No. 21-468

In the Supreme Court of the United States

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

v.

KAREN ROSS, ET AL.,
Respondents.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Whether allegations that California's Proposition 12 has dramatic economic effects largely outside of the State and requires pervasive changes to an integrated nationwide industry state a violation of the dormant Commerce Clause.

Whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike* v. *Bruce Church*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners here, plaintiffs-appellants below, are the National Pork Producers Council (NPPC) and the American Farm Bureau Federation (AFBF).

NPPC is an agricultural organization representing the interests of the $26-billion-a-year U.S. pork industry. Its members include pig farmers as well as the entire pork chain and associated businesses such as veterinarians, pork packers and processors, and other allied companies that serve the pork industry. NPPC does not have any parent corporation, and no publicly held corporation owns 10% or more of NPPC.

AFBF is an agricultural organization whose purpose is to improve the conditions of farmers. Nearly six million families, including farmers who grow and raise virtually every agricultural product in the U.S., are members of AFBF. AFBF does not have any parent corporation, and no publicly held corporation owns 10% or more of AFBF.

State defendants-appellees below, respondents here, are Karen Ross, in her official capacity as Secretary of the California Department of Food and Agriculture; Tomas Aragon, in his official capacity as Director of the California Department of Public Health (substituted for original defendant Sonia Angell); and Robert Bonta, in his official capacity as Attorney General of California (substituted for original defendant Xavier Becerra).

Intervenors-defendants-appellees below, respondents here, are the Humane Society of the United States of America; Animal Legal Defense Fund; Animal Equality; The Humane League; Farm

Sanctuary; Compassion in World Farming USA; and Compassion Over Killing.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The Ninth Circuit's decision (Pet. App. 1a-20a) is reported at 6 F.4th 1021 (9th Cir. 2021). The district court's decision (Pet. App. 21a-35a) is reported at 456 F.Supp.3d 1201 (S.D. Cal. 2020).

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2021. Pet. App. 2a. The timely filed petition for certiorari was granted on March 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3.

Proposition 12, codified at Cal. Health & Safety Code § 25990 *et seq*., is reproduced at Pet. App. 37a-46a.

The initial and revised proposed regulations of the California Department of Food and Agriculture (CDFA) implementing Proposition 12 are reproduced at Pet. App. 47a-146a and Pet. Reply App. 1a-104a, respectively.[1]

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[1] CDFA submitted final regulations to California's Office of Administrative Law for review on April 21, 2022, but as of June 9 no final rules have been promulgated.

STATEMENT

A state law runs afoul of the negative implications of Congress's power "[t]o regulate Commerce * * * among the several States" if its "practical effect" is to "'control [commercial] conduct beyond the boundaries of the State'" (*Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)), even if the law is "triggered only by sales" occurring "within the State" (*Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986)). A state law also is unconstitutional if it imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[2]

Petitioners' complaint (Pet. App. 147a-233a) alleges that Proposition 12 violates the dormant Commerce Clause in both of these ways. Petitioners allege that Proposition 12 in practice controls pork production, 99.87% of which occurs in other States. And petitioners allege that California has no valid justification for that interference with out-of-state commerce. Because this case comes to the Court from the grant of motions to dismiss and for judgment on the pleadings, petitioners' factual allegations are accepted as true and the question is whether those facts "plausibly give rise to an entitlement to relief." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009). They do.

Proposition 12 will transform the pork industry nationwide. The law makes it a criminal offense and civil violation to sell whole pork meat in California unless the pig it comes from was born to a sow—an

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[2] Another prohibition of the dormant Commerce Clause—a bar on protectionist state statutes that discriminate against interstate commerce—is not in issue here.

adult female—that was housed with 24 square feet of space and in conditions that allow the sow to turn around without touching her enclosure. Hardly any commercially bred sows are housed with that much space, including those raised in group pens; and farmers almost universally keep sows in individual pens that do not comply with Proposition 12 during the vulnerable period between a sow's weaning a litter of piglets and confirmation of her next pregnancy.

Though Proposition 12 applies to sales of pork meat in California, its practical effects are almost entirely extraterritorial. There are very few sow farms in California. The State imports 99.87% of the pork it consumes. Proposition 12 therefore governs the housing conditions of sows located almost exclusively outside of California. As the United States and its Department of Agriculture (USDA) told the Ninth Circuit, the "'critical inquiry'" under this Court's decision in *Healy* is "'whether the practical effect of the regulation is to control conduct beyond the boundaries of the State'" and the "district court erred by dismissing the complaint" under that standard. U.S. Am. Br. 1 (9th Cir. ECF 23) (U.S. Am. Br.).

Proposition 12's extraterritorial effects are not limited to the 13% of U.S. pork production needed to satisfy demand in California. A market pig progresses through multiple farms outside of California as it is raised, and then is processed into many different cuts of meat that are sold across the country. If *any part* of a pig is sold in California, the sow it came from must be Proposition 12-compliant. And sow farmers cannot say with certainty that no meat from any of their pigs will be sold in California, after those pigs pass through nursery and finishing farms, a packer-slaughter plant, then distributors, before their meat reaches

consumers. As the Ninth Circuit recognized, "[a]s a practical matter," "all or most [sow] farmers will be forced to comply with California requirements." Pet. App. 9a.

Those requirements necessitate reducing herd sizes or building costly new facilities, and they will require changes in every aspect of caring for sows, including feeding, breeding, medical care, and farm labor. That will raise prices in transactions with no California connection. It will drive smaller sow farms out of business, leading to greater industry consolidation. CDFA has proposed that California's agents will police compliance through intrusive inspections on out-of-state farms and burdensome record-keeping rules. These "dramatic upstream effects," the Ninth Circuit acknowledged, will force "pervasive changes to the pork production industry nationwide" and cause "cost increases to market participants and customers" everywhere. Pet. App. 18a, 20a. And farmers will be forced to adopt practices that they believe are harmful to their sows and employees.

If any law violates the dormant Commerce Clause's extraterritoriality principle because of its practical effects on commerce in other States, it is Proposition 12. And if Proposition 12 is constitutional, so is a state law that prohibits the sale of goods unless they were made by workers who were paid the State's minimum wage or belong to a union. Yet this Court has made clear that the Commerce Clause prevents a State from conditioning the importation of goods on "proof of a satisfactory wage scale." *Baldwin* v. *G.A.F. Selig, Inc.*, 294 U.S. 511, 524 (1935).

Petitioners also allege that Proposition 12 fails the *Pike* test. California's justifications for the law are

simply invalid. The law is based on philosophical preferences about conduct occurring almost entirely outside California. As the United States explained below, banning pork imports "based solely on a desire to prevent what California considers animal cruelty that is occurring entirely outside the State's borders" is "an improper purpose." U.S. Am. Br. 2. Proposition 12 rests otherwise on a human health rationale—one California did not defend below and CDFA admits lacks any scientific basis—that is false. Because petitioners plausibly allege that California advances no "legitimate local interest" to justify Proposition 12's wrenching effect on interstate commerce (*id.* at 18), their *Pike* challenge should not have been dismissed.

Proposition 12 undermines our federalist system, as 20 States explained below. Its extraterritorial reach infringes other States' sovereignty, including their "decisions *not* to impose burdensome animal-confinement requirements on their farmers." States' Am. Br. 16 (9th Cir. ECF 22). Ohio, for example, expressly permits sow farmers to do what Proposition 12 forbids—to confine sows in breeding pens post-weaning until a new pregnancy is confirmed. Ohio Admin. Code § 901:12-8-02(G)(4), (5). Proposition 12 also effectively regulates "transactions occurring wholly in other States—such as farm procurement and production, sale to distributors, and slaughter and packing"—before any transaction occurs in California. States' Am. Br. 14. And California agents will inspect and certify out-of-state farms and demand an "audit trail" for every cut of pork. Horizontal federalism principles embodied in this Court's dormant Commerce Clause jurisprudence protect California's sister States from these intrusions, which invite "tit-for-tat state regulatory conflict" and threaten to transform our "integrated national

market into a patchwork of regulatory regions." States' Am. Br. in Support of Cert. 13-14.

A. Proposition 12

Proposition 12 forbids farmers "within the state" from housing sows "in a cruel manner"—a provision petitioners do not challenge. Cal. Health & Saf. Code § 25990(a), Pet. App. 37a. It also prohibits the sale in California of "any uncooked cut of pork" when the seller knows or should know that the meat came from the offspring of a sow that was confined—anywhere in the world—"in a cruel manner." *Id.*, §§ 25990(b)(2), 25991(u), Pet. App. 38a, 43a; see Pet. Reply App. 8a, § 1322(k) (defining "cut"). It is that prohibition that petitioners allege is unconstitutional.

"A cruel manner" means confining a sow "six months or older or pregnant" in a way that prevents her "from lying down, standing up, fully extending the animal's limbs, or turning around freely" and, starting January 1, 2022, "confining a [sow] with less than 24 square feet of useable floorspace." Cal. Health & Saf. Code §§ 25991(a), (e), Pet. App. 40a. Among other narrow exclusions, these requirements do not apply for five days before a sow gives birth or while it is nursing piglets. *Id.*, § 25992(f), Pet. App. 45a.

Every sale of covered pork in California that does not meet these standards is a crime punishable by a $1000 fine or 180-day prison sentence, and subjects the seller to a civil action for an injunction and damages. *Id.*, § 25993(b), Pet. App. 45a; Cal. Bus. & Prof. Code §§ 17203-17207. The animal-rights activists who created and promoted the Proposition 12 ballot initiative tout it as "the strongest law of its kind in the world." Pallotta, *Wins for Animals in the 2018*

Midterm Election, Animal Legal Defense Fund (Jan. 5, 2019).

The stated justifications for Proposition 12's housing standards are (1) "to prevent animal cruelty by phasing out extreme methods of farm animal confinement" and (2) to protect California consumers from "the risk of foodborne illness and associated negative fiscal impacts on the State of California." Pet. App. 37a § 2. Because Proposition 12 was adopted by citizen initiative, no legislative findings address these rationales.

Proposition 12 directed CDFA and the California Department of Public Health (CDPH) to produce implementing regulations by September 1, 2019. Cal. Health & Saf. Code § 25993(a). The agencies missed that deadline, and as of the filing of this brief, nearly three years later, still have not promulgated final regulations.[3] Their proposed regulations, however, indicate how they plan to implement Proposition 12. In addition to reiterating the space requirements of the law, the proposed regulations provide for certification of sow farms as Proposition 12-compliant, which involves on-site inspections—"announced or unannounced"—by agents of California. Pet. Reply App. 38a-39a, § 1326.5(a). CDFA's agents must be

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[3] Because the agencies violated the rulemaking timetable, a court enjoined implementation of the law until 180 days after the final rule is effective. *Cal. Hisp. Chambers of Com.* v. *Ross*, No. 34-2021-80003765, 2022 Cal. Super. LEXIS 8135, at *22-23 (Jan. 21, 2022), appeal pending. CDFA says that stay "applies only to retailers," "not to pork producers providing pork products to California." Chuck Abbott, *Judge Delays Prop 12 Enforcement on California Retailers*, Successful Farming (Jan. 26, 2022), https://www.agriculture.com/news/business/judge-delays-prop-12-enforcement-on-california-retailers.

given "access to the production" operation, "offices," and any place "where covered animals and covered animal products may be kept, produced, processed, handled, stored or transported," regardless of where those animals or products might be sold. Pet. Reply App. 33a, § 1326.1(c). Farmers and distributors must maintain an "audit trail" documenting compliance. Pet. Reply App. 5a-6a, § 1322(b); 34a-35a, § 1326.2. The rules require that all sale and shipping documents identify whether pork is "Pork CA Prop 12 Compliant." Pet. Reply App. 17a, § 1322.4(a). And they mandate that any out-of-state government entity certifying facilities as Proposition 12-compliant must use a "process equivalent" to that required by CDFA rules. Pet. Reply App. 38a, § 1326.4(d).

Californians consume 13% of the pork eaten in the U.S. Pet. App. 151a ¶20, 344a ¶7. But California has only "about 0.133% of the national breeding pig herd," as CDFA admits. Pet. App. 80a. Thus, 99.87% of the pork consumed there comes from hogs born on farms outside the State, and it is to out-of-state sow farms that Proposition 12's production mandates almost exclusively apply. Pet. App. 150a-151a, ¶¶16-20.

B. The Pork Industry

Congress has found that "the production of pork" plays "a significant role in the economy of the United States" because pork is "produced by thousands of producers, including many small- and medium-sized producers," and is "consumed by millions of people" on "a daily basis." Pork Promotion, Research, and Consumer Information Act, 7 U.S.C. § 4801(a)(2). "[P]ork and pork products are basic foods that are a valuable and healthy part of the human diet" and "must be available readily and marketed efficiently to

ensure that the people of the United States receive adequate nourishment." *Id.*, § 4801(a)(1), (3).

Across the country, 65,000 farmers raise 125 million hogs a year with sales of $26 billion. Pork production is segmented. The production chain starts on a sow farm—most in the Midwest or North Carolina—where sows give birth to piglets. Production then involves multiple steps, transactions, and actors before pork from a market hog reaches consumers. This segmented model promotes herd health and produces economies of scale that enable pork farmers to provide consumers with affordable and plentiful proteins. Pet. App. 147a-148a, ¶¶3-7. It also makes it very difficult to trace every cut of pork back to a particular sow housed in a particular way. Pet. App. 181a-183a, ¶¶128-135, 214a ¶348.

1. Sow housing

How sows are housed is a critical farm-management decision informed by animal-welfare and production considerations. Pet. App. 184a, ¶¶147-149. Sow housing is either individual or group, or some combination of the two. Pet. App. 185a-186a, ¶¶150-152, 161-162. Most sow farmers—some 72%—care for their sows in individual pens throughout gestation. Pet. App. 204a, ¶286. These pens provide around 14 square feet of space and—for hygiene, safety, and animal-welfare and husbandry reasons—do not allow the sow to turn around. Pet. App. 151a, ¶24; 185a, ¶155. Individual pens provide a sow with access to water and feed without competition or aggression from other sows, which reduces sow stress, injury, and mortality; improves hygiene by separating food from manure; allows the farmer to provide individualized food rations and veterinary care; and protects farm workers from injury from sows that can

weigh 400 pounds. Pet. App. 172a-175a, ¶¶74-90; 185a-186a, ¶¶156-159; 222a, ¶¶394-395.

The remaining 28% of farmers keep their sows most of the time in group pens, which generally provide 16 to 18 square feet of space per sow. Pet. App. 186a, ¶162; 204a, ¶284.[4] In a group setting sows fight to establish their social order, and competition for food can lead to dominant sows becoming overweight and subordinate sows underweight. Pet. App, 186a, ¶¶165-166. Group housing poses complex management challenges in dealing with nutrition, medical care, sow safety and productivity, and employee safety. Pet. App. 186a-188a, ¶¶163-177.

Almost universally, farmers who use group pens nevertheless house sows in individual pens for the 30 to 40 days from the time a sow finishes weaning a litter through the time she is re-bred and pregnancy is confirmed. Pet. App. 173a-174a, ¶¶77-82; 204a, ¶287. This practice allows farmers to provide individualized care and nutrition that foster recovery from the stress of giving birth and weaning, and it protects sows from death, injury, pregnancy loss, or a drop in litter size due to aggression from other sows. Pet. App. 173a-175a, ¶¶79-90; 189a-191a, ¶¶181-206. Most farmers consider individual breeding pens vital to keeping sows healthy and successfully breeding piglets. Pet. App. 158a-169a, ¶58(a)-(l); see also Pet.

[4] Farmers keep young, unbred female pigs (gilts) in group pens with less space per pig because gilts are smaller than mature sows. Gilts are kept separate from sows until they are ready to breed at seven or eight months. Pet. App. 175a-176a, ¶¶91-92. But Proposition 12 covers the housing of gilts from six months of age. Cal. Health & Saf. Code § 25991(a), Pet. App. 39a. It therefore requires substantial changes in the housing of gilts supplied to sow farms. Pet. App. 198a, ¶¶244-249.

App. 266a, ¶25; 281a, ¶23; 289a-290a, ¶¶16-17; 312a, ¶14; 317a-318a, ¶¶12-13; 323a-324a, ¶16; 332a, ¶11.

In short, very few farmers in the country satisfy Proposition 12's sow-housing requirements, and most believe that those requirements harm their animals, employees, and operations. Pet. App. 172a-174a, ¶¶73-84; 175a, ¶90; 204a, ¶¶283-289. The same is true in nations like Canada, which supplies live piglets and finished pork to the U.S. Pet. App. 200a, ¶258; see Am. Br. of Canadian Pork Council in Support of Cert. 4, 7-8.

2. Vertical segmentation of pork production

After weaning, piglets are moved to nursery farms in a separate facility. Pet. App. 184a, ¶142. Nursery farms raise piglets for six to eight weeks, until they have grown into "feeder pigs." Pet. App. 149a, ¶11; 184a, ¶143. Feeder pigs are then raised for 16 to 17 weeks at finishing farms. Pet. App. 149a, ¶11; 181a, ¶121.

Once market hogs reach 240 to 280 pounds, they are sold to packer-slaughter facilities, often through years-long supply agreements that specify the number and timing of hogs to be delivered to the packer. Pet. App. 149a, ¶11; 181a, ¶126; 184a, ¶144. Packers slaughter thousands or tens of thousands of market hogs daily to process and pack cuts of pork. Pet. App. 150a, ¶13; 181a, ¶124. Some vertically integrated companies breed, raise, slaughter, and process hogs, but packers most commonly receive hogs from many different farms, including affiliated and independent farms, under multi-year contracts, and also acquire hogs on the spot-market. Pet. App. 149a, ¶¶11-12; 181a, ¶¶125-26.

Because pigs are serially transferred among multiple farming operations as they grow, it often is not clear upon their arrival at a packing facility which sow farm they originated from—let alone the housing conditions after the age of six months of the sow that gave birth to them. Pet. App. 181a-182a, ¶¶125, 130-131; 198a, ¶¶244-249.

3. Processing market hogs into different cuts

Packers process hogs received from different sources into cuts of pork destined for different markets across the country and abroad. Pet. App. 150a, ¶¶13, 19; 176a-177a, ¶96. Pork-product packages may combine meat from different pigs. Pet. App. 149a, ¶12; 158a-169a, ¶58; 176a-177a, ¶96; 182a-183a, ¶¶130-133. Rarely is the whole pig sold.

Packers sell pork cuts to wholesale distributors and large retail customers. Pet. App. 150a, ¶13; 181a, ¶124. Retailers in turn sell pork to consumers. Pet. App. 181a, ¶124. Each pork cut bears production costs stemming from the beginning of the supply chain—the sow that gave birth to the market hog—no matter where it is sold. Pet. App. 177a-178a, ¶96.

4. Pig and human health

Although Proposition 12 purports to protect Californians from "the risk of foodborne illness" (Pet. App. 37a §2), California declined to justify that goal below. Cal. Br. 33 n.13 (9th Cir. ECF 35). That is not surprising. CDFA conceded in its Standard Regulatory Impact Statement (SRIA) that Proposition 12's "[a]nimal space confinement allowances" are "not based on specific peer-reviewed published scientific literature or accepted as standards within the scientific community to reduce human food-borne

illness." Pet. App. 75a. In a later addendum to its SRIA, CDFA stated that it could not "confirm, according to its usual scientific practices, that the specific minimum confinement standards" in Proposition 12 "reduce the risk of human food-borne illness." Pet. Reply App. 74a. CDFA asserted that it nevertheless was not "unreasonable for California's voters to pass" Proposition 12 "as a precautionary measure to address any potential threats" while "scientific scrutiny" continues. *Id.*, 74a-75a. Petitioners allege, however, that no "potential threats" exist—still less ones that would be reduced by the increment of additional space afforded sows by Proposition 12. Pet. App. 225a-230a, ¶¶419-453.

Industry action and federal inspection fully address any "risk of foodborne illness" from pigs. To begin with, the rapid removal of piglets from sow farms after weaning, and the separation of sow farms from other hog farms, protects herds from disease. Pet. App. 184a, ¶142. Biosecurity is a major concern for pig farmers, because whole herds can be wiped out by diseases like African swine fever, which has killed hundreds of millions of pigs around the world. The spread of diseases is addressed by strict separation and decontamination measures and by limiting access to farms. Pet. App. 225a, ¶¶412-417.

Geographic and temporal separation of sows from market pigs also ensures that any disease a piglet might contract at a sow farm has disappeared before slaughter, six months and multiple farms later. Pet. App. 226a-229a, ¶¶426-442.[5]

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[5] There is no such dual separation in the case of veal or eggs. Proposition 12 applies to the housing of veal calves, which are the product that is consumed, and to egg-laying hens, which

In addition, the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 601 *et seq.*, "protect[s] the health and welfare of consumers" by "assuring" the safety of "meat and meat food products" in interstate commerce. *Id.*, § 602. The FMIA "establishes 'an elaborate system of inspecti[ng]' live animals and carcasses in order 'to prevent the shipment of impure, unwholesome, and unfit meat.'" *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452, 455-456 (2012).

USDA's Food Safety and Inspection Service (FSIS) administers the FMIA. An inspector conducts an "'ante-mortem' examination of each animal brought to a slaughterhouse," and if the inspector finds no "evidence of disease or injury, he approves the animal for slaughter." 565 U.S. at 456. Any diseased animal is slaughtered separately and "no part of its carcass may be sold for human consumption." *Id.* at 457. If the inspector deems an animal "suspect," it is "'slaughtered separately'" and "an inspector decides at a 'post-mortem' examination which parts, if any, of the suspect animal's carcass may be processed into food for humans." *Ibid.*

C. Proposition 12's Nationwide Impact On Pork Production And Pricing

Proposition 12 imposes steep compliance costs on farms that are almost all located outside of California. It requires production methods that increase sow mortality, decrease litter sizes, and reduce product-

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produce eggs that carry a well-documented risk to human health and are immediately packed on the farm for human consumption. The Official Voter Guide for Proposition 12 (prepared by HSUS) mentions only eggs as a source of foodborne illness. https://vigarchive.sos.ca.gov/2018/general/propositions/12/.

ivity (because fewer sows can be housed in the same amount of space). Petitioners allege that farmers would need to spend "$293,894,455 to $347,733,205 of additional capital in order to reconstruct their sow housing and overcome the productivity loss that Proposition 12 imposes." Pet. App. 214a, ¶342. Smaller sow farms may not be able to bear these costs, which will drive consolidation in the industry. Pet. App. 213a, ¶341; 166a-167a, ¶58(i).

Proposition 12 will cause significant market dislocation and price impacts that cannot be cabined to California sales. Petitioners allege that compliance will increase farmers' production costs by over $13 per pig, a 9.2% cost increase. Pet. App. 214a, ¶343. Increased production costs will flow through to every market hog born to every sow raised in compliance with Proposition 12, and to every cut of meat from each of those market hogs—regardless of where that meat is sold. Variations in demand by location and season mean there is virtually no such thing as a hog whose cuts are all sold in California. Proposition 12's massive additional costs will necessarily spill over to sales of pork that have nothing to do with California. Pet. App. 214a-215a, ¶¶344-350.

CDFA acknowledged that, within California, Proposition 12 will make pork "more expensive to consumers," "disproportionately reduce food purchasing power of low-income consumers," substantially increase costs to public entities like schools, and impose significant conversion, operating, and record-keeping costs on sow farmers, including "lower piglet output per animal and increased breeding pig mortality." Pet. App. 68a, 85a-86a; see Pet. App. 195a,

¶230.[6] But Proposition 12 will necessarily have those same effects *outside* California as well, because compliance costs apply not only to the cuts of pork sold in California, but to all pork from any hog born to a Proposition 12-compliant sow, wherever that pork is sold. Farmers and consumers everywhere will pay for California's preferred animal-housing methods. Pet. App. 214a, ¶¶343-347.

Packers, distributors, and retailers that serve California will amplify these nationwide effects. It is infeasible to selectively house sows in compliance with Proposition 12 only when the pork from their offspring will be sold in California: sow farmers do not know where any particular pig's meat will be sold. And because it is impracticable, in the complex, multi-stage pork production process, to trace a single cut of pork back to a particular sow housed in a particular manner from six months of age on, buyers of market hogs everywhere will demand that their suppliers comply with Proposition 12. Pet. App. 206a, ¶¶298-301. As the complaint alleges, that is already happening. Pet. App. ¶300; see U.S. Am. Br. 21 (although "some of these burdens would result from the decisions of other market participants rather than the direct terms of Proposition 12, they are properly subject to consideration and proof as part of determining the overall 'practical effect' of the law").[7]

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[6] As litigation progressed CDFA walked back as not "definitive" its admission that Proposition 12 adversely affects pig health. Pet. Reply App. 76a-77a. But the complaint alleges that Proposition 12 will increase sow mortality and reduce litter size, and accompanying farmer declarations provide vivid examples. Pet. App. 173a-74a, ¶¶78-83, 159a, 163a-164a, 166a-168a.

[7] Tracing would involve knowing how an unbred gilt was housed from six months of age (gilts are raised in separate facilities and

D. The Rulings Below

The district court dismissed petitioners' challenge to Proposition 12. Pet. App. 21a-35a. On de novo review the Ninth Circuit affirmed. It accurately characterized petitioners' allegations:

> A single hog is butchered into many different cuts which would normally be sold throughout the country. In order to ensure that they are not barred from selling their pork products into California, all the producers and the end-of-chain supplier will require assurances that the cuts and pork products come from [sows] confined in a manner compliant with Proposition 12. * * * As a practical matter, given the interconnected nature of the nationwide pork industry, all or most [sow] farmers will be forced to comply with California requirements. The cost of compliance with Proposition 12's requirements is high, and would mostly fall on non-California transactions, because 87% of the

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sow farmers often buy rather than raise them); knowing which sow bred the market pig and how the sow was housed at all times; knowing which nursery a piglet was moved to, and segregating it there (nurseries get pigs from many different sow farms); knowing which finishing farm a pig was moved to, and segregating it there; then segregating that pig when it arrives at the packer, which may receive 10,000 pigs a day from many different finishing farms, some under contract and some spot purchases; then segregating the whole meat from that pig and keeping it segregated throughout packing and distribution. Tracing at each step is difficult; put them together and tracing from gilt to whole pork cut is not currently possible. Pet. App. 182a-183a, ¶¶129-135. The sow farmers whom petitioners represent often have no control over segregation or tracing beyond their own farms.

> pork produced in the country is consumed outside California.

Pet. App. 9a. Petitioners thus "plausibly alleged that Proposition 12 will have dramatic upstream effects," "require pervasive changes to the pork production industry nationwide," and cause "cost increases to market participants and customers" everywhere. Pet. App. 18a, 20a. Nevertheless, the court of appeals held that petitioners failed to state a claim, for three reasons.

First, the "broad language" in this Court's *Healy* line of cases is "'overbroad extraterritoriality dicta'" that "'cannot mean what they appear to say.'" Pet. App. 7a. *Healy*'s explanation that the extraterritoriality principle "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the [regulating] State'" (491 U.S. at 336), concerns only "'price control or price affirmation statutes.'" Pet. App. 8a (quoting *Pharm. Rsch. & Mfrs of Am.* v. *Walsh*, 538 U.S. 644, 669 (2003)). Though Proposition 12 causes "cost increases" everywhere, it does not "dictat[e]" pork prices or tie "California to out-of-state prices." Pet. App. 8a, 18a.

Second, if the extraterritoriality doctrine does apply beyond price controls, "significant upstream effects outside of the state" do not violate it if the law directly "regulate[s] only conduct in the state," like in-state sales. Pet. App. 10a, 13a-14a.

Third, turning to *Pike*, the court of appeals attributed no "significant burden on interstate commerce" to Proposition 12, deeming its effects to be only "increased costs," which "do not qualify" for dormant Commerce Clause purposes. Pet. App. 17a-

18a. Having found no qualifying burden, the court did not consider the purported benefits of the law.

SUMMARY OF ARGUMENT

Petitioners' complaint should not have been dismissed because it plausibly alleges that Proposition 12 violates the Commerce Clause under this Court's extraterritoriality and *Pike* v. *Bruce Church* doctrines. As petitioners allege:

I. Proposition 12 violates the dormant Commerce Clause's extraterritoriality doctrine, which holds almost *per se* invalid State laws that have the practical effect of controlling commerce outside the State.

Proposition 12 forbids the sale in California of pork unless the sow was housed the way California prefers. Because California produces so little commercial pork itself, nearly all those sows are located outside California—and almost none are housed in a manner that satisfies Proposition 12. The practical effect of Proposition 12 is therefore to govern sow housing outside the State. And because of the nature of the industry and its product, Proposition 12 will govern sow housing generally, not just for out-of-state pigs destined for the (very large) California market. It will require massive and costly changes across the entire $26-billion-a-year industry. And it inescapably projects California's policy choices into every other State, a number of which expressly permit their farmers to house sows in ways inconsistent with Proposition 12.

Proposition 12 thus should be invalidated because it is inimical to the core constitutional principles that the dormant Commerce Clause has long been understood to protect. It prevents the orderly operation of

an unobstructed nationwide pork market—a market that is unquestionably essential to the Nation's food security. It upends the foundational principle of horizontal federalism that guarantees each state equal footing in the Union and its own sovereign dignity. And it threatens even greater harm, as other States enact competing and potentially retaliatory regulations, Balkanizing the national pork market.

II. Even if Proposition 12 were not *per se* invalid, its vast extraterritorial impact requires close scrutiny of California's two purported justifications for the law: animal welfare and human health.

Those justifications do not vindicate Proposition 12's extraterritorial effects on commerce and our federalist system. California lacks police power to address the welfare of farm animals in other States; that is the proper concern of the States where animals are located. And concern over food-borne illnesses in humans is bogus, because features of the industry and a robust federal meat-inspection system eradicate that risk, which would in any event be unaffected by a change from current to Proposition 12-mandated housing standards.

III. Proposition 12 also fails the *Pike* standard. Petitioners adequately allege that Proposition 12 imposes extreme burdens on interstate commerce that far outweigh justifications for Proposition 12 that are illusory and invalid.

ARGUMENT

I. PROPOSITION 12 UNCONSTITUTIONALLY REGULATES COMMERCE OCCURRING WHOLLY OUTSIDE CALIFORNIA

More than 99% of pork consumed in California is produced outside of that State. This fact triggers the dormant Commerce Clause's extraterritoriality principle, under which regulation of "commerce that takes place wholly outside of the State's borders" is prohibited "whether or not the commerce has effects within the [regulating] State." *Healy*, 491 U.S. at 336; see *Brown-Forman*, 476 U.S. at 583 (1986) (whether a state law "is addressed only to [in-state] sales is irrelevant if the 'practical effect' of the law is to control" conduct in other states).

The "critical inquiry" is "whether *the practical effect* of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336 (emphasis added). And "practical effect" is evaluated by "considering the consequences of the statute itself" and "how [it] may interact with the legitimate regulatory regimes of other States." *Ibid*. To serve its important purposes—preserving interstate markets, maintaining the federal-state regulatory balance, and protecting state sovereign dignity—the extra-territoriality doctrine should be given a scope that bars Proposition 12.[8]

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[8] Some courts of appeals say the extraterritoriality doctrine is limited to dormant Commerce Clause challenges to price-control or price-affirmation statutes. *E.g.*, *Energy & Env't Legal Inst.* v. *Epel*, 793 F.3d 1169, 1174-75 (10th Cir. 2015); *Ass'n des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013). But the needs served by the doctrine do not arise only in the case of price-control or -affirmation laws. And *Pharm-*

A. The Extraterritoriality Doctrine Serves Fundamental Purposes At The Heart Of The Constitutional Design

The rule that a State may not enact laws that have the practical effect of controlling conduct outside that State's borders serves vital functions central to the structure of our federalist system.

First, the extraterritoriality rule is important to achieving the Commerce Clause's aim of avoiding the Balkanization that characterized the Nation prior to ratification of the Constitution.

Second, the rule prevents one State from imposing its policy choices on another and thereby protects the dignity and sovereignty of all States.

Third, there are nationwide markets for which regulation, if any, must be at the federal level to ensure uniformity and allow the free flow of trade. The extraterritoriality rule safeguards national markets against parochial or retaliatory regulatory efforts.

Fourth, the rule protects citizens of other States who, lacking a voice in the enactment of the regulating state's laws, could be unfairly burdened under the guise of achieving parochial interests.

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aceutical Research, 538 U.S. at 669, did not limit the *Healy* line to such cases. This Court has examined the extraterritorial effects of state laws in non-price cases as varied as environmental standards (*C&A Carbone, Inc.* v. *Town of Clarkston*, 511 U.S. 383 (1994)) and corporate-registration requirements (*Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982)). And in *Brown-Forman*, 476 U.S. at 583, this Court relied on *Southern Pacific*—a case about train length—for the proposition that courts must consider the practical effects of a state law.

These constitutional principles require rigorous scrutiny of state laws that have material extra-territorial effects because those laws pose unique dangers to the structure of our federalism and the operation of nationwide markets. Indeed, this Court recently recognized that the extraterritoriality doctrine remains an independently operating "exception" to or "variation" of other dormant Commerce Clause rules governing discriminatory state laws or regulations subject to *Pike* balancing. *South Dakota* v. *Wayfair*, 138 S. Ct. 2080, 2091 (2018) (citing *Brown-Forman*, 476 U.S. 573). Whether regarded as a negative implication of Congress's commerce power or located elsewhere in the Constitution's federalist scheme of state territoriality and interstate "competition for a mobile citizenry" (*Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)), the extraterritoriality doctrine serves interests that are cornerstones of our constitutional design. See, *e.g.*, *Paul* v. *Virginia*, 75 U.S. (7 Wall.) 168, 180 (1869) (the Privileges and Immunities Clause "was not intended * * * to give to the laws of one State any operation in other States; such laws "can have no such operation" except by consent).

1. The extraterritoriality doctrine preserves interstate commerce

The Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States." *Hughes* v. *Oklahoma*, 441 U.S. 332, 325-326 (1979). Thus, a "special concern" of the Constitution is "the maintenance of a national

economic union unfettered by state-imposed limitations on interstate commerce." *Healy*, 491 U.S. at 335-336; see *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2459-2460 (2019) (dormant Commerce Clause "preserves a national market for goods and services"); *Camps Newfound/ Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564, 596 (1997) (Scalia, J., dissenting) ("We have often said that the purpose of our negative Commerce Clause jurisprudence is to create a national market").

Madison understood that allowing states to impose requirements on commercial actors beyond their borders "tends to beget retaliating regulations." Madison, *Vices of the Political System of the United States*, 2 Writings of James Madison 361, 363 (Gaillard Hunt ed. 1901). And Hamilton recognized that "interfering and unneighborly regulations of some States, contrary to the true spirit of the Union," give "just cause of umbrage and complaint to others" and could "be multiplied and extended" until they become "serious sources of animosity and discord," "injurious impediments to the intercourse" among the states, and a threat to the Union. The Federalist No. 22 at 144 (Hamilton) (Clinton Rossiter ed. 1961); see also The Federalist No. 11 at 89 (Hamilton) ("unrestrained intercourse between the states" will "advance the trade of each by an interchange of their respective productions").

This Court's precedent, which interprets the Commerce Clause to avert Balkanization by prohibiting states from impeding the interstate flow of goods, therefore "has deep roots." *Comptroller of Treasury of Maryland* v. *Wynne*, 575 U.S. 542, 549 (2015); see *Tennessee Wine*, 139 S. Ct. at 2460 ("without the dormant Commerce Clause, we would be

left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising"). Indeed—and particularly relevant here—it "was the vision of the Founders" that, through the protections of the Commerce Clause, "every farmer" and "craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539 (1949).

2. The extraterritoriality doctrine safeguards State sovereignty

A State "is sovereign within its territorial limits." *Ableman* v. *Booth*, 62 U.S. 506, 516 (1858). But a State's projection of its laws to control commerce "occurring wholly outside the boundaries of [the] State exceeds the inherent limits of the enacting State's authority." *Healy*, 491 U.S. at 336. As a matter of constitutional design, "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1882). State action that "pass[es] beyond" its territorial limits and "the rights of [its] own citizens," and "act[s] upon the rights of citizens of other States," is "incompatible with the rights of other States, and with the constitution of the United States." *Ogden* v. *Saunders*, 25 U.S. 213, 369 (1827).

Recognizing the inherent right of *each* State to regulate in-state conduct as the State sees fit, the extraterritoriality doctrine bars the "projection of one state's regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337. While States retain "autonomy" within "their respective sphere,"

the Constitution preserves each State's dignity and sovereignty by forbidding States from intruding upon the policy choices of their sister States through extraterritorial regulation. *Id.* at 336. Fundamentally, sovereign dignity requires that a State may not "attach restrictions" to "imports" that "control commerce in other States," because that "would extend the [State's] police power beyond its jurisdictional bounds." *C. & A. Carbone*, 511 U.S. at 393. Therefore, when the practical effect of a law is to "regulate directly * * * interstate commerce, including commerce wholly outside the State, it must be held invalid," "'regardless of the purpose with which it was enacted.'" *Edgar*, 457 U.S. at 642, 643 (plurality op.).

3. The extraterritoriality doctrine safeguards nationwide markets

"The basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics." *Wayfair*, 138 S. Ct. at 2095. Regulation of a nationwide market often is the sole province of the federal government, either due to the nature of the goods or because the complexities of the market that have freely developed without state interference require it. See *Southern Pac. Co.* v. *State of Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945) ("[T]he states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority"). The extraterritoriality doctrine's focus on the practical effects of a state law is well-grounded in this jurisprudence, which "has eschewed formalism for a sensitive, case-by-case analysis of purposes and

effects." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994). The extraterritoriality doctrine plays an important role in safeguarding "those subjects that by their nature imperatively demand a single uniform rule, operating equally on the commerce of the United States." *Wayfair*, 138 S. Ct. at 2090.

4. The extraterritoriality doctrine is a necessary check on one State placing the burdens of achieving its policy goals on the citizens of other States

State economic regulation with material extra-territorial effects also must be viewed with great skepticism because the usual constraints of the democratic process do not apply. Laws that serve the enacting State's policies by controlling conduct outside of that State will rarely be politically unpopular within the enacting State. See *Comptroller of Treasurer of Maryland*, 575 U.S. at 555-556. In those situations, the harm to interstate commerce "is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pac.*, 325 U.S. at 767 n.2.

B. Proposition 12 Violates The Extra-territoriality Doctrine

1. Proposition 12 in practical effect regulates wholly out-of-state conduct. Petitioners' complaint describes the features of raising pigs for pork, in which a market hog typically moves through different farms at different stages of life before being processed into numerous cuts of pork destined for different markets. This complex sequence includes numerous transactions—among farmers, packers, and distribu-

tors—that occur entirely outside California but will nonetheless effectively be regulated by Proposition 12.

Petitioners allege that Californians consume about 13% of the Nation's pork, but California farmers produce only a miniscule fraction of that meat. Nearly all pork sold in California comes from pigs raised outside the State. P. 8, *supra*. Petitioners detail the complex, segmented commercial pork production process that has evolved in this country. That vertically segmented production model evolved to protect herd health and to achieve economies of scale necessary to provide consumers with affordable pork products. Pp. 8-12, *supra*.

As the Ninth Circuit found, petitioners sufficiently alleged that Proposition 12 is incompatible with this production model and will impose significant costs on farmers and consumers outside California. Pet. App. 9a. Proposition 12 mandates that farmers provide each sow with 24 square feet of usable floor space and largely prohibits the use of individual stalls, even during the critical period between weaning and confirmation of pregnancy, when sows recover from the stress of giving birth, the sows are bred, and the embryo attaches. P. 6, *supra*. Both the square-feet requirement and the ban on breeding stalls are contrary to how the vast majority of sow farmers house their herds, and many farmers believe they are affirmatively harmful to sow health. Pp. 9-11, *supra*.

But because of the impracticality of tracing a single cut of pork back to a particular sow housed in a particular manner from six months of age on (p. 16 n.7, *supra)*, farmers everywhere will be required to conform their *entire* operations with Proposition 12 for all their sows. Pp. 16-17, *supra*. Thus, a pig raised

entirely outside California (as virtually all pigs are), but whose meat is sold even partly in California, will have to conform with Proposition 12. And because sow farmers will not know whether any cut from their pigs will be sold in California, all sows will need to be raised in a Proposition 12-compliant manner. As the complaint alleges, packers have already started telling their suppliers that *all* hogs must be raised in a way that meets the Proposition 12 criteria. P. 16, *supra*. Changing sow facilities to meet the California-imposed burdens will impose hundreds of millions of dollars of upfront costs on farmers, increasing production costs by about $13 per pig, regardless of where it is sold. P. 15, *supra*.

It is no answer, as California has urged, that Proposition 12 by its terms governs only sales of pork within California. The fact that the law purports to regulate only in-state commerce "is *irrelevant* if the 'practical effect' of the law is to control" conduct in other States. *Brown-Forman*, 476 U.S. at 583. Because 99.9% of pork consumed in California derives from sows raised out-of-state, the burden of transforming facilities will be borne by farmers virtually entirely outside of California. And because 87% of the Nation's pork is sold outside of California, the significant increase in the cost of pork resulting from Proposition 12 will be borne by consumers throughout the country. This is a material, practical, extraterritorial-regulation-driven effect on a $26 billion-per-year industry whose production processes have successfully evolved over decades in response to free-market forces.

2. Proposition 12 also violates the extraterritoriality doctrine because it impermissibly intrudes into the operations of out-of-state businesses

with its invasive inspection requirements. CDFA's proposed regulations make clear the extent to which California plans to inject itself into oversight of farms located out-of-state. Those proposed regulations provide for on-site inspections, including unannounced visits, by California's agents to certify out-of-state sow farms as Proposition 12 compliant. Pet. Reply App. 38a-39a, § 1326.5(a). California's agents must be afforded "access to the production" facility, offices, and any other places where covered animals may be kept, handled, processed, or transported. Pet. Reply App. 33a, § 1326.1(c). This physical intrusiveness cannot be reconciled with the territorial limits of a State's jurisdiction. See *Ogden*, 25 U.S. at 369.

3. Proposition 12 subjects pork farmers to inconsistent regulations and will lead to the Balkanization that the Framers called a constitutional convention to avoid. *Healy* directed courts to consider how a challenged law may interact with the regulatory regimes of other States and what effect would follow if other States adopted similar legislation. 491 U.S. at 336. The comprehensive and intrusive manner in which Proposition 12 prescribes farming practices for predominantly out-of-state businesses is precisely the type of regulation that is likely to "offend Sister states" and conflict with their regulation of in-state businesses. *Id*. at 336 n.13.

Allowing Proposition 12 to stand would encourage other States to impose sow housing requirements on out-of-state farmers, resulting in a regulatory patchwork that would throttle the nationwide pork market. Indeed, faced with an ever-growing array of state-imposed sow-housing requirements, some of which would be contradictory, the pork market would be stuck in the type of "gridlock" that required the

Court in *Healy* to strike down Connecticut's price-affirmation law. 491 U.S. at 340.

This scenario is not speculative. A Michigan statute permits that State's farmers to use individual pens from seven days prior to farrowing until pregnancy is confirmed, which Proposition 12 forbids. Mich. Comp. Laws § 287.746(1)(d), (j) & (2)(a). Ohio regulations permit Ohio sow farmers to confine sows in breeding pens post-weaning until a new pregnancy is confirmed, Ohio Admin. Code § 901:12-8-02(G)(4), (5), a practice that Proposition 12 forbids. Colorado permits its farmers to confine pregnant sows in individual stalls for 12 days before farrowing (Colo. Rev. Stat. § 35-50.5-102(1)(b)), and Rhode Island for 14 days (Rhode Island Stat. § 4-1.1-4(7)). Proposition 12 limits confinement of sows in farrowing stalls *anywhere* to 5 days. Pet. App. 45a. A Massachusetts citizen initiative advanced by HSUS two years before Proposition 12 imposes a stand-up, turn-around rule on pork sales in the State, but unlike Proposition 12 includes no square footage requirement. Mass. Gen. Laws Ann. ch. 129 App., §§ 1-3(C), 1-5(E). The practical effect of Proposition 12 is to override all those laws, and with them the sovereign dignity and policy choices of the enacting States.

In *Southern Pacific*, this Court invalidated the Arizona Train Limit Law, which capped the length of passenger and freight trains operated within the State, finding that it "must inevitably result in an impairment of uniformity of efficient railroad operation" because other States either did not regulate train length at all or imposed different (less strict) limits. 325 U.S. at 773. The "evident" confusion and difficulty created by imposing different regulations on an industry that operated nationwide

left "unsatisfied the need for uniformity." *Id.* at 774. And because of the impracticality of breaking down and reassembling trains at the Arizona borders, the practical effect of the Arizona law was that it "often controls the length of passenger trains all the way from Los Angeles to El Paso." *Ibid.* Similarly here, Proposition 12 disrupts a national market and controls, in practical effect, how hogs are raised in Iowa, North Carolina, and every pig-producing State, regardless of their local laws.

4. Proposition 12's extraterritorial effects are incompatible with the national policy proclaimed in the Pork Promotion, Research, and Consumer Information Act. In *Southern Pacific*, the Court explained that the Arizona Train Limit Law created a "substantial obstruction to the national policy proclaimed by Congress to promote adequate, economical and efficient railway transportation service." 325 U.S. at 773. In the Pork Promotion statute, Congress declared that pork "must be available readily and marketed efficiently" to provide food security to millions of Americans and that the "maintenance and expansion of existing markets" is vital to "the general economy of the United States." 7 U.S.C. § 4801(a)(3), (4).

Principles like the extraterritoriality rule "accommodate the necessary balance between state and federal power." *Wayfair*, 138 S. Ct. at 2090. From the outset of its Commerce Clause jurisprudence, this Court has recognized that certain "subjects by their nature 'imperatively demand a single uniform rule, operating equally on the commerce of the United States.'" *Ibid.* (quoting *Cooley* v. *Bd. of Wardens of Port of Phila. ex rel. Soc'y for Relief of Distressed Pilots*, 12 How. 299, 319 (1852)). In the Pork

Promotion statute, Congress has signaled the importance of fostering an efficient nationwide pork market. The practical effects of Proposition 12 are inconsistent with that congressional policy.

5. Without the territorial constraints imposed by the dormant Commerce Clause and the principles of horizontal federalism it embodies, there is nothing (short of congressional action) to stop any state from imposing production standards on imports and sales, regardless of whether and how that destroys investments made in other States, disrupts national markets, or inflames tensions with other States. California could bar sales of goods not produced by union members, even though in right-to-work States employees may opt out of union membership, and right-to-work laws are one aspect of competition among states. Or California might bar imports of goods not produced by workers paid California's $15-an-hour minimum wage, even though in most States the minimum wage is below $10, another key element in interstate competition.[9] It is not farfetched, given the deep divisions on moral and social issues within our country, to see a threat to the Union in the construction of these kinds of legal moats around a State's markets.

This Court in *Baldwin* mocked the idea that the Commerce Clause allows a State to "condition importation [of goods] upon proof of a satisfactory wage scale." 294 U.S. at 524. Yet if Proposition 12 is constitutional, that and any number of other laws

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[9] California argued in another case challenging Proposition 12 that a minimum-wage-based ban on sales would be constitutional. Oral Argument at 16:09-18:30, *N. Am. Meat Inst.* v. *Becerra*, https://www.ca9.uscourts.gov/media/video/?20200605/19-56408.

conditioning sales on compliance with a State's rules governing the operation of manufacturing plants, of the type struck down in *Legato Vapors, LLC* v. *Cook*, 847 F.3d 825 (7th Cir. 2017), could proliferate. There, the Seventh Circuit held that a State violated the extraterritoriality rule when, citing public health reasons, it conditioned obtaining a permit to sell vaping liquids in the State on the manufacturer—90% of them located out of state—maintaining specified security arrangements, satisfying "construction, design, and operation" requirements, and submitting to audits by State agents. *Id.* at 828. Proposition 12 likewise tells out-of-state farms how to produce pigs, and is likewise unconstitutional.

6. In sum, petitioners have sufficiently alleged that Proposition 12 will have substantial extra-territorial effects on conduct that takes place outside of California. Those effects are manifested in multiple ways. Proposition 12:

- requires farmers in other States and abroad to significantly change their operations, even though most of the pork they produce will not be sold in California;
- authorizes California's agents to inspect sow farms, almost all of which are outside California's borders;
- places farmers at risk of contradictory state regulations that will hamstring the nationwide pork industry;
- overrides other states' policy choices about the way their farmers may raise hogs; and

- imposes state regulations on a market that, as Congress has recognized, needs to be fostered by the nationwide free flow of pork.

These allegations state a claim that Proposition 12 violates the Commerce Clause's extraterritoriality rule.

7. In light of the damage they do to the horizontal-federalism and free-interstate-commerce principles that are foundations of our Union, extraterritorial laws, like discriminatory laws, should be "deemed almost *per se* invalid." *Energy and Env't Legal Inst.*, 793 F.3d at 1172. When a State has genuine, fact-based concerns about the health and safety of its residents, it may reasonably be assumed that its sister States share those concerns and will regulate their own businesses accordingly. If not, the Commerce Clause gives Congress authority to step in. Often, Congress will address States' concerns through a federal regulatory regime, as with federal meat inspection. California may experiment as it wishes within its own borders. But as Justice Brandeis described that "happy inciden[t] of the federal system," "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments *without risk to the rest of the country*." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added). Allowing a State to export its social experiments extraterritorially threatens our federalism. That is certainly true of Proposition 12, which many States strongly oppose.

II. PROPOSITION 12 IS UNCONSTITUTIONAL BECAUSE IT GOVERNS EXTRATERRITORIAL ACTIVITY BEYOND CALIFORNIA'S POLICE POWERS

Even if California's extraterritorial projection of its sow-husbandry laws is not a *per se* violation of the Commerce Clause, it nevertheless is unconstitutional because *this* extraterritorial projection exceeds California's police powers.

Under this Court's cases, a law with extraterritorial effects on commerce that has no local benefits exceeds the police power and violates the Commerce Clause. Courts do not accept at face value a State's invocation of police power, but ask whether the law reasonably can be justified as a measure to protect the health and safety of its citizens. Proposition 12 projects California's sow husbandry rules extraterritorially, but bears no relation to the State's internal health. And its concern for the "moral satisfaction, peace of mind, social approval" of its citizens is not within the police power. Pet. App. 75a.

A. A Law That Applies Extraterritorially But Has No Local Benefits Violates The Commerce Clause

1. States may exercise "'police powers to protect the health and safety of their citizens.'" *Hill* v. *Colorado*, 530 U.S. 703, 715 (2000). They enjoy "'great latitude'" to do so. *Gonzales* v. *Oregon*, 546 U.S. 243, 270 (2006). But the police power is not limitless. This Court has long recognized constitutional "checks upon the police power of the states." Ernst Freund, *The Police Power* § 68 (1904); see *Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) (exercise of police power

may be "challenged as violating some specific provision of the Constitution").

One of those checks is the Commerce Clause. A state law that governs commerce extraterritorially is unconstitutional if, though "clothed as police-power regulations" (*Tenn. Wine*, 139 S. Ct. at 2468), it bears no "reasonable relation to some purpose within the competency of the state to effect." *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923); see, *e.g.*, *S. Pac.*, 325 U.S. at 781-782; *Brennan* v. *City of Titusville*, 153 U.S. 289, 304 (1894); *Hannibal & St. J.R. Co.* v. *Husen*, 95 U.S. 465, 469 (1877). Such a law must be "directed to legitimate local concerns" (*City of Phila.* v. *New Jersey*, 437 U.S. 617, 624 (1978)); otherwise it extends the "police power" of a State "beyond its jurisdictional bounds." *C & A Carbone*, 511 U.S. at 393; see U.S. Am. Br. 18 (a State may not "attemp[t] to address harms occurring outside the State").

Baldwin, for example, concerned a law that established a minimum price for milk sold in New York regardless of where it was produced. 294 U.S. at 519. New York claimed the law would "promote health." *Id.* at 524. In New York's view, the law would provide additional "economic security for farmers" so that they would not "be tempted to save the expense of sanitary precautions." *Id.* at 523.

Writing for a unanimous Court, Justice Cardozo rejected that argument. He observed that the relationship between the earnings of out-of-state farmers and the health of New York residents was "too remote and indirect" to "be upheld as a valid exercise by the state of its internal police power." 294 U.S. at 523-524. The "prope[r]" maintenance of "farms or factories" in other States, the Court reasoned, is a matter for which *those* States' legislatures, exercising

their police power, should "supply the fitting remedy." *Id.* at 524. Put simply, state laws that project extraterritorially but bear no relation to internal "public safety or public order are beyond the police power of a state or locality and thus violate the commerce clause." 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 11.7(a) n.2 (5th ed. 2012) (collecting decisions).

2. In determining whether a law exceeds the police power, courts do not accept at face value the proffered rationale. Even the most well-intentioned regulation "might well exceed the scope of the State's legitimate interests." *Head* v. *N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 447 (1963). A State's determination that a law "constitutes proper exercise of police power is not final or conclusive" (*Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923)), regardless of whether it was enacted "in good faith" to "protect the health of the people" (*Minnesota* v. *Barber*, 136 U.S. 313, 319 (1890)). Thus, the mere "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel* v. *Cons. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) (op. of Powell, J.); see *Kan. City S. Ry.* v. *Kaw Valley Drainage Dist.*, 233 U.S. 75, 79 (1914) (Holmes, J.) (a "state cannot avoid the operation of" the Commerce Clause "by simply invoking the convenient apologetics of the police power").

The question ultimately is one of reasonableness: Can the law reasonably be justified as a measure to "'protect the health and safety of th[e] citizens'" of the State or locality given its effects outside the State? *Hill*, 530 U.S. at 715. The "test of 'reasonableness' under the interstate commerce clause cases is much stricter" than the "test of 'reasonableness' of economic

activities under the due process and equal protection cases." 2 *Treatise on Constitutional Law*, *supra,* § 11.7(a) (discussing *S. Pac.*, 325 U.S. at 778). To protect interstate commerce and interstate relations from harm, courts must take a hard look at the proffered rationales for a law with substantial extraterritorial effects, and how well the law serves those purposes. See *Legato Vapors*, 847 F.3d at 834 n.1 ("extraterritorial laws" may be upheld "in the unusual circumstances where the state law serves an important purpose and the state can show that no less restrictive or intrusive measures would serve the purpose"); cf. *Central Hudson Gas & Electric* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 561-566 (1980) (protecting commercial speech by requiring that the government's regulatory interest be substantial, that regulation directly advance that interest, and that regulation be no more extensive than necessary to serve that interest).

B. Proposition 12 Bears No Relation To California's Internal Health And Safety

This case presents a textbook example of a law that extends the police power of the State "beyond its jurisdictional bounds." *C & A Carbone*, 511 U.S. at 393. Proposition 12's stated justification to prevent animal cruelty is invalid, because California has no interest in methods of out-of-state farm animal confinement. And its health-and-safety rationale is so baseless that the State did not try to defend the law on that ground in the district court or court of appeals. Dist. Ct. Dkt. 18-1, at 12 n.6; Cal. Br. 33 n.13. As the United States explained below, the State "does not invoke any legitimate interest in avoiding in-state harm." U.S. Am. Br. 19 n.3. At a minimum, the complaint raises plausible concerns about the validity

of Proposition 12 as a legitimate exercise of police power that state a Commerce Clause claim.

1. The first justification for Proposition 12 is to "prevent animal cruelty by phasing out extreme methods of farm animal confinement." Pet. App. 37a §2. Although safeguarding the welfare of domestic animals is a valid exercise of police power, a law that attempts to address perceived harms to animals in *other* States is not. California's interest in preventing perceived animal cruelty is not a legitimate reason for regulating the production of goods outside its borders.

By the early twentieth century, every State had enacted laws to protect animal welfare. Animal Welfare Inst., *Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1990* 4 (1990). This Court has long held that statutes that prohibit actions that are "injurious to its domestic animals" are legitimate exercise of police power. *Reid* v. *Colorado*, 187 U.S. 137, 151 (1902); see *Sentell* v. *New Orleans & C.R. Co.*, 166 U.S. 698, 705 (1897).

But the police power does not extend "beyond * * * jurisdictional bounds" to protect the welfare of animals in other States. *C&A Carbone*, 511 U.S. at 393; cf. *Edgar*, 457 U.S. at 644 (State had "no legitimate interest in protecting nonresident shareholders"); see U.S. Am. Br. 18.

One measure enacted in Proposition 12 is aimed at protecting the welfare of California's "domestic animals." That provision prohibits farmers "within the state" from confining sows "in a cruel manner." Pet. App. 37a § 25990(a). But the measure at issue here prohibits the sale of pork in California that "is the meat of immediate offspring" of a sow that was "confined in a cruel manner." Pet. App. 38a

§ 25990(b)(2). That measure has *no* impact on pigs housed in California. As the State has acknowledged (Pet. App. 80a), 99.87% of commercial sows in the United States are housed in other States. And Proposition 12 already makes it illegal for in-state farmers to "confine[] in a cruel manner" the small number of in-state sows. As the United States explained below, "there can be no plausible argument" that the challenged provision "is intended to promote the welfare of animals within California." U.S. Am. Br. 18.

2. The second justification for Proposition 12 is to protect "the health and safety of California consumers" by reducing "the risk of foodborne illness and associated negative fiscal impacts on the State of California." Pet. App. 37a §2. Although States may enact food-safety measures to protect the public health, Proposition 12's minimum-space requirements are unconnected to that objective.

To protect public health, a State has authority to regulate "animals having contagious or infectious diseases." *Hannibal & St. J.R.*, 95 U.S. at 471. But this Court repeatedly has held that purported meat-safety measures that burden interstate commerce and bear no real relation to public health violate the Commerce Clause. In *Brimmer* v. *Rebman*, 138 U.S. 78, 80 (1891), for instance, a State law imposed an inspection fee on beef slaughtered more than 100 miles from its place of sale. The law was "avowedly enacted to protect" the State's citizens from "unwholesome meats." *Id.* at 84. Yet this Court concluded that it was a "regulation of commerce beyond the power of the state to establish" because it lacked any "real or substantial relation to" the stated public-health objective. *Ibid.*; see *Barber*, 136 U.S. at

329 (meat-inspection law was not a "legitimate exertion of the police powers of the state").

The same is true of Proposition 12. The stated justification of protecting the health and safety of citizens by reducing the risk of foodborne illness is bogus. Pet. App. 37a § 2. No evidence connects that objective to the requirement that farms house sows with 24 square feet of space (rather than 16 to 18) and cease to use gestation stalls.

Proposition 12 "addresses only *sow* housing practices"—not housing practices for the "*offspring* of sows" that actually "enter the market" for whole pork meat and might "present some risk of causing foodborne illness." Pet. App. 226a, ¶¶423-424. Sows and offspring "are physically separated" after nursing precisely "to prevent diseases from being transmitted from the sow to the offspring while the piglets develop." Pet. App. 227a, ¶¶430-32; 184a, ¶142. Offspring then are raised for five more months in different facilities than sows. Pet. App. 149a, ¶11. "Any infection held [by offspring] early in life is not likely to be present even several months later." Pet. App. 227a, ¶433.

CDFA—the agency with responsibility for ensuring food safety in California—agreed that the food-safety justification is baseless. In its SRIA, the CDFA stated that "the law was not primarily written" to address "human foodborne illness." Pet. App. 76a. The prescribed "space allowance[e]," the SRIA explained, is not "accepted" as a "standar[d] within the scientific community to reduce human food-borne illness" or "other human or safety concerns," and is not "based in specific peer-reviewed scientific literature" or, for that matter, in any "scientific research" at all. Pet. App. 75a-76a. The addendum to the SRIA

confirmed that no scientific literature allowed CDFA to confirm, according to "usual scientific practices, that the specific minimum confinement standards" in Proposition 12 "reduce the risk of human-borne illness." Pet. Reply App. 74a.

Anyway, federal law already "protect[s] the health and welfare of consumers" by "assuring" the safety of "meat and meat food products" in interstate commerce. 21 U.S.C. § 602. The Federal Meat Inspection Act "establishes 'an elaborate system of inspect[ing]' live animals and carcasses in order 'to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products.'" *Nat'l Meat Ass'n*, 565 U.S. at 455-456 (quoting *Pittsburgh Melting Co.* v. *Totten*, 248 U.S. 1, 4-5 (1918)). USDA inspects "each animal brought to a slaughterhouse" for "evidence of disease." *Id.* at 456; see 9 C.F.R. § 309.1. A diseased animal is slaughtered in a separate facility, and "no part of its carcass" is "sold for human consumption." *Nat'l Meat Ass'n*, 565 U.S. at 457; see 21 U.S.C. § 610(c); 9 C.F.R. § 309.13(a). An animal that a USDA inspector suspects of being diseased also is "slaughtered separately." 9 C.F.R. § 309.2(n). "[P]ost-mortem' examination" determines "which parts, if any," may "be processed into food for humans." *Nat'l Meat Ass'n*, 565 U.S. at 457

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In short, neither of the purported aims of Proposition 12 is a legitimate exercise of California's police power. Neither justifies the extraterritorial regulation of sow housing under *any* standard, let alone the searching inquiry necessary to protect interstate commerce and horizontal federalism.

III. PETITIONERS STATE A CLAIM UNDER *PIKE*

Putting aside the special scrutiny required of extraterritorial laws, and even if Proposition 12's purported objectives lay within the police power, the law fails the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Under *Pike*, "the question becomes one of degree." *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 441 (1978). Courts ask whether "the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (alterations omitted) (quoting *Pike*, 397 U.S. at 142); see *Dep't of Rev. of Ky.* v. *Davis*, 553 U.S. 328, 353 (2008) ("nondiscriminatory burdens on commerce may be struck down" if they "clearly outweigh the benefits of a state or local practice"). Petitioners' complaint states a Commerce Clause claim because it plausibly alleges that Proposition 12's burden on interstate commerce substantially outweighs any local concerns. The court of appeals erred by not engaging in meaningful *Pike* balancing.

A. Proposition 12 Imposes A Substantial Burden On National Pork Production And Any Local Benefits Are Illusory

The complaint alleges that Proposition 12 imposes substantial burdens on the national pork industry that are borne entirely by out-of-state farmers and their customers. Those burdens clearly outweigh any negligible benefits of Proposition 12 to in-state sows and human health.

1. The facts in the complaint, supported by declarations from sow farmers, an economist, and

trade groups, plausibly allege that Proposition 12 imposes a substantial burden on pork production outside California.

The farms regulated by the challenged requirements are outside California. The State's consumption accounts for approximately 13% of the national pork market, or the annual offspring of approximately 673,000 sows. Pet. App. 151a, ¶20. Only 1,500 sows are commercially bred in California (*ibid.*), and those sows are housed on farms that have to comply with a separate Proposition 12 measure. Accordingly, the burdens of the challenged requirements fall exclusively on out-of-state sow farmers. CDFA acknowledged this fact (Pet. App. 80a), and the State has not disputed it in litigation.

The practices of the vast majority of farmers nationwide do not comply with Proposition 12. While some States impose stand-up, turn-around requirements on their own sow farmers, none has established square-footage requirements. Pet. App. 203a, ¶280; see National Agricultural Law Center, *Farm Animal Confinement*, https://nationalaglawcenter.org/state-compilations/farm-animal-welfare. A number of those States expressly permit pre-farrowing and gestation confinement longer than does Proposition 12. *Supra*, p. 31. And with one exception—a Massachusetts ballot initiative—no State has applied its sow-housing regulations extraterritorially. Pet. App. 203a, ¶281.

Yet sow farmers outside California have no practical choice but to comply with Proposition 12. Sow farmers rarely sell pork directly to businesses or consumers and do not know where their pork may eventually be sold. There are many intermediate actors. Individual sow farms sell piglets to nurseries that sell feeder pigs to finishing farms that sell hogs

to slaughter-packer plants that sell whole pork meat to businesses through distributors. Pet. App. 181a, ¶¶126-27; 183a-84a, ¶¶136-44. Downstream market participants will require sow farmers to comply with Proposition 12 in order to avoid the difficulty of tracing and segregating pork products. Pet. App. 177a, ¶97; 181a, ¶128; 206a, ¶¶299-300; 213a, ¶¶337-39; see p. 16 n.7, *supra*.

To comply with Proposition 12, farmers will have to decrease production or build new facilities, and change the way they care for their animals. Farmers who can no longer use individual stalls during gestation will lose pigs due to pregnancy loss and increased sow injuries and fatalities. Pet. App. 172a-74a, ¶¶74-84; 158a-69a, ¶58. Farmers who already use group housing will need to reduce herd size to meet the square-foot minimum. Pet. App. 171a-72a, ¶¶68-70; 160a-61a, ¶58(c); 164a-66a, ¶58(g)-(h). Building compliant sow housing and developing and implementing new processes (such as for feeding and insemination) will require millions of dollars in additional capital and labor expenditures. Pet. App. 208a-10a, ¶¶311-22. These changes will increase the per-pig production cost by an estimated 9.2%. Pet. App. 214a, ¶343.

Some farms, especially smaller operations, will be forced from the market, caught between the prohibitive cost of complying with Proposition 12 and losing relationships with packers that insist on compliance by their suppliers. Pet. App. 176a-77a, ¶¶94-95, ¶97. As a consequence, the industry will consolidate around larger farms, and more vertical integration will occur to facilitate packer control of housing conditions and tracing. Pet. App. 213a, ¶341.

2. Those burdens on interstate commerce clearly exceed any putative local benefits of Proposition 12. The burden-benefit inquiry involves "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp.*, 434 U.S. at 441. A state law that interferes with commerce "substantially" while furthering the stated purpose "marginally" is invalid. *Kassel*, 450 U.S. at 670.

We have explained that Proposition 12's purported benefits are invalid or non-existent. Part II.A, *supra*. But even if there are cognizable local impacts, they are flimsy. The complaint sufficiently alleges that their effects are marginal, and that they do not outweigh the substantial burden on commerce.

First, though CDFA claims "hard-to-quantify [local] benefits such as moral satisfaction, peace of mind, [and] social approval" for California residents (Pet. App. 75a), petitioners allege that Proposition 12 in fact "aggravate[s], rather than ameliorate[s]," animal cruelty (*Kassel*, 450 U.S. at 674). Sows in group housing experience more injuries and fatalities than sows housed in breeding stalls because they are exposed to aggression. Pet. App. 221a-22a, ¶¶393-95. Sows in breeding stalls are calmer and healthier. Pet. App. 221a, ¶¶390, 396-99. In addition, providing health care and critical nutrients to pregnant sows is more difficult in group housing. Pet. App. 223a-24a, ¶¶404-05.[10]

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[10] Notably, in consultation with the American Association of Swine Veterinarians and respondent HSUS, the largest U.S. restaurant chain has committed to sourcing pork products from farmers who house sows in "individual stalls for the viability of

Second, the complaint alleges that Proposition 12 has no beneficial impact on human health, and the State's own food-safety agency agrees. Part II.A.2, *supra*. Geographic and temporal separation between sows and their offspring ensures that any disease a piglet might contract at a sow farm has disappeared before slaughter. USDA ensures that any diseased animals are slaughtered separately from livestock intended for human consumption. Anyway, there is no evidence that Proposition 12-housed sows are healthier than sows as currently housed. Industry action and federal inspection fully address any "risk of foodborne illness" from pork, which petitioners allege would actually be exacerbated by Proposition 12. Pet. App. 229a-230a, ¶¶443-453.

B. The Court Of Appeals Erroneously Narrowed The Scope Of *Pike* At The Pleading Stage

The Ninth Circuit's holding that petitioners failed to state a claim was based on the view that "increase[d] compliance costs, without more," cannot be a "significant burden" on commerce. Pet App. 17a. But the court itself recognized that the burden of Proposition 12 on interstate commerce is far greater than simply the cost of compliance.

The court of appeals observed that petitioners "plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide." Pet. App. 20a. Indeed, the entire national, $26-billion industry will be compelled to restructure. Pet. App.

[sows'] embryos and safety of themselves, the other animals and the humans that care for them." McDonald's Corp., *2022 Annual Meeting Update* 7 (May 2022), bit.ly/3kRVMuf.

207a-213a, ¶¶305-340; pp. 14-16, *supra*. The court recognized that Proposition 12 "forc[es]" "all or most hog farmers" to "comply with California requirements"; that the costs of doing so "mostly fall on non-California transactions"; and that ultimately it will result in "higher costs to consumers." Pet. App. 9a, 19a-20a. Those effects on commerce go far beyond industry "compliance costs." Pet. App. 17a.

In addition, petitioners allege that the housing practices dictated by California will affirmatively harm out-of-state sows. Pet. App. 220a, ¶379; 221a-224a, ¶¶390-410. And independent sow farmers who cannot afford to comply with Proposition 12 will be forced out of business, leading to industry consolidation. Pet. App. 213a, ¶341. Those too are effects on interstate commerce that are not mere "compliance costs."

In any case, the Ninth Circuit got the law wrong. It cited no decision of this or any other Court to support its holding that "increase[d] compliance costs" cannot "constitute a significant burden on interstate commerce." Pet. App. 17a. The effects of most laws that burden commerce could be characterized as "compliance costs," including laws that this Court has invalidated. For instance, the law in *Kassel* barring trucks longer than 60 feet from Iowa highways "increased costs" for trucking companies by millions of dollars by forcing them to reroute shipments or use smaller vehicles. 450 U.S. at 674. And in *Pike*, the requirement that fruit grown in Arizona be packed there before shipment out of state would have required the company challenging the law to build a $200,000 in-state packing facility. 397 U.S. at 140, 142-143.

The only decision of this Court cited by the court of appeals, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), is inapposite. *Exxon* held that shifting business "from one interstate supplier to another" in response to a regulation that prohibited producers of petroleum products from operating gas stations in Maryland did not burden "the interstate market," reasoning that "the Commerce Clause [does not] protect[t] the particular structure or methods of operation in a retail market" and "there was no reason to assume" that the challenged law would have any effect on the "entire supply" of petroleum products entering Maryland. *Id.* at 127-128. The burden petitioners assert is far greater than the minor burden at issue in *Exxon*. Petitioners allege that Proposition 12 will in practice require sow farms everywhere to adopt its production standards, structurally reworking the industry, requiring costly changes to thousands of facilities, increasing sow mortality, decreasing herd size, and resulting in every pork consumer paying for California's preferred farming practices. Unlike the law in *Exxon*, which would have no effect beyond Maryland's market and at most have a negligible effect within Maryland, Proposition 12 will seriously upset the interstate market, imposing a cognizable burden on interstate commerce that is "clearly excessive in relation to the putative local benefits" of the law. *Pike*, 397 U.S. at 142.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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