that the "practice *of many States* in *restricting the commercial intercourse* with other States," by treating other States' "productions and manufactures *on the same footing with those of*

foreign nations, * * * tends to beget retaliating regulations." Madison, *Vices*, *supra*, at 363 (emphasis added). Madison was thus addressing protectionism and discrimination, such as "Virginia restricting foreign vessels to certain ports," or Maryland's "favorit[ism] of vessels belonging to her *own citizens*." *Id.* at 362.

Congress's Commerce Clause authority is not limited to overcoming protectionism. But petitioners invoke the Commerce Clause as itself impliedly limiting state authority over sales within their own boundaries. If the Commerce Clause is to be read as imposing such a limit—despite arguments it should not[5]—that "dormant" aspect should not be extended beyond cases like those the Clause was designed to address.

2. This Court's early dormant Commerce Clause cases confirm that. Non-protectionist state laws were routinely upheld despite interstate effects. In *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851), for example, the Court upheld pilotage fees where "Pennsylvania d[id] not give a preference to the port of Philadelphia." *Id.* at 314-315. In *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1868), the Court upheld a statute where "[t]here [was] no attempt to discriminate injuriously against the products of other States." *Id.* at 140; see Frederick H. Cooke, *Commerce Clause of the Federal Constitution* 119-122 nn.23-25 (1908) (collecting cases).

Absent discrimination, the States' traditional police powers were upheld despite potential for "considerable

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[5] *Hillside Dairy Inc.* v. *Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., concurring- and dissenting-in-part) ("'no basis in the text of the Constitution'"); *Tyler Pipe Indus., Inc.* v. *Wash. State Dep't of Revenue*, 483 U.S. 232, 262-263 (1987) (Scalia, J., concurring- and dissenting-in-part) ("no conceivable basis in the text" or the "historical record").

influence on commerce" outside the regulating State. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824); see, *e.g.*, *Mayor of New York* v. *Miln*, 36 U.S. (11 Pet.) 102 (1837) (state law requiring passenger identification lists for ships from other jurisdictions). As Justice Bushrod Washington observed, the Commerce Clause does not, absent conflicting federal law, "impair the right of the state governments to legislate, in such manner as in their wisdom may seem best." *Corfield* v. *Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230). "From the beginning of the Union, the States had woven a network of regulatory measures" that were permissible because they were not protectionist. Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 51 (1937).

By contrast, discriminatory or protectionist laws have been invalidated. See *Welton* v. *Missouri*, 91 U.S. 275, 277-283 (1876) (discriminatory law on sellers of out-of-state goods); *Gibbons*, 22 U.S. (9 Wheat.) at 209 (suggesting invalidity of state-granted monopoly over navigable waters under Commerce Clause but invoking federal preemption); *Plumley* v. *Massachusetts*, 155 U.S. 461, 468-471 (1894) (collecting cases).

3. "[M]odern" Commerce Clause precedent is likewise "driven by concern about 'economic protectionism.'" *Davis*, 553 U.S. at 337. The primary "extraterritoriality" cases petitioners invoke—*Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Authority*, 476 U.S. 573 (1986); and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989)—all involved protectionism. See *Energy & Env't Legal Inst.* v. *Epel*, 793 F.3d 1169, 1172-1173 (10th Cir. 2015) (Gorsuch, J.); *Am. Beverage Ass'n* v. *Snyder*, 735 F.3d 362, 380-381 (6th Cir. 2013) (Sutton, J., concurring).

For example, *Baldwin* invalidated a New York statute requiring milk sold in the State to have been purchased from suppliers at a minimum price, even if the purchase from suppliers occurred outside New York. 294 U.S. at 518-519 & n.1. That law was protectionist: It sought "to promote the economic welfare" of New York farmers by "guard[ing] them against competition with the cheaper prices of Vermont." *Id.* at 522. This Court explained that requiring purchases in other States be at a minimum price, as a condition of accessing New York markets, was no different than imposing the tariffs the Framers found anathema: It "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521.

The price-affirmation statutes in *Brown-Forman* and *Healy* similarly sought to "control * * * prices in other States" to force those States' "producers or consumers" to "surrender whatever competitive advantages they may possess." *Brown-Forman*, 476 U.S. at 580, 583; see *Healy*, 491 U.S. at 331-340. Those regulations, too, amounted to "[e]conomic protectionism," *Brown-Forman*, 476 U.S. at 580; see *Healy*, 491 U.S. at 326, 340 ("discriminat[ory]" statute intended to prevent "residents" from "cross[ing] state lines to purchase" from out-of-state retailers). If enacted by multiple States, such price restraints threatened "price gridlock," "short-circuiting * * * normal pricing decisions based on local conditions." *Healy*, 491 U.S. at 340.[6]

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[6] Petitioners identify only three supposed "extraterritoriality" cases not explicitly about price controls. Pet. Br. 21-22 n.8. *Carbone* invalidated a *discriminatory* ordinance requiring waste treatment at a "transfer station" inside the municipality. 511 U.S. at 386. Requiring in-state treatment "discriminate[d] against interstate commerce" by "depriv[ing] out-of-state businesses of access to" that business. *Id.* at

This Court has declined to extend those cases to laws that do not present discrimination or protectionism risks. In *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003), this Court refused to enjoin a Maine law requiring manufacturers selling drugs in Maine to offer rebates or face "prior authorization requirements" in Maine's Medicaid program. *Id.* at 654. The Court did so despite the argument that nearly "all of their prescription drug sales occur outside of Maine." *Id.* at 656. "[U]nlike [the] price control or price affirmation statutes" in *Baldwin* and its progeny, Maine's law did "'not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect.'" *Id.* at 669. It did not "'insist that manufacturers sell their drugs to a wholesaler for a certain price'" or tie "'the price of [Maine's] in-state products to out-of-state prices.'"

389-390. Indeed, this Court upheld a "quite similar" ordinance requiring processing at a government facility, "while treating all private companies exactly the same." *United Haulers*, 550 U.S. at 334, 342. The critical element in *Carbone* thus was not supposed "restrictions" beyond the municipality's "jurisdictional bounds," Pet. Br. 26 (quoting *Carbone*, 511 U.S. at 393)—the ordinance upheld in *United Haulers* had the same effect—but the enactment's *protectionist* nature. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), concerned interference with the "interstate movement of trains"—an instrumentality of interstate commerce, *id.* at 779—not implicated here. Pp. 21-22, *infra*. In *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), a plurality would have deemed Illinois's effort to "regulate directly and to interdict" corporate takeover offers that "would not affect a single Illinois shareholder" impermissibly extraterritorial. *Id.* at 642-643. But a majority later rejected a challenge to a similar Indiana restriction that limited its application to Indiana corporations partially owned by Indiana shareholders, even though "most" corporate takeovers were "launched by offerors outside Indiana." *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 73, 88, 93 (1987). Insofar as the *Edgar* plurality invoked incidental effects outside Indiana, its rationale does not survive *CTS*.

Ibid. Consequently, the "rule * * * applied in *Baldwin* and *Healy*" was "not applicable." *Ibid.* The same is true here.

Even *Pike* "balancing" cases are best understood as addressing discrimination and protectionism concerns. The "most serious concern identified" in *Pike* itself was "economic protectionism." *Ark. Elec. Co-op. Corp.* v. *Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 394 (1983). *Pike* concerned an Arizona decision that promoted Arizona industry—requiring fruit packaging in Arizona—at the expense of other States. 397 U.S. at 138-140, 144. Although cases following *Pike* have considered ostensibly "even-handed[]" state laws, *id.* at 142, close "examination * * * support[s] the conclusion that the Court has looked for discrimination rather than for baleful effects," *Amanda Acquisition Corp.* v. *Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989) (Easterbrook, J.); see Richard H. Fallon, Jr., *The Dynamic Constitution* 311 (2d ed. 2013) (balancing inquiry designed to "'smoke out' a hidden" protectionism). "As long as a State's" law "does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause." *CTS*, 481 U.S. at 95-96 (Scalia, J., concurring).

A broader view of *Pike* would be anomalous. Racial minorities cannot obtain searching review of state laws by showing only disparate impact, or that burdens exceed benefits. See, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 239 (1976); cf. *Emp. Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 886 (1990). "[I]t is hard to see any justification for providing substantially greater judicial protection to interstate businesses" under an implied dormant Commerce Clause than against categories of discrimination the Constitution expressly proscribes. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 Const. Comment. 395, 404 (1986).

Petitioners concede that Proposition 12 is not a "protectionist state statute[ ] that discriminate[s] against interstate commerce." Pet. Br. 2 n.2. It does not seek to "neutralize advantages" belonging to out-of-state commerce. *Baldwin*, 294 U.S at 527. This Commerce Clause challenge to Proposition 12 thus should be met at the very least with extreme skepticism.

B. Petitioners Would Radically Expand the Dormant Commerce Clause

Petitioners urge that even non-discriminatory state laws are "*per se* invalid" if they "prevent[ ] the orderly operation of an unobstructed nationwide pork market." Pet. Br. 19-20. Raising and slaughtering pigs, petitioners say, is a "nationwide market[ ] for which regulation, if any, must be at the federal level to ensure uniformity and allow the free flow of trade." Pet. Br. 22; see Pet. Br. 26-27, 31-33. Petitioners' absurd view that the *Constitution itself* requires uniform federal control over pig husbandry and slaughter is profoundly ahistorical.

1. This Court "has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede *the flow* of interstate goods"—their physical movement—by disrupting *instrumentalities* of interstate commerce like trains and trucks. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 128 (1978) (emphasis added); see *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959) (invalidating commercial-truck mudflap regulations due to "heavy burden * * * on the interstate movement of trucks"). *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), on which petitioners rely, Pet. Br. 26, 31-32, proves the point.

Sullivan involved trains—the quintessential instrumentality of interstate commerce. 325 U.S. at 771. Incon-

sistent regulation concerning train length would have required "interstate trains * * * to be broken up and reconstituted as they enter[ed] each state." *Id.* at 773. That would "prevent[ ] the free flow of commerce by delaying it." *Id.* at 779. The Court distinguished valid state laws that, despite "affecting the commerce," did not "interfere[ ] with the interstate *movement* of trains." *Ibid.* (emphasis added); see *N.Y., N.H. & H.R. Co.* v. *New York*, 165 U.S. 628, 631 (1897) (upholding state law regulating conditions of train cars passing through).

But pigs aren't trains or trucks. Railroads and trucks are "indispensable" to *others* "engaged * * * in commercial pursuits." *W. Union Tel. Co.* v. *Texas*, 105 U.S. 460, 464 (1881). Locally regulating the sale of pork products within California does not affect the "free flow" of goods generally. *Sullivan*, 325 U.S. at 779. This Court's precedents concerning interstate "transportation service[s]," *id.* at 773, do not justify judicially imposing uniform nationwide markets for ordinary consumer products. Petitioners' effort to conscript the dormant Commerce Clause as an enforcer of "'national uniformity,'" Pet. Br. 26 (quoting *Sullivan*, 325 U.S. at 767), threatens to broadly strip States of regulatory authority. If pork production by its "'nature imperatively demand[s] a single uniform rule, operating equally on the commerce of the United States,'" Pet. Br. 27 (quoting *Wayfair*, 138 S. Ct. at 2090), it is difficult to conceive of an industry that, "[i]n today's interconnected marketplace," *Epel*, 793 F.3d at 1173, would not.

2. Whether a particular product market should be subject to uniform federal regulation—or left unregulated—is a question for Congress, not courts. The Constitution gives "Congress" the "Power * * * [t]o regulate Commerce * * * among the several States." U.S. Const., Art.

I, §8, cl. 3. Congress can investigate and determine whether a preemptive federal regime is appropriate. *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1480 (2018). Such determinations "require a policy decision based on political and economic considerations." *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 279 (1978). This Court should not legislate uniform standards—even if *Congress* would be "amply justif[ied]" in enacting "legislation requiring all States to adhere to uniform rules." *Id.* at 280.

Petitioners' brief nonetheless reads like a whitepaper advocating a unitary federal regime. See Pet. Br. 3-6, 8-16, 26-35, 39-48. Presented with such arguments, Congress has repeatedly *declined* to enact legislation preempting state laws that, like Proposition 12, impose "a standard or condition on the production or manufacture of any agricultural product" more demanding than "the laws of the State * * * in which such production or manufacture occurs." H.R. 4879, 115th Cong. §2(a) (2018); see H.R. 272, 116th Cong. §2 (2019); H.R. 3599, 115th Cong. §2(a) (2017); H.R. 687, 114th Cong. §2(a) (2015). While petitioners insist Proposition 12 is "incompatible with the national policy proclaimed in the Pork Promotion, Research, and Consumer Information Act," Pet. Br. 32, they never assert preemption. And with reason: That Act *disclaims* any effort to "provide for control of the production of pork" nationwide. 7 U.S.C. §4801(b)(3)(B). It is not a "fundamental purpose[]" of the dormant Commerce Clause, Pet. Br. 22, to deliver petitioners "victories that they failed to obtain through the political process," *United Haulers*, 550 U.S. at 355 (Thomas, J., concurring in the judgment).

3. Having argued that the dormant Commerce Clause's "fundamental purpose[]" is to displace state regulation and create uniform "nationwide markets," peti-

tioners reverse course to argue that one of the Clause's "fundamental purposes" is to "protect[] the dignity and sovereignty of all States." Pet. Br. 22. Invoking "horizontal federalism," Pet. Br. 20, they urge that "one State" cannot "impos[e] its policy choices on another," Pet. Br. 22. But petitioners defy that principle as soon as they articulate it, positing a regime where *other* States project their laws into California to displace California's decisions about the food that appears on California grocery shelves.

"The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington* v. *Texas*, 441 U.S. 418, 431 (1979). Acting "as laboratories," *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009), States may "try novel social and economic experiments" without "the rest of the country['s]" approval. *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). California has determined the pork—safer and more humane—that will appear on the State's grocery shelves. That California imports most of its pork changes nothing. Pet. Br. 29. In *Exxon*, this Court upheld a Maryland statute regulating in-state gas-station ownership even though *every* affected business was based outside Maryland. 437 U.S. at 125-129; see *CTS*, 481 U.S. at 88.

Petitioners urge that Proposition 12's "practical effect * * * is to override" the laws of States like Iowa that permit practices that do not satisfy Proposition 12. Pet. Br. 31. Not so. Farmers in those States may raise pigs however they choose; only pork sold in California must meet California standards. The Michigan, Ohio, and Rhode Island laws petitioners cite, moreover, merely *permit*, but do not *mandate*, the confinement practices Proposition 12 addresses. Pet. Br. 31. Farmers in those States that choose to produce pork consistent with Propo-

sition 12's standards do not violate the less-stringent *minimum* standards their States allow. Laws that "create additional, but not irreconcilable, obligations are not considered to be 'inconsistent.'" *Instructional Sys., Inc.* v. *Comput. Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994).

Petitioners' "horizontal federalism" is highly selective. California has decided to regulate its markets by ridding them of pork that it finds immoral and contrary to "the health and safety of California consumers." Prop. 12, § 2. Petitioners assert that, because pork producers in Iowa and other States wish to sell their product in California, *those States'* more lenient standards "override" *California's* "policy choices." Pet. Br. 31. In their view, Iowa decides what can be sold in California. What of California's "sovereign dignity"? *Ibid.* Under petitioners' approach, the dormant Commerce Clause would command that the least-restrictive regulation adopted by any State must prevail in every State so as to avoid "inconsistent regulations." Pet. Br. 30.

That is not federalism, but its opposite. "[I]t is a foundational principle of our federal system that states differ in their values and policy preferences, and thus can and do regulate differently." Goldsmith & Volokh, *supra*, at 9. The "commerce clause" does not "dictate[ ]" a "result" that "would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them." *Robertson* v. *California*, 328 U.S. 440, 460 (1946).

Petitioners challenge a law they consider economically undesirable. "There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause," but the Court "should not seek to reclaim that ground for judicial

supremacy under the banner of the dormant Commerce Clause." *United Haulers*, 550 U.S. at 347 (plurality); *id.* at 348-349 (Scalia, J., concurring-in-part).

II. Petitioners' "Extraterritoriality" Challenge Fails

Petitioners' contention that Proposition 12 is extraterritorial in "practical effect" seeks to reformulate an insubstantial *Pike* balancing claim into a putative "*per se*" Commerce Clause violation. Pet. Br. 19, 21. Petitioners concede that Proposition 12 evenhandedly regulates sales in California. So they assail Proposition 12's "effects" in other States. Pet. Br. 2 n.2, 3, 27-35. And they denigrate California's asserted local interests. Pet. Br. 36-43. That is no different from petitioners' conception of *Pike* balancing—their insistence that Proposition 12's burdens on their operations exceed local benefits. Pet. Br. 44.

Petitioners' effort to reformulate *Pike* balancing into a supposed *per se* violation requires them to rewrite their complaint and the law. The complaint simply fails to plead facts showing impermissible extraterritoriality. And petitioners must reformulate the law around "four purposes" so unbounded as to threaten a vast range of otherwise unquestionably legitimate regulations.

A. Petitioners' Proposed Theory of Extraterritoriality Defies Law and Logic

1. Petitioners do not begin their analysis with the Constitution's text, structure, or history. They instead reformulate this Court's cases as revolving around four abstract "purposes." Pet. Br. 22-27. Petitioners' "purposes," however, are crafted to deny States authority to impose standards that differ from those in other jurisdictions. Petitioners begin with the goal of "avoiding" economic "Balkanization." Pet. Br. 22-25. If that defined

the Commerce Clause's scope, States would lack authority to impose their own standards for products sold within their borders that originate elsewhere. But they undeniably can—and have from the Nation's inception.[7] The Commerce Clause limits economic balkanization *not* by demanding that States regulate identically, but by barring protectionist or discriminatory legislation—and authorizing Congress to regulate.

Insofar as the Commerce Clause safeguards state "sovereignty"—petitioners' second "purpose," Pet. Br. 22—that is a two-way street. California cannot dictate standards for pork produced and consumed in Iowa. But Iowa's more lax standards cannot displace California's sovereign authority to enact non-discriminatory rules governing food sold within California. Yet that is precisely what petitioners propose—that the dormant Commerce Clause inject Iowa's standards *into California* to displace *California* law determining what appears on *California* grocery shelves. Businesses operating in multiple jurisdictions have long had to meet the standards for *each* jurisdiction in which they sell products. That in-state standards apply evenhandedly to products from out-of-state does not convert those standards into efforts to regulate economic transactions that "'tak[e] place wholly outside the State's borders.'" *Healy*, 491 U.S. at 336.

Petitioners' remaining two "purposes"—protecting "nationwide markets" and preventing States from externalizing "burdens," Pet. Br. 22-23, 26-27—are so capacious as to nullify state regulation for *any* product with an interstate production chain—*i.e.*, most goods in today's

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[7] Act of Feb. 13, 1797, N.J. Laws, ch. 630, at 166 (prohibiting sale of tickets for any lottery "made in this State or elsewhere"); Act of Dec. 26, 1792, Va. Acts, ch. 63, at 173-175 (imposing packing requirements for barrels of various products "whether made here or imported").

economy. Pp. 21-22, *supra*. Nothing about California's citizen-enacted Proposition 12 denies "citizens of other States" a "voice in the enactment" of laws within their own States. Pet. Br. 22. Proposition 12 regulates only pork sold *in California*. Iowa voters may support, and their legislators may adopt, whatever standards they wish for pork sold in Iowa.

2. Proposition 12, by its terms, applies only to pork sold (or raised) "within the state." Prop. 12, § 3. No pork producer outside California is required to comply. For the 87% of the domestic pork market outside California, Proposition 12 has nothing to say. Petitioners are therefore reduced to arguing that this Court's cases invalidate any law with "material extraterritorial effects." Pet. Br. 23, 27. This Court has never applied such a standard. Nor can it be correct. It reduces to *Pike* balancing without the balancing: Petitioners would have courts examine the legislation's effect while disregarding the State's corresponding interest. That creates "serious problems of overinclusion" and "offers no limiting principle." *Epel*, 793 F.3d at 1175.

"[I]n a modern economy just about every state law will have some 'practical effect' on extraterritorial commerce." *Online Merchants Guild* v. *Cameron*, 995 F.3d 540, 559 (6th Cir. 2021). Petitioners' test would threaten them all. States might lack authority to ban unsafe product designs if out-of-state manufacturers would have to retool to comply. States could be precluded from requiring a percentage of electricity sold within the State to come from renewable sources whenever the electricity is generated elsewhere. *Epel*, 793 F.3d at 1171. State price-gouging laws would fall with respect to out-of-state online sellers. *Online Merchants*, 995 F.3d at 553-556. So too would state usury laws with respect to out-of-state lenders. *TitleMax*

of Del. v. *Weissmann*, 24 F.4th 230, 237-241 (3d Cir. 2022), cert. denied, 2022 WL 2295563 (U.S. June 27, 2022). Petitioners threaten to confine States' authority over sales within their borders to the few matters with *no* incidental out-of-state impact. The Court should reject that "audacious invitation." *Epel*, 793 F.3d at 1175.

3. Invoking dictum from *Baldwin*, petitioners attempt to analogize Proposition 12 to hypothetical state laws banning goods that are "not produced by union members" or made by workers not paid a "minimum wage." Pet. Br. 33. Such laws are problematic, however, not because they are extraterritorial, but because they are protectionist: They protect local economic interests from out-of-state products made without the costs of union or better-paid labor. *Baldwin* decried "condition[ing] importation upon proof of a satisfactory wage scale" because it protects in-state concerns from out-of-state competition no less than "customs duties" equal to the resulting cost differences. 294 U.S. at 524, 527; see pp. 17-18, *supra*. Given the problems such laws present, they may warrant condemnation, despite proffered justifications, because "the challenged conduct is almost always likely to prove problematic and a more laborious inquiry isn't worth the cost." *Epel*, 793 F.3d at 1172.

Baldwin itself distinguished statutes like Proposition 12 from cases like petitioners' hypotheticals. In *Baldwin*, New York defended its price floor for out-of-state transactions as promoting farmers' economic security, thereby eliminating "tempt[ation] to save the expense of sanitary precautions." 294 U.S. at 523. The Court found that rationale too attenuated. *Id.* at 524. It observed, however, that New York could address "the evils springing from uncared for cattle * * * by measures of repression more direct and certain." *Ibid.* New York could "exclude[ ]"

milk from other States "if necessary safeguards have been omitted." *Ibid.* Proposition 12 does just that: It "excludes" from California's markets foods that—as products of extreme and unsanitary confinement—are immoral and threaten public health. Petitioners' hypotheticals about laws targeting attenuated out-of-state economic transactions are far afield.

Proposition 12 does not regulate wholly out-of-state economic transactions. It is not a price-control or price-affirmation statute that tethers California prices to out-of-state rates. It regulates only pork sold in California without regard to sales in other States. Nor does Proposition 12 "punish" out-of-state conduct. Chamber Br. 2, 21, 23. Proposition 12 does not bar producers from selling non-compliant pork in *other* markets as a condition of accessing California's market. Proposition 12 says nothing about out-of-state production of pork for sale outside California. It does not "directly" regulate "wholly out-of-state conduct." Pet. App. 29a. No individual rights are imperiled. Californians are free to travel to other States and consume non-compliant pork. Whatever the Commerce Clause's bounds, Proposition 12 does not cross them.[8]

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[8] Petitioners urge that "proposed regulations" would permit "California's agents" to inspect farms seeking to certify Proposition 12 compliance. Pet. Br. 30; Pet. Reply App. 38a-39a. Those regulations are not final and not properly before the Court. *Nat'l Park Hosp. Ass'n* v. *Dep't of Interior*, 538 U.S. 803, 807-808 (2003). Regardless, the proposed regulations permit certification by non-governmental third parties, many used for myriad programs (*e.g.*, "organic") already. Pet. Reply App. 28a-29a; Pet. App. 77a. And the Court has upheld similar laws. See *Rasmussen* v. *Idaho*, 181 U.S. 198, 201 (1901) (upholding law authorizing governor of Idaho "to investigate the condition of sheep in any locality," and restrict "their introduction into the State" as deemed "necessary").

4. Petitioners repeatedly suggest that Proposition 12's "practical effect" is to control out-of-state conduct. Pet. Br. 27-35. This Court has never invalidated a state law on that basis. Incidental effects of evenhanded laws are at most evaluated under *Pike*. Regardless, state enactments do not "directly" or "inevitabl[y]" regulate out-of-state conduct where—as here—the "practical" effect on interstate commerce arises from industry participants' "independent decisions" regarding how to "structure[ ]" their "marketplace." *Online Merchants*, 995 F.3d at 555.

Petitioners state that "[d]ownstream market participants" (*e.g.*, packers) will "insist on compliance" nationwide to "avoid the difficulty of tracing and segregating pork products." Pet. Br. 46; see Pet. Br. 16 ("buyers of market hogs everywhere will demand that their suppliers comply"). Those "downstream market participants" are petitioners' members. When petitioners urge that "farmers everywhere will be required to conform their *entire* operations"—even for pork not destined for California, Pet. Br. 28—they essentially threaten a coordinated purchasing boycott against non-compliant pork (despite their members' public representations that they have capacity and incentive to segregate compliant and non-compliant pork, see pp. 4-6, *supra*).

"The dormant commerce clause" may "prevent[ ] a state from 'project[ing] its legislation' into another state, but it does not invalidate a state law when some private third-party has done the projecting of its own accord." *Online Merchants*, 995 F.3d at 559 (quoting *Baldwin*, 294 U.S. at 521) (citation omitted). Petitioners' threat to require that 100% of pork production satisfy Proposition 12—including pork not covered by Proposition 12—cannot create a Commerce Clause problem. While Petitioners

assert that Proposition 12 "is incompatible with th[eir] production model," Pet. Br. 28, this Court has rejected the suggestion that the Commerce Clause "protects" any "particular structure or methods of operation." *Exxon*, 437 U.S. at 127. Petitioners describe the pork market as highly concentrated, with oligopolist processors operating uniformly throughout the Nation. Their chosen market structure does not truncate state regulatory authority.

Petitioners' theory also leads to bizarre results. If Rhode Island had enacted Proposition 12, petitioners would not claim nationwide impacts. It is only the size of California's market that leads petitioners to make that claim. Pet. Br. 8, 14-16, 19, 28. But "all States enjoy equal sovereignty." *Shelby County* v. *Holder*, 570 U.S. 529, 535 (2013). California does not lose authority to regulate its own markets because of its size.

B. Petitioners Never Plead Facts Plausibly Showing Proposition 12's Invalidity

Regardless, petitioners' *pleadings* must plausibly show a Commerce Clause violation, properly accounting for alternative explanations. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567-568 (2007). But petitioners plead themselves out of a case.

1. Despite petitioners' repeated arguments here, their complaint nowhere alleges that every packer will demand that every pig it processes comply with Proposition 12. To the contrary, the economist affidavit attached to petitioners' complaint asserts that some packers will buy Proposition 12-compliant pigs "*for at least as much of their production* as is required *to supply their California sales*." Pet. App. 343a (¶ 4(c)) (emphasis added). Representing that it "can do multiple programs simultaneously, including" one that complies with Proposition 12, NPPC member Tyson describes Proposition 12's impact as "not

significant"; others have represented similarly. See pp. 5-6, *supra*. Petitioners' complaint repeatedly acknowledges that some producers do "not plan to comply with Proposition 12," even if they will "lose the opportunity to sell * * * into supply chains bound for the California market." Pet. App. 165a (¶ 58(g)). Petitioners cannot plausibly establish that *all* pork will have to meet Proposition 12's standards when "the complaint itself gives reasons" that will not happen. *Twombly*, 550 U.S. at 568.

Petitioners' contrary arguments defy basic economics. It is irrational to assume every packer would incur the increased costs of Proposition 12 compliance—allegedly "$13 per pig," Pet. Br. 29—for 100% of their pork if California represents 13% of the market. Doing so would forsake a cost advantage in the other 87% of the national market. Sellers "compete for business by offering buyers lower prices." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979). If some processors "insist on compliance" with Proposition 12, Pet. Br. 46, that "creates a profitable opportunity for competing processors *not* to comply"—and be more competitive outside California. Agric. & Res. Economists Br. 10. The complaint does not plausibly plead that California itself, or other domestic and foreign markets together, are too small for sufficient economies of scale. Farmers thus can decide how to house their sows based on which processors offer them greater profits. To establish plausibility, petitioners must address this "obvious alternative explanation" of Proposition 12's impact. *Twombly*, 550 U.S. at 567. They do not.

The complaint contradicts petitioners' predictions of nationwide price increases. Pet. Br. 15. The complaint's declarations aver that "markets" outside California "will not pay an increased price." Pet. App. 335a (¶ 19). Basic economic theory forecloses the contrary view. Agric. &

Res. Economists Br. 6. Because Proposition 12 applies only to "sale[s] within" California, Prop. 12, § 3, it "seems most obviously calculated to raise prices for *in-state* consumers," *Epel*, 793 F.3d at 1174. One of the complaint's declarations thus avers that Proposition 12 "adds cost to delivering pork *to California* consumers," causing them to "purchase less." Pet. App. 342a (¶ 3) (emphasis added).

2. Petitioners' allegations about the "difficulty of tracing and segregating pork products," Pet. Br. 46, are likewise implausible. The complaint itself confirms that petitioners could "carefully segregate products." Pet. App. 206a (¶ 299). It incorporates representations by NPPC's members that they would have to "segregate pigs that are the offspring of Proposition 12 compliant breeding sows from the offspring of sows that are not." See p. 4, *supra*.

The industry already traces and segregates pork to meet customer demand for organic, antibiotic-free, or other products. Barringer Br. 12-30. Federal regulations recognize that meat, including pork, is often marketed with "claims regarding the raising of animals," "organic claims," and claims about origin. 9 C.F.R. § 412.1(c), (e); see p. 4, *supra*. Recognizing that segregating pork based on sow-housing conditions is feasible, the USDA has enacted and now reproposed regulations clarifying that pork cannot be sold as "organic" unless the pigs were given "sufficient space and freedom to lie down, turn around, stand up, fully stretch their limbs, and express normal patterns of behavior." USDA Proposed Organic Rule, *supra*, at 106; pp. 2-3, *supra*. Packers can use existing tools to trace and segregate Proposition 12-compliant pork. Barringer Br. 30-35. Petitioners do not plausibly plead otherwise.

3. Gridlock concerns are likewise unsupported. Pet. Br. 30-32. The price-affirmation statute in *Healy* explicitly

tied in-state and out-of-state prices, such that "any reduction in either State would permanently lower the ceiling in both." 491 U.S. at 340. If other States have their own "sow housing requirements," Pet. Br. 30, producers can meet the most demanding, or tailor operations to local conditions and their chosen markets. That is not "gridlock." It is commonplace for producers of any product that serve "different communities with different local standards." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989).

C. Proposition 12 Regulates *In-State* Sales for Legitimate, *In-State* Purposes

Petitioners insist Proposition 12 is impermissibly extraterritorial because it "attempts to address perceived harms to animals in *other* States." Pet. Br. 40. But Proposition 12 and its voter guide defy that argument. They explain that Proposition 12 serves to (1) "eliminate inhumane and unsafe products * * * *from the California marketplace*" and (2) "reduce[ ] the risk of people being sickened by food poisoning." Pet. App. 202a (¶270) (emphasis added); see Prop. 12, §2. Petitioners' efforts (at 39-43) to denigrate those twin local benefits are at most relevant to *Pike* balancing. And ample evidence supports both in-state rationales. The USDA's latest organic proposal recognizes the potential for healthier products for human consumption. Petitioners do not come close to alleging the facts necessary to overcome them.

1. Petitioners never acknowledge the daunting burden they confront. In *Maine* v. *Taylor*, 477 U.S. 131, 140, 148 (1986), this Court upheld a facially *discriminatory* law against importing baitfish based on concerns about their potentially invasive effect. Maine, the Court held, need not "'sit idly by and wait * * * until the scientific community agrees'" about risks "'before it acts to avoid such

consequences.'" *Id.* at 148. Petitioners' insistence that California lacks "evidence" connecting "the risk of foodborne illness" to the "requirement that farms house sows with 24 square feet of space," Pet. Br. 42, is thus irrelevant (apart from its falsity). If *discriminatory* laws are permissible to address potential impacts on fish and seagrass in the face of "imperfectly understood * * * risks" that "may ultimately prove to be negligible," *Taylor*, 477 U.S. at 148, California can surely enact legislation to address the serious human health issues here. The Commerce Clause "'cannot be read as requiring the State'" to "'wait until potentially irreversible'" harm to its citizens' health "'has occurred or until the scientific community agrees on what'" practices "'are or are not dangerous before it acts to avoid such consequences.'" *Ibid.*; see *CTS*, 481 U.S. at 92; *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 469, 473 (1981) (crediting State's rationale if it is "'at least debatable'").[9]

The United States' insistence that States have "latitude to guard against 'imperfectly understood risks'" only where they have "introduced evidence or otherwise established a concrete basis to substantiate [their] law[s]," U.S. Br. 25, defies prior representations to this Court. A law's "*challengers*," the United States has explained,

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[9] Petitioners invoke cases involving protectionist laws disguised as health-and-safety regulations. Pet. Br. 41 (citing *Brimmer* v. *Rebman*, 138 U.S. 78, 82 (1891) (taxing meat slaughtered 100 miles from place of sale imposed "disadvantage on the products of other states"); *Minnesota* v. *Barber*, 136 U.S. 313, 322-323 (1890) (requiring that animals undergo in-state inspection before slaughter effectively barred imports of meat slaughtered elsewhere)). But Commerce Clause precedent has "long recognized a difference between economic protectionism * * * and health and safety regulation." *Fort Gratiot Sanitary Landfill, Inc.* v. *Mich. Dep't of Nat. Res.*, 504 U.S. 353, 365 n.6 (1992).

"bear the burden of negating 'every conceivable basis which might support it.'" U.S. Br. 13-14 in *United States* v. *Vaello-Madero*, No. 20-303 (June 7, 2021) (quoting *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)) (emphasis added). That position—which applies even where no findings accompany the enactment—is correct and principled. *Beach*, 508 U.S. at 313. The United States' contradictory position here is neither.

Regardless, respondents and amici have explained the serious health threats that Proposition 12 addresses. See, *e.g.*, C.A. Dkt. 36 at 1, 3, 11 n.2, 44-45, 50; C.A. Dkt. 48 at 10-15; Br. Amicus Pub. Health Ass'n et al. Proposition 12's text and the accompanying voters' guide expressly address that purpose. Indeed, petitioners' complaint acknowledges evidence *supporting* California's judgment: It admits that "studies suggest that lower stocking density correlates with lower salmonella rates among growing pigs." Pet. App. 228a (¶ 440). The complaint attempts to minimize that evidence by alleging the studies concern "growing pigs," not "sows." Pet. App. 226a-228a (¶¶ 422-441). But petitioners cannot second-guess California's reasonable inference—supported by peer-reviewed science—that extreme confinement exacerbates pathogen spread beyond that circumstance.

Studies show that offspring of sows subjected to extreme confinement in gestation crates suffer reduced immune resistance—"a weaker immunity barrier"—compared to other piglets. M. Kulok et al., *The Effects of Lack of Movement in Sows During Pregnancy Period on Cortisol, Acute Phase Proteins and Lymphocytes Proliferation Level in Piglets in Early Postnatal Period*, 24 Polish J. of Vet. Scis. 85, 90 (2021); see Xin Liu et al., *A Comparison of the Behavior, Physiology, and Offspring Resilience of Gestating Sows When Raised in a Group*

Housing System and Individual Stalls, 11 Animals 2076, at 5 (2021). That reduced resistance threatens food safety. USDA researchers found, for example, that piglets typically become colonized with *Campylobacter*—"one of the leading causes of human bacterial gastroenteritis"—"within a few hours of birth" and "remain carriers until slaughter." C.R. Young et al., *Enteric Colonisation Following Natural Exposure to* Campylobacter *in Pigs*, 68 Rsch. Vet. Sci. 75, 75-77 (2000). *Campylobacter* "carried in the intestinal tract of animals * * * can thus contaminate foods." *Id.* at 75.

Despite the United States' position here, the USDA recognizes that giving animals "sufficient space and freedom to lie down, turn around, stand up, fully stretch their limbs, and express normal patterns of behavior"—consistent with Proposition 12—has human-health implications. USDA Proposed Organic Rule, *supra*, at 106. Proposing that pork cannot be sold as "organic" absent such conditions, the USDA explained that providing sufficient space "supports the [animals'] natural behaviors" and thus "may be positively associated with improved health and well-being, may be better for the environment, and may result in *healthier livestock products for human consumption*." *Id.* at 12-13. Petitioners cannot explain why California cannot seek "healthier livestock products for human consumption" more broadly and not just for pork sold as "organic."

Petitioners' *ipse dixit* that "[g]eographic and temporal separation between sows and their offspring ensures that any disease * * * has disappeared before slaughter," Pet. Br. 48, defies science and USDA research. *Campylobacter* can be "most effectively controlled by intervention strategies on * * * breeding farms," precisely because it otherwise remains "until slaughter." Young et al., *supra*, at 77.

Petitioners fail to plead facts sufficient to foreclose California from addressing such risks within its borders. *CTS*, 481 U.S. at 92; *Taylor*, 477 U.S. at 148. And petitioners never explain why repeatedly moving infected pigs and intermixing them with others, Pet. Br. 10-12, reduces rather than spreads disease.

Petitioners' insistence that federal law already addresses any human health concerns, Pet. Br. 43, is absurd. An "estimated 525,000 infections, 2900 hospitalizations, and 82 deaths are attributed to consumption of pork" in the U.S. each year, Self et al., *supra*, at 2980, more than chicken or beef, Robert L. Scharff, *Food Attribution and Economic Cost Estimates for Meat- and Poultry-Related Illnesses*, 83 J. Food Prot. 959, 963-964 (2020). "[T]he Framers * * * designed a system in which the State and Federal Governments would exercise concurrent authority." *Printz* v. *United States*, 521 U.S. 898, 919-920 (1997). Absent preemption, California can act to protect "the health and safety of its citizens," *Taylor*, 477 U.S. at 151, whether or not other States "share" California's concerns, Pet. Br. 35.

Petitioners err in asserting that the California Department of Food and Agriculture ("CDFA") deems "the food-safety justification * * * baseless." Pet. Br. 42. CDFA recognizes growing scientific support for Proposition 12's standards. See Cal. Dep't Food & Agric., 15-Day Notice of Modified Text and Documents Added to the Rulemaking File Relating to Animal Confinement 74 (Nov. 30, 2021), www.cdfa.ca.gov/ahfss/pdfs/regulations/ACP15day CommentPeriodDocuments.pdf. It now recognizes that, even if science is uncertain, Proposition 12 is hardly "unreasonable" as a prophylactic. *Ibid.* CDFA's earlier statement that Proposition 12's standards are not "'based in specific peer-reviewed scientific literature,'" Pet. Br. 42

(quoting Pet. App. 75a), is incorrect as shown above (at 37-39). But "'peer-reviewed scientific literature'" is not the standard. Even for *discriminatory* regulation, States need not "wait * * * until the scientific community agrees." *Taylor*, 477 U.S. at 148. "It is not for" this Court "to resolve empirical uncertainties underlying state legislation"—much less when health is at stake. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60 (1973). Congress has banned medicines and pesticides until harm is disproven—until the product is *proven* safe and effective. 21 U.S.C. § 355; 7 U.S.C. § 136a. Surely California can address potential threats to health where the evidence at worst is uncertain. State and local governments at the vanguard of health-and-safety regulation are often later vindicated. See *Austin* v. *Tennessee*, 179 U.S. 343, 344-350 (1900) (Tennessee ban on cigarettes); *City of Philadelphia* v. *Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 116 (3d Cir. 1993) (Philadelphia's efforts to ban lead paint).

Experience shows the wisdom of acting now. In 2010, California prohibited in-state sales of eggs produced under extreme confinement conditions based on the concern that they "result in increased exposure to disease pathogens including salmonella." Cal. Health & Safety Code §§ 25995-25996. Since then, CDFA has found that "the scientific literature supporting the potential public health benefits related to egg-laying hens that are provided additional space * * * continues to increase." Pet. Reply App. 75a. Scientific studies have "repeatedly" found "'that packing animals in tiny, filthy cages increases the risk of food poisoning.'" Pet. App. 202a (¶ 272); see Pet. App. 228a (¶ 440). Absent allegations showing that California's concerns are not even debatable, Proposition 12 must be upheld.

Proposition 12 also addresses conditions associated with the emergence and spread of contagious zoonotic illnesses—and the resulting threat of pandemics. Pigs carry infectious diseases that can be transmitted to humans, including influenza, Nipah virus, and brucellosis. Jason R. Rohr et al., *Emerging Human Infectious Diseases and the Links to Global Food Production*, 2 Nature Sustainability 445, 451 (2019). There is "strong evidence" that extreme confinement conditions reduce immune resistance, creating greater opportunity for retransmission and mutation—"amplification"—yielding more transmissible and virulent strains and variants. Bryony A. Jones et al., *Zoonosis Emergence Linked to Agricultural Intensification and Environmental Change*, 110 Proceedings Nat'l Acad. Scis. 8399, 8399 (2013); see Pet. App. 202a (¶272). Thousands of California workers come into contact with millions of pigs brought into the State for slaughter annually. See Pew Comm'n on Indus. Farm Animal Prod., *Putting Meat on the Table: Industrial Farm Animal Production in America* 11-13 (2008); Nat'l Agric. Stat. Serv., U.S. Dep't Agric., *Livestock Slaughter 2019 Summary*, at 45 (Apr. 2020). It is but a short leap from there to workers' families and the public.

California has a powerful interest in preventing new zoonotic diseases from emerging inside the State. The 2009 swine flu pandemic, which killed almost 600,000 people, first reached the U.S. in California after the virus made the leap from pigs to humans. CDC, *2009 H1N1 Pandemic Timeline*, https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html. California need not wait to become ground-zero again. Reducing risks from pigs raised in or brought into the State for consumer pork consumption is a valid state interest.

2. Proposition 12 also has a powerful in-state moral purpose. From this Nation's founding, States have had authority to "protect 'the social interest in order and morality.'" *Paris Adult Theatre*, 413 U.S. at 61; see *Tenn. Wine*, 139 S. Ct. at 2464. Animal cruelty laws trace to "the early settlement of the Colonies." *United States* v. *Stevens*, 559 U.S. 460, 469 (2010).

Petitioners impugn Proposition 12 as directed to animal welfare in *other* States. Pet. Br. 38. But Proposition 12 does not regulate what farmers do outside California. It seeks to "eliminate inhumane and unsafe products * * * *from the California marketplace*." Pet. App. 202a (¶270) (emphasis added). Sovereigns have a strong interest in refusing to "furnish a market" for products they find immoral. *Austin*, 179 U.S. at 346 (quoting *License Cases*, 46 U.S. (5 How.) 504, 577 (1847)). Absent preemption, States may ban animal products for consumption on moral grounds, regardless of where the product originates. See, *e.g.*, *Empacadora de Carnes de Fresnillo, S.A. de C.V.* v. *Curry*, 476 F.3d 326, 336 (5th Cir. 2007); *Cavel Int'l, Inc.* v. *Madigan*, 500 F.3d 551, 552-553, 557-559 (7th Cir. 2007); *Chinatown Neighborhood Ass'n* v. *Harris*, 794 F.3d 1136, 1145-1146 (9th Cir. 2015).

California's interests in its markets are not constrained by the morals of other jurisdictions. New York need not permit the sale of explicit material involving juveniles simply because the acts depicted were legal where they occurred. *New York* v. *Ferber*, 458 U.S. 747, 765-766 & n.19 (1982). States can ban the sale of immoral products, such as goods made by forced labor, N.Y. Gen. Bus. Law §69-a; 30 Ill. Comp. Stat. Ann. 583/5 & 584/5, or from

endangered species.[10] Such laws have long been upheld even if the animal was "brought in from another State where the killing was lawful." W.P. Prentice, *Police Powers Arising Under the Law of Overruling Necessity* 85 (1894).

Those prohibitions are not extraterritorial: They do not command or prohibit conduct outside the State's territory. They reflect the State's determination that trafficking in the fruits of immorality within the State is immoral because "maintenance of the market * * * leaves open the financial conduit by which the production of [immoral] material is funded." *Ferber*, 458 U.S. at 766 n.19; cf. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) ("funding" activity of others can violate religious beliefs).

Standards for consumption, based on ethical concern for the method of production, have an ancient pedigree. The Bible teaches not to eat "meats * * * from things strangled." *Acts* 15:29 (King James). Kosher laws prohibit consumption of animals not slaughtered according to principles of *shechita*, which reduces animal suffering by causing "loss of consciousness within a few seconds." S.D. Rosen, *Physiological Insights into* Shechita, 154 Veterinary Rec. 759, 759-760 (2004). Islam has similar rules. Febe Armanios & Boğaç A. Ergene, *Halal Food: A History* 61-62 (2018). Those restrictions on consumption promote morality of the "righteous," who have regard for the "beast." *Proverbs* 12:10 (King James). They are not efforts to regulate butchers (wherever located).

Petitioners argue that moral objections are not a "legitimate reason for regulating the production of goods outside [California's] borders." Pet. Br. 40; see U.S. Br.

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[10] *E.g.*, 16 U.S.C. § 1538; 16 U.S.C. § 668; N.Y. Env't Conserv. Law § 11-0535; Conn. Gen. Stat. Ann. § 26-315; N.J. Stat. Ann. § 23:2A-13.3.

19-21. But Proposition 12's ban on selling products from certain mistreated animals no more regulates farmers "outside [California's] borders" than a domestic ban on ivory sales inside the U.S. regulates conduct in Africa. Farmers outside California may employ whatever practices their States permit. Proposition 12 addresses only goods within California. The Commerce Clause does not require California to permit trafficking in kitten meat simply because other States produce it. *Cavel*, 500 F.3d at 552-553.

The United States concedes that California can *ban* pork consumption entirely if it finds pork immoral. U.S. Br. 28; see 7 U.S.C. § 2160 (banning dog and cat slaughter for human consumption). But it cannot explain why, if Californians find it ethical to eat pigs but not mistreated ones, the Commerce Clause overturns that judgment. The Commerce Clause simply does not constrain California's effort to address within its borders a moral evil—in-state trafficking in products derived by subjecting pigs to cruel and extreme confinement.

Dismissing California's concerns as "philosophical," Pet. Br. 5, defies centuries of tradition and precedent, see pp. 42-44, *supra*. Petitioners and the United States effectively argue that the people of California can have economic interests but not moral values. The Constitution, however, does not preclude legislation that pursues important values any more than it "enact[s] Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). If the Framers had intended a new legal universe where regulation on moral grounds cannot extend evenhandedly to all products in a State regardless of origin, they would not have hidden that revolution inside an indirect implication from a provision authorizing Congress to regulate interstate commerce.

III. PROPOSITION 12 IS CONSTITUTIONAL UNDER *PIKE*

At the end of their brief (at 44), petitioners eventually turn to *Pike*, urging that Proposition 12 imposes burdens on "interstate commerce" that are "clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Even assuming *Pike* extends beyond protectionist, discriminatory, and similar legislation, see pp. 20-21, *supra*, their arguments fail.

A. Petitioners Allege No Cognizable Burden on Interstate Commerce

Petitioners primarily complain about compliance costs. Pet. Br. 4, 14-15, 19. Having already presented the same arguments under the guise of extraterritoriality, petitioners have little new to say—and what they do say fails for the same reasons. See pp. 26-45, *supra*.

Among other things, whatever Proposition 12's effect on *particular firms* wishing to sell in California, petitioners must plead a significant burden on *interstate commerce*. Pet. App. 16a-19a (citing *Exxon*, 437 U.S. at 127). "Most regulations of business necessarily impose financial burdens"; they are "costs of our civilization." *Day-Brite Lighting Inc.* v. *Missouri*, 342 U.S. 421, 424 (1952). Such costs are an "inseparable incident of the exercise of a [State's] legislative authority." *S.C. State Highway Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 189 (1938). Contrary to petitioners' view, Pet. Br. 49, *Pike*'s outcome was not a consequence of compliance costs. *Pike* focused on the "nature of th[e] burden," which required "business operations to be performed *in the home State*" rather than "elsewhere." 397 U.S. at 145 (emphasis added).

Regardless, *Exxon* largely disposes of petitioners' position. In that case, Maryland prohibited petroleum producers from operating retail gas stations within the State.

437 U.S. at 119. Exxon argued that, because Maryland had "no local producers or refiners," the "divestiture requirements" fell "solely on interstate companies," and could force some to "withdraw entirely from the Maryland market." *Id.* at 125-127. This Court found no Commerce Clause problem. Some "interstate dealers," it observed, "are not affected by the Act because they do not refine or produce gasoline." *Id.* at 126. The law did not burden the "interstate market," but instead "particular interstate firms." *Id.* at 127-128. While one might question "the wisdom of the statute," it did not impose an impermissible "burden on commerce." *Id.* at 128.

Petitioners cannot escape *Exxon*. Proposition 12 imposes identical burdens on sales within California regardless of the pork's origin. Prop. 12, § 3. Petitioners do not allege that compliance costs are greater for out-of-state producers. Whatever the ratio between affected farmers inside and outside California in this case, *every* affected business in *Exxon* was outside Maryland. 437 U.S. at 125. Nor is it relevant whether tracking pork from "sow farms" to "nurseries" to "finishing farms" to "slaughter-packer plants" to "distributors," Pet. Br. 45-46, is supposedly difficult for integrated operators. Apart from petitioners' failure to plead that plausibly, pp. 32-45, *supra*, the Commerce Clause does not protect "particular structure[s] or methods of operation in a retail market" from "prohibitive or burdensome regulation," *Exxon*, 437 U.S. at 127-128; see *Breard* v. *City of Alexandria*, 341 U.S. 622, 638-639 (1951) (calling similar argument "constitutionally, immaterial").

Petitioners urge that the putative burdens they predict are "far greater" than in *Exxon*. Pet. Br. 50. But the "nature of th[e] burden is, constitutionally, more significant than its extent." *Pike*, 397 U.S. at 145. In *Exxon*, compa-

nies would have had to *cease* operations. Here, the "nature" of the burden consists of compliance costs borne by firms only insofar as they sell in California. Besides, petitioners' assertion that "the entire national, $26-billion industry will be compelled to restructure," Pet. Br. 48, is implausible hyperbole, contradicted by their own complaint. See pp. 32-34, *supra*. The market already segregates and tracks products to meet customer demand for humanely raised pork. P. 4, *supra*. Petitioners can provide multiple lines, including one compliant with Proposition 12. They can specialize in Proposition 12-compliant pork. Or they can avoid supposedly "costly changes" and "withdraw" from California markets, as Exxon threatened and this Court was ready to accept. 437 U.S. at 127. Petitioners' professed desire for a uniform, undifferentiated market structure does not enshrine that structure in the Constitution or foreclose state-by-state regulation. *Id.* at 127-128.

The "Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary * * * to satisfy a *Pike* burden in this particular case." *Davis*, 553 U.S. at 353. Courts are "unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 308 (1997). Judicial invalidation of state law under the dormant Commerce Clause is a function "of extreme delicacy, and only to be performed where the infraction is clear." *Conway* v. *Taylor's Ex'r*, 66 U.S. (1 Black) 603, 634 (1861). If petitioners' speculative and self-contradictory claims of "burden" sufficed to survive the pleading stage, virtually any *Pike* challenge would.

B. Proposition 12's Local Benefits Are Amply Sufficient

Pike sets forth a "permissive" test, *United Haulers*, 550 U.S. at 347 (plurality), and "[s]tate laws frequently survive * * * *Pike* scrutiny," *Davis*, 553 U.S. at 339. For the reasons given above, the complaint lacks facts plausibly showing interstate commerce burdens that are "clearly excessive" compared to Proposition 12's benefits. *Pike*, 397 U.S. at 142. Petitioners measure Proposition 12's burdens in dollars. But Proposition 12 provides benefits measured in lives, health, and morality. Comparing such divergent and incommensurable interests necessarily requires extraordinary deference to the State's judgments.

Petitioners' effort to dismiss health concerns fails for all the reasons given above. Among other things, ample evidence shows that extreme confinement of sows increases the risk to human health posed by their offspring. See pp. 37-42, *supra*. The proper balance between health and cost here "is 'at least debatable.'" *Clover Leaf*, 449 U.S. at 469 (quoting *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). Any debate belongs before legislatures, not courts.[11]

Petitioners also largely elide California's moral interests. Californians voted to "eliminate * * * from the California marketplace" products derived from sows "crammed inside tiny cages for their entire lives." Pet. App. 201a-202a (¶270). Petitioners respond that their extreme confinement techniques are actually a kindness, because sows are protected from other pigs' "aggression." Pet. Br.

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[11] That Proposition 12 addresses confinement standards for sows, but not market and finishing pigs, does not render its health-and-safety rationale "bogus." Pet. Br. 42. States may address issues incrementally. *Clover Leaf*, 449 U.S. at 466.

47. Petitioners, of course, could offer individual pens of sufficient size. Regardless, it beggars belief that these "creatures with all the intelligence, emotional sensitivity, and social natures of dogs" somehow benefit from being "almost completely immobilized for all of their lives, unable to walk or even turn around." Matthew Scully, *A Brief for the Pigs: The Case of* National Pork Producers Council v. Ross, National Review (July 11, 2022), https://www.nationalreview.com/2022/07/a-brief-for-the-pigs-the-case-of-national-pork-producers-council-v-ross/.

Petitioners' suggestion that their practices "protect[ ]" and "keep[ ] sows healthy," Pet. Br. 10, contrasts starkly with the reality of millions of sows "covered in feces, dried blood, and open sores; signs of respiratory disease and urinary-tract infections; bruises, lesions on skin and toes, ulcers, cysts, 'pus pockets,' bleeding eyes, and on and on," Scully, *supra*. Entering such a facility triggers "a bedlam of squealing and chain-rattling and guttural, roaring sounds—a shrieking panic. Encased, pigs * * * are unable to do anything but sit and suffer and scream at each new appearance of a human. They have never seen one of our kind who wasn't there to inflict harm or to ignore their terrible plight." *Ibid.* Petitioners know all of this. That is why "the NPPC lobbied to make it a crime to photograph" the use of gestation crates. *Ibid.* The people of California are entitled to judge for themselves. See Br. Amicus Prof. Broom et al. States are not required to lend their markets to trafficking in products of depraved conditions.

Petitioners never explain how to balance Proposition 12's supposed costs against California's interests in eliminating such immoral products from its marketplace and protecting public health. The issue "is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines." *Davis*, 553

U.S. at 360 (Scalia, J., concurring in part). Californians will pay any higher prices caused by Proposition 12. See pp. 33-34, *supra*; Pet. App. 342a (¶3). They balanced the costs against their health and moral benefits. This Court ought not accept the pernicious view that "exaggerated claims about the effects of Proposition 12 on commerce" are sufficient to "stifle moral debates" and "democratic judgments." Scully, *supra*. Petitioners failed to plead facts sufficient to move that debate from the ballot box to the courtroom. The only conceivable relief petitioners can demand—a remand—is unwarranted.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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