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.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

Whether the Commerce Clause permits a State to impose penalties on imports of a product solely on account of objections to the way it was produced in another State, in the absence of any material effects within the importing State.

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

*Amicus* the Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases of concern to the Nation's business community.

This is such a case. California's Proposition 12 regulates how pork is produced nationwide, and its requirements threaten to multiply costs at every step of the supply chain. Pork producers outside California raise 99.87% of the Nation's pork. If Proposition 12 is allowed to stand, those producers will be required to spend hundreds of millions of dollars—potentially bankrupting costs—to retrofit their facilities in hopes of complying with the law, even though the choice was not California's to make.

More broadly, if Proposition 12 stands, California and other States commanding large market shares will be able to impose their notions of sound public policy on the people of other States, enforced through

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made a financial contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

import restrictions and boycotts like this one. That is something that the Constitution's Framers specifically sought to prevent. The Chamber thus submits this brief to shed light on the historical basis for the constitutional rule implicated here—that the States may not arrogate to themselves Congress's power to regulate interstate commerce or other States' power to regulate their internal affairs.

## INTRODUCTION AND SUMMARY OF ARGUMENT

One fundamental presupposition of our system of interstate federalism is that States have authority only to regulate activities within their own jurisdiction. What happens in other States is the business of those States or—where goods or services cross state lines—of the federal government. Larger States cannot impose their will on smaller States.

This fundamental principle is reflected in the overall structure of the U.S. Constitution and several of its specific provisions—including the Due Process Clause, the Full Faith and Credit Clause, Article IV's Privileges and Immunities Clause, and (relevant here) the Commerce Clause. When it comes to impositions on life, liberty, or property, the States generally may not punish people for deeds done in other States (*Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911)), and courts may not serve process on parties outside their territorial jurisdiction (*Pennoyer* v. *Neff*, 95 U.S. 714, 727 (1877)). When it comes to interstate travel, the States may not exclude citizens of other States on account of what they did elsewhere. *Saenz* v. *Roe*, 526 U.S. 489, 500 (1999). And when it comes to commerce, the States may not bar the importation of goods from other States because of how they were manufactured

elsewhere—in the absence of material effects within the State. In short, the principle that the statutes of one State may not "operate beyond the jurisdiction of that State * * * lies at the foundation" of numerous constitutional provisions and "is so obviously the necessary result of the Constitution that it has rarely been called in question." *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161-162 (1914).

In each of these constitutional contexts, States are limited to laws affecting the health, safety, or welfare of their own citizens. If, for example, an imported product would have a deleterious effect on the health, safety, or welfare of the importing State's own citizens, the importing State may keep it out. But it cannot ban out-of-state products because of considerations or events that took place outside its borders and have no material effects within the State. It cannot block interstate commerce for the purpose of coercing or influencing the way people behave in other States.

Things are different in the international arena, where sovereigns, including the United States, have plenary authority over the movement of goods and people across their borders, and may use that power in service of political and diplomatic objectives well beyond their own citizens' direct welfare. Under the Constitution, by contrast, the several States wholly gave up the power to regulate interstate (as well as international and tribal) commerce, creating a constitutionally grounded common market. To be sure, States retain police powers, the exercise of which may have incidental effects on commerce in other States. But they have no power over interstate commerce as such. They cannot interfere with the movement of goods and persons across state lines with the object of influencing the conduct of the residents of other

States—absent some material effect on the welfare of their own citizens resulting from the presence or use of the product inside their borders.

This principle was well known to the Framers and followed consistently by this Court in its first century. The Commerce Clause was a reaction to the chaos wrought by States' protectionist and extraterritorial measures under the Articles of Confederation. As James Madison observed, "[t]he practice of many States in restricting the commercial intercourse with other States * * * is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive & vexatious in themselves, than they are destructive of the general harmony." James Madison, "Vices of the Political System of the U. States," *in The Writings of James Madison* (Gaillard Hunt ed., 1900) (written shortly before he left for the Constitutional Convention in May, 1787). The Framers and this Court's early decisions thus distinguished between States' "regulations of police, respecting the public health," which were valid, and States' "regulations of the commerce of the United States," which were not. *Gibbons* v. *Ogden*, 22 U.S. 1, 178 (1824).

Applying this principle does not require any subjective balancing of interests by the courts. They need only ask where the evil that the regulation seeks to prevent would occur. If it would occur within the State imposing the regulation, as a result of the sale or use of the product within the State, then the regulation is a legitimate exercise of the police power. If the evil would occur in some other State—such as the State of production—then the regulation is outside the scope of the police power and is a bare intrusion into the regulation of interstate commerce.

On the facts of this case, the application of this principle is clear. The object of California's law is preventing cruelty to animals—an entirely legitimate objective. But California's authority to do so is confined to its territorial limits. Other States are equally free to determine how animals should be treated within their borders. With respect to imports, any violation of California's desired code of conduct toward animals already occurred in the State of production, before the product reached California's borders. Nothing in the use of the product within California has any bearing on the statutory purpose.

If California were permitted to enforce this law, it would be free to use its considerable market power to impose its political will on the people of other States in countless other ways. It could block importation of goods not made in compliance with California's labor laws, or by companies that select board members in ways that are lawful where they operate but not lawful in California. It could attempt to reduce water pollution in Minnesota by banning the importation of certain paper products into California—even though that paper would cause no more pollution in California than any other. Indeed, it could enact a comprehensive system of nationwide Environmental, Social, and Governance (ESG) regulations, enforced by blocking interstate commerce from flowing into California when it comes from companies that do not comply.

Nor would attempts to regulate companies beyond state borders be limited to California. Other States would block interstate commerce based on quite different policy preferences. Such laws may be good or bad on their policy merits, but it is up to Congress, not the legislature of a single State, to enact and enforce nationwide regulations.

States are free to block interstate commerce only when the prohibited products would create material effects within the State. For example, a State might regulate products where their in-state use would pollute the environment, endanger the health of consumers, or facilitate unlawful conduct. Proposition 12, by contrast, uses California's monopsony power as regulator for the purpose of prohibiting conduct that takes place in other States, which is flatly illegitimate. As the Court explained in *BMW of North America, Inc.* v. *Gore*, a State "may not impose economic sanctions * * * with the intent of changing * * * lawful conduct in other States." 517 U.S. 559, 572 (1996).

The Court should take this opportunity to restore the interstate federalism principles of the Founding, recognized in the early Commerce Clause cases of this Court. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), takes a somewhat different approach, involving a balancing of interests rather than a categorical distinction between state police power and congressional power over interstate commerce. But it is not necessary either to apply *Pike* here or to revisit its approach as a general matter. California's law imposes a direct restraint on interstate commerce for the sole purpose of extraterritorial regulation. That is invalid without regard to *Pike*-style balancing. It is simply impermissible for States to keep products from crossing state lines for the purpose of imposing their public policy preferences on the people of other States.

## STATEMENT

California voters adopted Proposition 12 in 2018, by ballot initiative. The law bars selling in California any pork from pigs born to a sow that was housed in a manner deemed "cruel" by California lawmakers.

Cal. Health & Saf. Code § 25990(b)(2). Far from reflecting prevailing industry standards, the law was heralded by animal welfare activists as "the strongest law of its kind in the world." Pet. 6. To comply, pig farmers must house each sow with 24 or more square feet of "useable space" and must not limit its mobility in defined ways. Cal. Health & Saf. Code §§ 25991(a), (e). The California Department of Food and Agriculture's (CDFA) proposed implementing regulations require farms to allow CDFA agents access to inspect their compliance—wherever they are located. Pet. App. 123a-124a. In other words, California law enforcement officials will roam the entire country to determine compliance with California law without regard to local regulations.

Californians consume 13% of the pork sold in the United States, but raise only 0.13% of the Nation's breeding pigs. Pet. App. 80a. All but a tiny sliver of the costs imposed by Proposition 12 thus fall on farmers in other States—mostly in the Midwest and eastern North Carolina. Pet. App. 150a-151a. Moreover, because pig farmers cannot feasibly segregate pork destined for California from pork destined for other states, "all or most farmers will be forced to comply with California requirements" (Pet. App. 9a), with the cost borne by out-of-state producers, and by consumers across the country. Californians thus enjoy the moral self-satisfaction of setting lofty rules, while the rest of the country bears almost all of the cost.

The National Pork Producers Council and American Farm Bureau Federation sued, contending that Proposition 12 impermissibly regulates conduct occurring wholly outside California and thus trespasses on Congress's exclusive constitutional authority over interstate commerce. The district court dismissed the

complaint, and the Ninth Circuit affirmed, declining to apply the "extraterritoriality" principle of this Court's prior cases on the ground that the cases "cannot mean what they appear to say." Pet. App. 7a. This Court granted review, and it should reverse.

## ARGUMENT

### I. The Constitution does not permit States to engage in extraterritorial regulation.

It is a bedrock principle of our constitutional system that "[n]o State can legislate except with reference to its own jurisdiction"—that is, beyond its borders. *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881); see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 251 (1992). Of course, the laws of each State may have an *effect* on persons in other States. For example, if one State forbids the sale of incendiary fireworks, producers in other States will lose some lucrative opportunities for commerce. But no State may impose a penalty on an out-of-stater for conduct that is lawful in the State where it occurs. That is what California is attempting here: it seeks to impose the penalty of an import ban on pork producers who do not conform to California's production rules.

#### A. The rule against extraterritorial regulation follows from the equality of the States.

Upon declaring independence, the States became equal sovereigns and subjects of the law of nations. "Under international law, then, independence 'entitled' the Colonies 'to all the rights and powers of sovereign states.'" *Franchise Tax Bd. of Cal.* v. *Hyatt*,

139 S. Ct. 1485, 1493 (2019) (quoting *McIlvaine* v. *Coxe's Lessee*, 8 U.S. 209, 212 (1808)).

The Articles of Confederation recognized that each State would retain "its Sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled." Articles of Confederation of 1781, art. II. Thus, "[w]hen independence was achieved, the precepts to be obeyed" in resolving disputes between States were "those of international law." *New Jersey* v. *Delaware*, 291 U.S. 361, 378 (1934); see also *Hyatt*, 139 S. Ct. at 1493. Those principles still govern many disputes between States today. See Stephen Sachs, *Constitutional Backdrops*, 80 G.W. L. Rev. 1813, 1835 (2012).

One such principle, dating back to the Peace of Westphalia, is that the "rights [of a sovereign state] are naturally the same as those of any other state" (1 E. de Vattel, The Law of Nations § 4 (J. Chitty ed. 1883)); "nature has established a perfect equality of rights" because "whatever privileges any one of them derives from freedom and sovereignty, the others equally derive from the same source" ((2 E. de Vattel, The Law of Nations § 35 (J. Chitty ed. 1883)). The principle of equality among the States also characterized the American Founding: our Nation "was and is a union of States, equal in power, dignity and authority." *Shelby Cty., Ala.* v. *Holder*, 570 U.S. 529, 544 (2013) (quoting *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911)). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Ibid.* (quoting *Coyle*, 221 U.S. at 580).

The equal, "independent authority of the States" within "their proper spheres" is "distinctly recognized" in both the overall structure and "many articles of the Constitution," with discrete and narrow exceptions that further illustrate the general principle. *Lane Cty.* v. *Oregon*, 74 U.S. 71, 76 (1868). The Commerce Clause is just one such article.

For example, States enjoy "equal suffrage in the Senate" (U.S. Const. art. V), and every State has been admitted as an "entire member" and on "equal footing with the original States in all respects whatever." *Coyle*, 221 U.S. at 566-567. No State may prosecute a person for wrongdoing wholly committed outside its boundaries. See *Strassheim*, 221 U.S. at 285. Likewise, the Full Faith and Credit and Due Process Clauses presuppose that each State's borders limit its legislative jurisdiction. See *Head*, 234 U.S. at 161-162; cf. *Prigg* v. *Pennsylvania*, 41 U.S. 539, 612 (1842) (Story, J.) (discussing the narrow, constitutionally defined exceptions to the general rule). Since each State is both co-equal and sovereign, its power to regulate within its borders is exclusive of that of any other State—except where federal law provides otherwise. Thus, a State "'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 822 (1985) (quoting *Home Ins. Co.* v. *Dick,* 281 U.S. 397, 410 (1930)).

Before the Constitution, however, the States (like other sovereigns) had plenary power to regulate and even prohibit the movement of goods or people across their borders. Thus, despite having no lawful power to engage in extraterritorial regulation, they could accomplish much the same objective by barring importation or immigration when it served their purposes.

The States gave up that power when they ratified the Constitution, which gives Congress alone the power to regulate the movement of products and people across state lines. Although the States may still exercise the police power to regulate conduct within their borders —even when exercising this power has ripple effects elsewhere—they have no power over interstate commerce as such.

### B. Any power of a State to regulate commerce outside of its borders was delegated to the federal government by the Commerce Clause.

The Commerce Clause was a result of the States' experience of interference with each other's commerce under the Articles of Confederation. After the Revolutionary War, the thirteen independent States enacted what Madison later called "rival, conflicting, and angry" regulations against one another. James Madison, Preface to Debate in the Convention of 1787, in 3 The Records of the Federal Convention of 1787, at 547 (Max Farrand ed., rev. ed. 1937); see Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1896 (2011).

Many States enacted tariffs applicable to interstate as well as foreign commerce. See Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 59-66 (2005/2006). New York, for example, taxed goods imported from Rhode Island, Connecticut, New Jersey, and Pennsylvania unless it could be proven that such goods had not been imported into those States by British ships. *Id.* at 62 & n. 144 (citing Act

of March 15, 1785, Ch. XXXIV, at 65). New York also imposed "special duties on foreign goods imported by American vessels from Connecticut and New Jersey." Curtis P. Nettels, The Emergence of a National Economy, 1775-1815, at 72 (1962). And New York embargoed certain staple foods entering from other States, causing prices to rise in the neighboring States. Denning, *supra*, at 62 (citing Cathy D. Matson & Peter S. Onuf, A Union of Interests: Political and Economic Thought in Revolutionary America 72 (1990); E. Wilder Spalding, New York in the Critical Period 1783-1789, at 156 (1932)).

New Jersey retaliated by taxing the New York lighthouse located in Sandy Hook, while Connecticut barred exports to New York and prohibited New York's ships from landing at its ports. Denning, *supra*, at 62-63 (citing Spalding, *supra*, at 157). Likewise, Virginia imposed across-the-board duties on imported goods, specifically providing that "all vessels coming within this State from any of the United States * * * shall be liable to pay." *Id.* at 60 (citing Act of May, 1783, Ch. LXXIX, § XIV, at 25). And Connecticut imposed duties on luxury goods imported from any other State. *Id.* at 63 (citing Act of Jan. 1784, Connecticut Acts, at 271).

At the time of the Founding, therefore, "as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States [of the Confederacy] exercised, or seemed disposed to exercise, the power of laying duties on imports." *Brown* v. *Maryland*, 25 U.S. 419, 438 (1827). Many prominent Framers viewed such protectionist state laws as detrimental to the Union, believing that unifying American policy as to domestic and foreign commerce was

essential to the Nation's economic health. Friedman & Deacon,97 Va. L. Rev. at 1888-1892.

In Federalist No. 11, for example, Alexander Hamilton explained that "[t]he importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion, and which * * * commanded the most general assent of men who have any acquaintance with the subject." He feared that clashing commercial regulation across the States "would naturally lead to outrages, and these to reprisals and wars." The Federalist No. 7 (Alexander Hamilton).

James Madison agreed, observing that the "exercise of [commercial] power separately, by the States * * * engendered rival, conflicting and angry regulations." 3 Farrand (Madison) 547. Among other issues, protectionist regulations against other States "were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy." *Id.* at 549. These laws "would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility." The Federalist No. 42 (James Madison). As Madison explained, the "mischiefs" of duties imposed between the States occurred "from the want of Genl. Government over commerce." 2 The Records of the Federal Convention of 1787, at 441 (Max Farrand ed., rev. ed. 1937). Thus, he continued, "it is very certain that [the interstate commerce clause] grew out of the abuse of the power by the importing states in taxing the non-importing." Letter of February 13, 1829, to J. C. Cabell, 3 Farrand 478.

The importance of protecting "non-importing" or "uncommercial states" was apparent to Federalists

and Anti-Federalists alike. Gouverneur Morris favored "the power [of Congress] to regulate trade between the States," because, as Roger Sherman put it, otherwise "exporting states [would] tax the produce of their uncommercial neighbors." 2 Farrand 308, 360. Prominent Anti-Federalists such as Samuel Adams and the pseudonymous Federal Farmer agreed that the "powers of the union ought to be extended to commerce." 1 Letters from the Federal Farmer No. 6 (Dec. 25, 1787); see 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 136 (Jonathan Elliot ed., Washington 1836). The most important objective of the Commerce Clause was not to empower Congress to regulate, but to disempower States from interfering. The Framers did this by giving Congress exclusive power to decide what goods, services, and people could move across state lines, denying this power to States. Although States could regulate conduct within their boundaries, they were stripped of authority to impose their will on people in other States though import restrictions.

### 1. The Constitution vested all power over interstate commerce exclusively in Congress.

In line with these concerns about state commercial regulations, the Constitution delegated to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Under this Court's precedents, the foreign and Indian commerce powers are understood to be exclusive: Congress's power "to regulate commerce with foreign nations" is "exclusive and plenary" (*Board of Trs.* v. *United States*,

289 U.S. 48, 56 (1933)),[2] and "the States * * * have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996); Friedman & Deacon, 97 Va. L. Rev. at 1910.

The exclusive character of the Foreign and Indian Commerce Clauses is obvious from their purpose. It was essential to prevent foreign nations from negotiating special deals with individual States, to the injury of the whole. And it was essential to prevent individual States from dealing (often abusively and unfairly) with the tribes—a practice that frequently had led to warfare in which the entire United States was implicated. Thus, no one argues that the States have individual authority to regulate international commerce or to control trade with Indian tribes.

Read together, the three commerce clauses powerfully support the conclusion that, like the foreign and

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[2] These references to exclusivity are to Congress's core power to regulate the movement of goods and people across state lines. Accordingly, "a statute that *directly* controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (emphasis added). This Court has held that congressional regulation of all subjects that substantially affect interstate commerce is necessary and proper to Congress's commerce power. *Wickard* v. *Filburn*, 317 U.S. 111, 124-125 (1942). That "necessary and proper" extension is not, and logically could not be, exclusive, which is why the "National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner Smith* v. *Ware*, 414 U.S. 117, 140 (1973).

Indian commerce powers, the interstate commerce power too was meant to be exclusive. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1160 & n.28 (2003); see *Gibbons*, 22 U.S. at 229 (Johnson, J., concurring) ("The language which grants the power as to one description of commerce, grants it as to all."). As a result, "the 'Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy*, 491 U.S. at 336 (quoting *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion)). That conclusion follows from the Constitution's text, structure, and history.

First, text and structure. As Chief Justice Marshall explained for the Court in *Gibbons* v. *Ogden*, the term "commerce" should "carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it." 22 U.S. at 194. That straightforward rationale applies equally to the term "regulate"—which, like "commerce," appears only once in the Clause. Thus, insofar as the powers to regulate foreign and interstate commerce are exclusive, it logically follows that the same should be true of the parallel power to regulate interstate commerce (as originally understood, see *supra* n.2).

Second, history. Madison highlighted the Clause's internal parallelism in his letter to Cabell: "Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to [the power over interstate commerce]." 3 Farrand 478. Madison insisted that the interstate commerce clause was not just an empowerment of Congress but "was

intended as a *negative and preventive provision* against injustice among the states themselves." *Ibid.* (emphasis added). As Madison put it near the end of the Convention, he "was more and more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority." 2 Farrand (Madison) 625.

Many other Framers likewise understood the grant of the power to regulate interstate commerce to Congress to be exclusive. As Hamilton noted in Federalist No. 32, some constitutional grants of power to Congress were by their very nature exclusive, and thus implicitly denied the States a similar power: "[E]xclusive delegation, or * * * alienation, of State sovereignty would * * * exist * * * where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant." Similarly, Charles Pinckney understood the clause to grant "complete management of our commerce" to the federal government. 3 Farrand 116.

**2. Although States lack commerce power, they can legislate in ways that affect commerce.**

That the Framers understood the commerce power to belong exclusively to Congress does not mean that States were left powerless to pass any laws having *effects* on the commerce of other States. States retain, as a "residuum" of their sovereignty, a police power to regulate the health, safety, and welfare of their citizens—but only within their borders.

The Framers understood this balance of power. As explained by James Wilson—later a Justice of this Court—the "Commerce" power is "peculiar" to the

"natil. Govt.," but "certain inferior and local Qualities are the province of the" States. Friedman & Deacon, 97 Va. L. Rev. at 1906 (quoting 1 Farrand 416). Likewise, Roger Sherman and Oliver Ellsworth observed that the "powers [of Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters." 3 Farrand 99; see also Friedman and Deacon, *supra*, at 1907 (citing various Framers for the exclusivity of federal powers).

This Court's early Commerce Clause cases support this interpretation. In *Gibbons*, the first such case, the Court struck down a New York navigation regulation as preempted by a federal statute. 22 U.S. at 209-212. Although the Court ultimately did not decide whether the federal commerce power was exclusive, it acknowledged the "great force in th[e] argument" of William Wirt that "'to regulate' implies in its nature, full power over the thing to be regulated," and "produces a uniform whole," which is "disturbed and deranged by changing what the regulating power designs to leave untouched." *Id.* at 209. Indeed, the Court was "not satisfied that it ha[d] been refuted." *Ibid.*

The Court nonetheless went on to find it "immaterial" whether New York's steamboat monopoly law was justified by commerce or police powers, as the law had been preempted by Congress's adoption of a law licensing ships for the coastal trade. *Id.* at 210, 221. Along the way, however, Chief Justice Marshall's opinion for the Court distinguished the federal commerce power from the States' retained power to enact "inspection laws," "quarantine laws, and other regu-

lations of police"—which "do not partake of the character of regulations of the commerce of the United States." *Id.* at 178, 203.

First, the Court contrasted the object of commerce powers with the "object" of "inspection laws." *Id.* at 203. Inspection laws are requirements that certain products manufactured within the State be inspected before they are sold or exported, for the purpose of "improv[ing] the quality of articles produced by the labour of a country." *Ibid.* Obviously these laws *affect* interstate commerce, but they do not *regulate* interstate commerce as that term was understood at the Founding, because they "act upon the subject before it becomes an article of foreign commerce, or of commerce among the States." *Ibid.*

As Chief Justice Marshall explained, the same is true of "quarantine" or "health laws of every description," which regulate and sometimes prohibit the use of products within the State *after* they have crossed state lines, for the purpose of protecting public health *within* the State. *Ibid.* These measures "remain subject to State legislation," and do not infringe on the "direct general power * * * granted to Congress" to regulate commerce "among the States." *Ibid.*

In other words, Congress has plenary power under the Commerce Clause to control commerce among the States, but it has no police powers—which have the distinct object of promoting public health, safety, or welfare within a State. Powers that at times resemble the police power, such as those exercised by Congress today, derive principally from the Necessary and Proper Clause, on account of substantial effects on interstate commerce. *Wickard*, 317 U.S. at 124-125; *supra* n.2. Accordingly, state legislation supported by a

legitimate police power does not intrude on the exclusive federal commerce power. "Marshall agreed that so long as the state laws were passed for those non-commercial purposes, they could not be considered impermissible regulations of commerce." Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. Online 815, 840 (2020).

In the final step of its analysis, the Court discussed the result when state and federal law diverged. "[I]n exercising the power of regulating their own purely internal affairs, whether of trading or police," States may inadvertently enact laws that "come into collision with an act of Congress." *Gibbons*, 22 U.S. at 209-210. If such a collision occurs, it would not matter "whether those [state] laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police." *Id.* at 210. Regardless of the power exercised, state law must yield to federal.

Justice Johnson went even further, embracing the position that New York's steamboat monopoly law was a direct attempt to regulate which steamboats could engage in commerce between New Jersey and Manhattan, and thus infringed Congress's exclusive commerce power even if Congress had not legislated. *Id*. at 235 (Johnson, J., concurring). The majority did not dispute Justice Johnson's point, but declared it unnecessary to resolving the case.

In sum, according to the Marshall Court, Congress possesses the whole of the power to regulate "commerce which concerns more States than one," while the States retain the power to regulate conduct within their own borders. 22 U.S. at 194. If Congress passes

a law within the scope of its Commerce Clause power, it preempts any inconsistent state law—even one supported by the state's police power. If a State passes a police power regulation—one regulating conduct within the State, aimed at protecting its citizens—and that law does not conflict with federal legislation, it is enforceable even if it has some effect on interstate commerce. But if a State purports to regulate the movement of goods across state lines for a purpose other than preventing harms within its boundaries—say, the purpose of punishing moral evils that take place in the course of production in another State—the law cannot be supported by the police power, and it intrudes on Congress's exclusive power to decide which products can cross state lines.

Five years after *Gibbons*, the Supreme Court confronted a State's exercise of the police power affecting interstate commerce in the absence of federal legislation. In *Willson* v. *Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829), Delaware authorized a private company to build a dam that obstructed movement on a navigable waterway, for the purpose of ameliorating the health effects of a disease-ridden marsh. Although Congress may regulate navigable waters under its commerce powers, "[C]ongress ha[d] passed no such act." *Id.* at 251-252. Consequently, the constitutionality of the Delaware law authorizing construction of a dam rose and fell entirely upon whether the State had legitimately exercised its police powers.

The Court held that it had. The authorizing statute sought to dam a creek that passed through "a deep level marsh" where "the tide flows for some distance," such that "[t]he value of the property on its banks" and the "health of the inhabitants" were "enhanced" and "improved" by the dam's construction. *Id.* at 251.

The "[m]easures calculated to produce these objects," the Court reasoned, "are undoubtedly within those [powers] which are reserved to the states." *Ibid.* Because the object of Delaware's law was to benefit property values and residents' health, and because it did not conflict with any congressional act, the law was valid. *Id.* at 251-252. The Court did "not think that the act * * * can, under all circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." *Id.* at 252. Measures calculated to advance a legitimate police power purpose, unlike those designed to interfere with commerce, could thus be upheld. Wurman, 87 U.Chi. L. Rev. Online at 842; see also *City of New York* v. *Miln*, 36 U.S. 102, 137 (1837) ("[W]hilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress acting under a different power.").

Later cases identified discrete exceptions to the exclusivity of Congress's power to regulate interstate commerce, while recognizing that "[w]hatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley* v. *Bd. of Wardens*, 53 U.S. 299, 319 (1851). Where "different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not

such, but are simply local powers." *Leisy* v. *Hardin*, 135 U.S. 100, 109 (1890).

### C. The structure of the Constitution presupposes and reinforces the rule against extraterritorial regulation by States.

Beyond the Constitution's limits on commercial regulation, the document's broader structure provides additional grounding for the rule against extraterritorial regulation by States. Each State's equal dignity and sovereignty under the Constitution implies constitutional "limitation[s] on the sovereignty of all of its sister States." *Hyatt*, 139 S. Ct. at 1497 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980)). In particular, each State's prerogative to regulate its own internal affairs is limited by the need to refrain from punishing conduct that is lawful where it occurs, based on "the need to respect the interests of other States." *Gore*, 517 U.S. at 571. Thus, a State "may not impose economic sanctions * * * with the intent of changing * * * lawful conduct in other States." *Id.* at 572.

The Court's extraterritoriality cases illustrate this principle. In *Ogden* v. *Saunders*, the Court explained that when States "pass beyond their own [territorial] limits * * * there arises a conflict of sovereign power * * * which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States." 25 U.S. 213, 369 (1827) (opinion of Johnson, J.); see also *Boyle* v. *Zacharie*, 31 U.S. 635, 643 (1832) (Story, J.) (confirming that Justice Johnson spoke for the *Ogden* majority). Likewise, in *New York Life Insurance Co.* v. *Head*, the Court invalidated a Missouri law that purported to ban modifying, in New York, a contract executed in

Missouri. 234 U.S. at 160. The Court explained that the extraterritorial application of Missouri law would "throw[] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *Id.* at 161; accord *Bonaparte*, 104 U.S. at 594. And in *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897), the Court struck down a Louisiana statute that banned procuring an insurance policy from an out-of-state insurer that had not complied with Louisiana's licensing requirements. There, as here, there was no showing that the affected out-of-state contracts had any negative material effect within the regulating State.

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In sum, the States have never possessed the power to regulate beyond their borders.[3] For a territorially

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[3] Enforcing the Constitution's territorial limits on state power is particularly important after *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), which held that "in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit" instead of neutral rules drawn from the general law of conflicts. *Id.* at 494; *cf.* William F. Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 27-31 (1963) (discussing the long history of independent federal-court judgment on conflicts issues). "Largely because of *Klaxon*, diversity jurisdiction no longer checks states' tendencies to favor in-state interests by extending the reach of certain laws beyond their own borders." Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 567 (2006) (citing Laycock, *supra*, at 282); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 496 (1928); *Saunders*, 25 U.S. at 359 (Johnson,

limited state law—such as a price control, an embargo on certain goods, or a dam built on a navigable waterway—that affects commerce in or with another State to be a legitimate exercise of the police power, it must be aimed at protecting the health, safety, or welfare of its citizens and use means appropriate to that end. Otherwise, the State both exceeds its inherent constitutional power and invades Congress's exclusive prerogative to regulate interstate commerce.

## II. Proposition 12 impermissibly regulates conduct that lawfully takes place in other States, and thus attempts to exercise a power that California does not have.

Proposition 12 is unconstitutional for every reason discussed above. It lacks any valid justification under California's police power, regulates commerce that is exclusively within Congress's power to regulate, and exceeds the scope of California's sovereignty.

Proposition 12 regulates commerce, not the health, safety, or welfare of its inhabitants. The law prohibits the sale of pork produced with prevailing commercial methods, and its practical effect is to require out-of-state pork producers to comply with its terms to keep participating in the national market. Indeed, the law's proposed implementing regulations would directly regulate out-of-state producers by requiring

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J.) (stating that the establishment of federal courts was intended to address conflict of laws).

them to allow CDFA agents to inspect their facilities and records. Pet. App. 123a.[4]

California's police power doubtless includes regulating animal mistreatment—insofar as the mistreatment takes place in California. But California cannot, in the name of protecting the health, safety, and welfare of *its* citizens, leverage the market power of those citizens to impose its idiosyncratic brand of animal husbandry beyond its borders.[5] Nor can it displace other States' judgments about how best to balance animal welfare and economic concerns within their own borders. Other than with respect to the 0.13% of the breeding herd that California hosts, the behavior that California seeks to regulate takes place entirely beyond its borders, in the various States where the pork is produced, and is complete before the relevant pork products reach California's borders.

In a self-evident attempt to evade the constitutional prohibition on extraterritorial regulation, Proposition 12's drafters purported to address "the risk of foodborne illness and associated negative fiscal impacts on the State of California." Pet. App. 37a. But on this record, that rationale is purely pretextual, and California does not seriously contend otherwise. Pet. 30; Pet. App. 75a-76a, 226a-228a. Pork produced in

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[4] Although the implementing regulations are not final, they confirm California's purpose of directly regulating out-of-state activity.

[5] The analysis would likely be different if the State itself were buying the pork, and thus acting as a market participant, rather than regulating what pork its inhabitants may buy. See *Reeves Inc.* v. *Stake*, 447 U.S. 429 (1980).

compliance with California's rules is indistinguishable from pork produced through conventional methods. Indeed, that is why the implementing regulations contemplate California inspectors roaming around the country. If the pork itself were different, California could enforce the rules by inspecting the imported products when they arrive at its doorstep.

Although a statute that is genuinely "calculated to produce" a result within the police power might not "be considered as repugnant to the power to regulate commerce in its dormant state" (*Willson*, 27 U.S. at 251-252), this is not a case where the imported product—say, an unhealthy product, or one that will cause pollution or other negative effects when used—has material effects in California. California has shown no ill health effects from pork derived from pigs born to sows that were held in less than 24 square feet of "useable space." Cal. Health & Saf. Code §§ 25991(a), (e). Under these circumstances, California cannot announce an embargo on pork produced in compliance with the standards of, say, Ohio or North Carolina.

Nor can Proposition 12 be sustained as an exercise of the power to regulate on behalf of the "morals" of California's inhabitants, in addition to "health, safety, and welfare" generally. California's law is not aimed at preventing the unethical treatment of animals in California, but rather at protecting animals across the country from confinement contrary to California law. California's stated justifications confirm that the law was not passed "with a view to those subjects" it is free to regulate. *Gibbons*, 22 U.S. at 203-204. Its aim is regulating animal cruelty nationwide. Pet. 6. This issue is beyond the power of one State and can be addressed only by Congress. Were the law otherwise, a State could declare a moral objection to anything, and

thus block imports of anything. But as we have shown, the Commerce Clause requires a minimum level of comity toward other States' commercial activities.

## III. This Court need not apply *Pike* balancing to conclude that California lacks the power to enact this law, but the law nonetheless fails to serve a legitimate interest under *Pike*.

As we have shown, Proposition 12 cannot be reconciled with the original public meaning of the Constitution and the limitations that it imposed on the powers of States. But as petitioner explains, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), provides an additional basis for reversing the judgment below.

Indeed, *Pike* itself recognized that a statute does not satisfy the Constitution unless it "effectuate[s] a legitimate local public interest." 397 U.S. at 142. In its application to pork farmed outside of California, Proposition 12 fails this precondition for the simple reason that regulating the conditions under which pork is produced in other States is not a "legitimate local public interest" of California's—*i.e.*, a subject that it is free to regulate under its police power. Accordingly, even under *Pike* balancing, Proposition 12 should be invalidated.

Alternatively, however, the Court can simply hold that California's law directly and indirectly regulates conduct occurring within another State without a valid justification—and thus restore the categorical distinction between regulations that fall within the States' police powers and those that intrude on Congress's exclusive power over interstate commerce.

## IV. California is increasingly leveraging its regulatory power over the largest state product market in the Nation to regulate conduct in other States.

Finally, the effect of upholding the judgment below would be wide-ranging and severe. Proposition 12's pork provision is only one of California's many attempts to deploy the purchasing power of its citizens to regulate the manner in which goods are produced beyond California's borders.

Other provisions of Proposition 12 constitute similarly impermissible extraterritorial regulation. Along with pork, Proposition 12 regulates the manner in which egg-laying hens and veal calves are held nationwide. Cal. Health & Safety Code § 25990. And other California laws take the same approach. For instance, California Health and Safety Code Section 25981 prohibits force-feeding a bird for the purpose of "enlarging the bird's liver," a standard means of commercially producing foie gras. *Id.* § 25981. Relatedly, section 25982 purports to prohibit selling any product "in California if it is the result of force-feeding a bird for the purpose of enlarging [its liver]." *Id.* § 25982.

If such uses of the State's market power are valid, California and other States are certain to exercise the power in increasingly broad and extraterritorial ways. California recently attempted to require the boards of directors of public companies headquartered there to meet gender parity quotas. CA Senate Bill 826. If California were to ban the purchase of products in the State made by companies, in- or out-of-state, that did not satisfy SB 826's parity requirement, such a law would present constitutional issues like those posed by Proposition 12. Under California's reading of the

Commerce Clause, moreover, the State might be able to require out-of-state companies to comply with various environmental, social, and governance (ESG) criteria to sell products in California. On the other end of the spectrum, States might choose to only allow the importation of products produced in "open shops" or by workers paid less than a particular wage, or attempt to impose their policy preferences on social media companies nationwide. In short, whatever their policy preferences, upholding Proposition 12 will undoubtedly inspire other populous and economically powerful States to pass extraterritorial regulations.

Such schemes would contravene the interstate cooperation in commercial matters that animates the Commerce Clause and would exceed the "residuum of sovereignty" that California retains under the Constitution. In short, our Nation's charter forbids States from using their commercial assets, whether deep-water ports or a deep-pocketed citizenry, to control and exploit other States.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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