No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, ET AL.,
Petitioners,

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS

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QUESTION PRESENTED

California voters passed Proposition 12 to proscribe the sale of animal products where the source animals were confined in extreme conditions that are "crue[l]" and "threaten the health and safety of California consumers." Prop. 12 §2 (Pet.App.37a). Proposition 12 applies to pork products sold in California, without regard to whether the products originate inside or outside the State. It does not apply, however, to products sold outside California. Producers can freely sell products outside California from farm animals confined contrary to Proposition 12's standards. The district court granted respondents' motions to dismiss the case, holding that the challengers failed to state a claim that Proposition 12 violated the dormant Commerce Clause. The court of appeals affirmed. The question presented is:

Whether the court of appeals erred in holding that a non-discriminatory in-state restriction on sales of specific products does not violate the dormant Commerce Clause simply because it may have incidental upstream effects on out-of-state business activity.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners National Pork Producers Council and American Farm Bureau Federation were the plaintiffs in the district court and the appellants in the court of appeals.

Respondents 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; and Rob Bonta, in his official capacity as Attorney General of California, or their predecessors, were the defendants in the district court and the appellees in the court of appeals.

Non-Government respondents-intervenors The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook were intervenors in the district court and intervenors-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

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

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings, within the meaning of Rule 14.1(b)(iii), beyond those identified in the petition.

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Hormel Foods Company Information About California Proposition 12, Hormel (Oct. 6, 2020), https://www.hormelfoods.com/newsroom/in-the-news/hornews/hormel-foods-company-information-about-california-proposition-12/ 16

Bryony A. Jones et al., *Zoonosis Emergence Linked to Agricultural Intensification and Environmental Change*, 110 Proc. Nat'l Acad. Sci. U.S., no. 21, (2013), https://www.pnas.org/content/110/21/8399 12

Greta Kaul, *Why California's New Pork Rules Could Mean Big Changes for Minnesota Hog Farmers*, Minn. Post (Aug. 6, 2021), https://www.minnpost.com/economy/2021/08/why-californias-new-pork-rules-could-mean-big-changes-for-minnesota-hog-farmers/ 17

Letter from Nat'l Pork Producers Council to Hon. Thomas J. Vilsack, U.S. Sec'y of Agric. (May 27, 2021), https://nppc.org/wp-content/uploads/2021/05/NPPC-Letter-to-Sec.-Vilsack-on-Prop.-12-Background-Study.pdf 17

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Xin Liu et al., *A Comparison of the Behavior, Physiology, and Offspring Resilience of Gestating Sows When Raised in a Group Housing System and Individual Stalls*, 11 Animals no. 7, 2021, https://www.doi.org/10.3390/ani11072076 13

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Tyson Foods Third Quarter 2021 Earnings, Tyson Foods (Aug. 9, 2021), https://s22.q4cdn.com/104708849/files/doc_financials/2021/q3/08-11-21_Tyson-Foods-080921.pdf..... 17

Delcianna Winders, *Survey Says . . . Californians Can Have Their Pork and Let Pigs Move*, Vermont Law School Blog (Dec. 6, 2021), https://www.vermontlaw.edu/blog/animal-law/survey-says-californians-can-have-pork-let-pigs-move 5, 17

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BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS

PRELIMINARY STATEMENT

Petitioners assert a dormant Commerce Clause challenge to California's prohibition on in-state sales of certain pork products from animals confined in cruel and unsanitary conditions that threaten the health of California consumers. That in-state sales ban applies without regard to where the pork originates. Because that prohibition applies only to sales inside California, moreover, producers outside California are free to confine animals however they choose for products sold outside the State.

The case does not properly present the issues the petition purports to present for review. Petitioners insist the

Ninth Circuit's approach to the extraterritoriality doctrine is at odds with this Court's and other circuits' precedent. But the Ninth Circuit follows petitioners' preferred rule and petitioners lost below anyway. The petition also portrays Proposition 12 as aimed only at preventing animal cruelty. That ignores the statute's other purposes, such as protecting the health and safety of California consumers. Because petitioners' issues for review are based on false premises, and present no conflict in circuit authority, review is unwarranted.

STATEMENT

I. STATUTORY FRAMEWORK

A. Proposition 12's Amendments to the California Health and Safety Code

In November 2018, California voters overwhelmingly approved Proposition 12, an initiative that prohibits in-state sales of certain products made from farm animals confined under some of the most extreme, cruel, and unsanitary conditions. Section 2 of Proposition 12 sets forth its purposes: "to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." Prop. 12, §2 (Pet.App. 37a). The ballot-measure pamphlet described the initiative's intended local impacts, which included "eliminat[ing] inhumane and unsafe products from * * * abused animals from the California marketplace" and "reduc[ing] the risk of people being sickened by food poisoning and factory farm pollution." Official Voter Information Guide, California General Election 70 (Nov. 6, 2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf.

Section 3 of Proposition 12 amends the California Health and Safety Code. It provides that "farm owner[s] or operator[s] within" California shall not knowingly confine covered animals "in a cruel manner." Prop. 12, §3 (codified Cal. Health & Safety Code §25990(a)) (Pet. App. 37a-38a). "Confined in a cruel manner" is defined as confinement that "prevents the animal from lying down, standing up, fully extending [its] limbs, or turning around freely." *Id.* §4 (codified Cal. Health & Safety Code §25991(e)(1)) (Pet. App. 40a). Providing specificity, Proposition 12 identifies minimum space allotments for identified animals. *Id.* §4 (codified Cal. Health & Safety Code §25991(e)(2)-(5)) (Pet. App. 40a). Those standards apply only to operations within California.

Proposition 12 also prohibits businesses from knowingly selling "within the state" certain veal meat, pork meat, or eggs from animals confined contrary to Proposition 12's standards. Prop. 12, §3 (codified Cal. Health & Safety Code §25990(b)) (Pet. App. 37a-38a). That prohibition does not distinguish among products based on origin. Nor does it apply to sales outside the State. Producers wishing to sell products outside California from farm animals confined contrary to Proposition 12's standards remain free to do so. Producers may also sell Proposition-12-compliant products in California while selling products elsewhere that do not satisfy Proposition 12's standards. Many producers have committed to doing so already. See pp. 16-18, *infra*.

B. Prior Legislation

Proposition 12 was preceded by similar legislative reforms. In November 2008, California voters passed Proposition 2 to "prohibit the cruel confinement of farm animals" within California. Prop. 2, §2 (codified Cal. Health & Safety Code §§25990-25994) (Jan. 1, 2015).

In 2010, the California legislature passed Assembly Bill 1437 (AB 1437), which prohibited the sale, within California, of certain eggs produced by hens confined in contravention of Proposition 2's standards. Cal. Health & Safety Code §§25995-25997.1 (Jan. 1, 2011). The final legislative findings declare AB 1437's purpose: "to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella." *Id.* §25995(e). While complete consensus regarding the health effects of extreme confinement of hens was absent before AB 1437's enactment, evidence has since indicated that the prohibited confinement conditions significantly raise the risk of contamination and harm to public health. See Cal. Dep't Food & Agric., 15-Day Notice of Modified Text and Documents Added to the Rulemaking File Relating to Animal Confinement 74 (Nov. 30, 2021), www.cdfa.ca.gov/ahfss/pdfs/regulations/ACP15dayCommentPeriodDocuments.pdf.

Proposition 2 and AB 1437 were upheld despite state and federal constitutional challenges. See, *e.g.*, *Cramer* v. *Brown*, No. 12-cv-3130, 2012 WL 13059699 (C.D. Cal. Sept. 12, 2012), aff'd sub nom. *Cramer* v. *Harris*, 591 F. App'x 634 (9th Cir. 2015); *JS W. Milling Co., Inc.* v. *California*, No. 10-04225 (Cal. Sup. Ct. 2010); *Ass'n of Cal. Egg Farms* v. *State*, No. 12CECG03695, 2013 WL 9668707 (Cal. Sup. Ct. Aug. 22, 2013). This Court declined to exercise original jurisdiction over one such challenge brought by a coalition of States, *Missouri ex rel. Hawley* v. *Becerra*, 137 S. Ct. 2188 (2017), and another challenge to a similar Massachusetts law, *Indiana* v. *Massachusetts*, 139 S. Ct. 859 (2019).

II. PROCEEDINGS BELOW

A. Petitioners Challenge Proposition 12

Proposition 12 was first challenged on dormant Commerce Clause grounds by the North American Meat Institute ("NAMI"), a trade association for meat and poultry producers (whose membership substantially overlaps with petitioners').[1] See *N. Am. Meat Inst.* v. *Becerra*, No. 2:19-cv-8569, ECF No. 1 (C.D. Cal. Oct. 4, 2019). When the California district court presiding over that litigation denied a motion for a preliminary injunction, *id.* ECF No. 43, petitioners filed this nearly identical case, Pet. App. 147a. Like NAMI, petitioners allege that Proposition 12's in-state sales ban violates the dormant Commerce Clause by regulating extraterritorially and by imposing an excessive burden on interstate commerce in comparison to local benefits. Pet. App. 230a-232a.[2] Respondents The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook (collectively, "Intervenors"), intervened to defend Proposition 12. Pet. App. 1a, 3a n.1.

B. The District Court Dismisses Petitioners' Complaint

The district court granted California's and Intervenors' motions to dismiss and for judgment on the pleadings. Pet. App. 21a-35a. Addressing petitioners' reliance on the line of cases beginning with *Baldwin* v. *G.A.F.*

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[1] See Delcianna Winders, *Survey Says . . . Californians Can Have Their Pork and Let Pigs Move*, Vermont Law School Blog (Dec. 6, 2021), www.vermontlaw.edu/blog/animal-law/survey-says-californians-can-have-pork-let-pigs-move (identifying overlapping membership).

[2] Unlike NAMI, petitioners nowhere allege that Proposition 12 discriminates against interstate commerce.

Seelig, Inc., 294 U.S. 511 (1935), the court recognized that state statutes may violate the Commerce Clause if they have an impermissible extraterritorial effect. See Pet. App. 27a. The court held, however, that the complaint failed to allege that Proposition 12 has such an effect. Pet. App. 28a-31a. Because Proposition 12 "precludes the sale *within California* of" non-compliant pork products, it "does not regulate wholly out-of-state conduct." Pet. App. 29a (emphasis added). The court agreed that Proposition 12's restriction on in-state sales, like any local product regulation, might have "'upstream effects'" on out-of-state conduct. Pet. App. 30a. The court explained, however, that such effects do not render a law "'necessarily extraterritorial'" when it directly regulates only in-state transactions. *Ibid.* (quoting *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981)).

The district court also rejected petitioners' contention that Proposition 12 unreasonably burdens interstate commerce under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. App. 31a-35a. Proposition 12, the court observed, does not require pork producers to conform all nationwide production to California standards. Pet. App. 33a. The fact that industry participants might face increased costs because they prefer uniform production methods does not mean that Proposition 12 creates a substantial burden on interstate commerce. Pet. App. 34a (citing *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978)).

C. The Court of Appeals Affirms Dismissal of Petitioners' Claims

A unanimous court of appeals panel affirmed. Pet. App. 1a-20a.

The court of appeals first held that petitioners had failed to adequately allege that Proposition 12 has an im-

permissible extraterritorial effect. Pet. App. 6a-16a. The court noted that petitioners' claim necessarily failed insofar as the extraterritoriality doctrine extends only to price-control or price-affirmation statutes, as this Court has suggested. Pet. App. 8a (citing *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 669 (2003)).

The Court continued: Petitioners' contrary view, it explained, was "not barred by *Walsh*'s characterization of the" extraterritoriality doctrine "as being limited to price-control and price-affirmation statutes." Pet. App. 9a. Under the "'broad[er] understanding of the extraterritoriality principle'" endorsed by Ninth Circuit precedent, however, petitioners' claims still failed. Pet. App. 9a-10a (alteration in original) (quoting *Ward* v. *United Airlines, Inc.*, 986 F.3d 1234, 1240-1241 (9th Cir. 2021)). What petitioners describe as impermissible extraterritorial effects, the court explained, are merely incidental "upstream effects outside the state" resulting from petitioners' own business decisions. Pet. App. 10a-14a. Citing *Baldwin*, 294 U.S. at 524, the panel reasoned that a State may impose standards on products sold within the State, even if those products are produced out-of-state. Pet. App. 12a.

The court of appeals also agreed with the district court that petitioners failed to allege the substantial burden on interstate commerce necessary to state a claim under *Pike*. Pet. App. 16a-19a. Under *Pike*, producer decisions to structure operations in a particular manner do not deprive States of authority to regulate local sales. Pet. App. 17a-18a. "'[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another'" or because producers prefer

uniform, nationwide production methods. Pet. App. 17a-18a (quoting *Exxon*, 437 U.S. at 127).

III. Parallel Proceedings

Meanwhile, the Ninth Circuit addressed NAMI's nearly identical Commerce Clause challenge to Proposition 12, upholding the denial of NAMI's motion for a preliminary injunction. 825 F. App'x 518 (9th Cir. 2020). NAMI filed a petition for certiorari supported by largely the same coalition of *amici* that have appeared in this case. This Court denied that petition. *N. Am. Meat Inst.* v. *Bonta*, 141 S. Ct. 2854 (2021). That case remains pending in district court.

REASONS FOR DENYING THE PETITION

This is not the case the petition represents it to be. The purported conflicts asserted by the petition are neither genuine nor properly presented. The decision below is consistent with this Court's extraterritoriality precedents. And the petition does not even attempt to suggest a division of circuit authority with respect to petitioners' fact- and case-specific "*Pike* balancing" theory. Review is unwarranted.

I. This Case Does Not Properly Present The Questions The Petition Asserts For Review

Petitioners ask this Court to review whether *Baldwin*'s extraterritoriality doctrine extends beyond price-affirmation and price-control statutes, and whether concerns about humane treatment are alone sufficient to justify in-state sales regulation under *Pike*. Neither issue is properly presented.

A. This Case Presents No Question Regarding Limits on *Baldwin*'s Scope

The petition asks this Court to review the Ninth Circuit's supposed holding that the extraterritoriality doc-

trine elucidated in *Baldwin* is limited to price-control or price-affirmation statutes. Pet. 22-24. No such issue is presented. The decision below was explicit: Ninth Circuit precedent does not cabin the extraterritoriality doctrine to price-control or price-affirmation statutes. Pet. App. 9a-10a. The very language petitioners quote from the decision below makes that clear. The Ninth Circuit, the decision declares, has "recognized that the Supreme Court has *not* expressly narrowed the extraterritoriality principle to only price-control and price-affirmation cases, *and we have recognized a 'broader understanding of the extraterritoriality* principle' may apply outside this context." Pet. 26 (emphasis added) (quoting Pet. App. 9a-10a (quoting *Ward* v. *United Airlines, Inc.*, 986 F.3d 1234, 1240-1241 (9th Cir. 2021))); see Pet. 24 (conceding that the Ninth Circuit "ultimately concluded" that the extraterritoriality principle is not confined "to only price-control and price-affirmation cases" and that it had "recognized a broader understanding"). Petitioners' assertion of a conflict with this Court's decisions requires petitioners to rewrite Ninth Circuit precedent.

The Ninth Circuit's en banc decision in *Sam Francis Foundation* v. *Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015), cert. denied, 577 U.S. 1062 (2016)—never mentioned in the petition—places the issue beyond dispute. *Christies* did not involve a price-control or price-affirmation statute. It concerned a California statute requiring any "seller of fine art to pay the artist a five percent royalty if 'the seller resides in California or the sale takes place in California.'" *Id.* at 1322. The Ninth Circuit held that the statute violated the dormant Commerce Clause as applied to out-of-state sales by in-state residents because it purported to "regulat[e] a commercial tran-

saction that 'takes place wholly outside of the State's borders.'" *Id.* at 1323 (quoting *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). The court distinguished prior cases that, like this one, involved "state laws that regulated in-state conduct with allegedly significant out-of-state practical effects." *Id.* at 1324. *Christies* makes clear that the Ninth Circuit has not, as petitioners claim, limited the extraterritoriality doctrine to price-control or price-affirmation statutes.[3]

Petitioners present no contrary argument. They simply pretend *Christies* and cases like it do not exist. Suggesting the possibility of an intra-circuit conflict within the Ninth Circuit, petitioners invoke language from *Association des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013). Pet. 26. *Eleveurs*, however, predates the en banc decision in *Christies*, which controls to the extent of any conflict. See *Saffon* v. *Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 872 n.2 (9th Cir. 2008). *Christies*, moreover, distinguished cases like *Eleveurs* as "concern[ing] state laws that regulated in-state conduct with allegedly significant out-of-state practical effects" rather than "regulation of

[3] Other Ninth Circuit cases (cited by the decision below, Pet. App. 10a) resolve extraterritoriality challenges to statutes having nothing to do with price-control or price-affirmation without simply holding that the extraterritoriality doctrine is limited to such restrictions. See *Ward*, 986 F.3d at 1240-1241 (statute regulating employee wage statements); *Rosenblatt* v. *City of Santa Monica*, 940 F.3d 439, 445-448 (9th Cir. 2019) (ordinance prohibiting short-term rentals), cert. denied, 140 S. Ct. 2762 (2020); *Rocky Mountain Farmers Union* v. *Corey*, 913 F.3d 940, 952-953 (9th Cir. 2019) (regulation of fuel sales); see also *Chinatown Neighborhood Ass'n* v. *Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015); *Pharm. Rsch. & Mfrs. of Am.* v. *County of Alameda*, 768 F.3d 1037, 1043 n.2 (9th Cir. 2014).

wholly out of state conduct." 784 F.3d at 1324. If the statute in *Eleveurs* constituted a regulation of purely out-of-state conduct that lacked any in-state health, safety, or other interest, it surely would have failed *Pike* balancing. But it did not. *Eleveurs*, 729 F.3d at 952. Regardless, even if an intra-circuit conflict existed, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties"—not an obligation of this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioners thus lost below even though the Ninth Circuit *accepts* their view of the question they purport to present for review. They nowhere explain how a decision of this Court that likewise agrees with them on that legal question could change the outcome. Indeed, the result would be the same regardless of the circuit in which this case arose. See pp. 18-20, *infra*. Petitioners' attack on the decision below merely reflects a disagreement about the outcome here. It does not warrant review.

B. The Petition Rests on an Erroneous Depiction of Proposition 12 and Its Effects

The petition fails to properly present the questions asserted for review for a second reason: Petitioners' arguments rest on a misreading of the challenged legislation. Their arguments also depart from the allegations of the complaint and on-the-ground reality in the pork industry. By attacking a fantasy version of Proposition 12, petitioners present imaginary questions this litigation does not genuinely present.

1. The petition falsely presents Proposition 12 as directed exclusively to humane treatment, urging that the dormant Commerce Clause prohibits States from banning the in-state sale of a product based solely on moral concerns about how it was produced. Proposition 12 in part serves to protect California consumers from becom-

ing unwittingly complicit in cruel confinement practices by purchasing the products of—and thus supporting—such cruelty. But Proposition 12 *also* addresses threats to California consumers' health that extreme methods of confinement create. By its terms, Proposition 12 was enacted to protect "the health and safety of California consumers," and to decrease "the risk of foodborne illness and associated negative fiscal impacts on the State of California." Prop. 12, §2 (Pet.App. 37a); see pp. 2-3, *supra*.

That is an unquestionably valid state interest. And this Court generally "assume[s] that the objectives articulated by the legislature are actual purposes of the statute.'" *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981).[4] It is "well-established that close confinement leads to the 'increased risk of the spread of disease' between hogs" and that "humans are not far behind." *McKiver* v. *Murphy-Brown, LLC*, 980 F.3d 937, 980 (4th Cir. 2020) (Wilkinson, J., concurring). Addressing concerns about zoonotic illness from animals confined in inhumane and unsanitary conditions by itself is a sufficient state interest to support Proposition 12.[5] Petition-

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[4] In California, it is similarly "presume[d] that the voters intend the meaning apparent on the face of an initiative measure." *Lesher Commc'ns, Inc.* v. *City of Walnut Creek*, 52 Cal. 3d 531, 543 (1990).

[5] The Brief of Health Care Without Harm et al., in *National Pork Producers Council* v. *Ross*, No. 20-55631 (9th Cir. Dec. 7, 2020), details myriad infectious diseases caused or exacerbated by closely confined animals. See ECF No. 48 at 10-15. Foodborne bacterial pathogens "can be facilitated by intensified livestock systems," which "generally have high density populations." Bryony A. Jones et al., *Zoonosis Emergence Linked to Agricultural Intensification and Environmental Change*, 110 Proc. Nat'l Acad. Scis. U.S., no. 21, at 8399 (2013), https://www.pnas.org/content/110/21/8399. And re-

ers' attack on the adequacy of morality concerns is thus irrelevant here.

Petitioners reimagine the record when they assert (at 30-31) that California "declined to defend" a health-and-safety justification. The State simply asserted that "[i]t is unnecessary for the Court to resolve this issue because the prevention of animal cruelty is unquestionably a recognized benefit that applies here." Answering Brief of State Defendants, *Nat'l Pork Producers Council* v. *Ross*, No. 20-55631, ECF No. 35, at 33 n.13 (9th Cir. Nov. 23, 2020). Indeed, the California Department of Food and Agriculture recently clarified the validity of Proposition 12's health-and-safety rationale. Addressing its previous statements—which petitioners invoke (at 30)—the Department stated that they "reflect *only* that there is not currently a *consensus* in peer reviewed published scientific literature that would allow the Department to independently confirm, according to its usual scientific practices, that the specific minimum confinement standards outlined in [Proposition 12] reduce the risk of human food-borne illness * * * or other human or safety concerns." Cal. Dep't Food & Agric., 15-Day Notice of Modified Text and Documents Added to the Rulemaking File Relating to Animal Confinement 74 (Nov. 30, 2021), www.cdfa.ca.gov/ahfss/pdfs/regulations/ACP15dayComm

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search shows that piglets born to sows confined in gestation crates have compromised disease resistance, which, coupled with overcrowding in intensive animal production, creates serious risk factors for both animal and human diseases. See Xin Liu et al., *A Comparison of the Behavior, Physiology, and Offspring Resilience of Gestating Sows When Raised in a Group Housing System and Individual Stalls*, 11 Animals no. 7, 2021, at 2076; https://www.doi.org/10.3390/ani11072076.

entPeriodDocuments.pdf (emphasis added). Voters, the Department explained, could reasonably enact Proposition 12 as a "precautionary measure" given reasons for concern. *Ibid.*

Indeed, although California's Proposition 2—which included provisions regulating in-state hen confinement—was enacted before scientific consensus on health benefits had emerged, "the scientific literature supporting the potential public health benefits related to egg-laying hens that are provided additional space * * * continues to increase" a decade after Proposition 2's 2008 enactment. Cal. Dep't Food & Agric., *supra*, at 74. Petitioners cite nothing suggesting that peer-reviewed studies or scientific consensus are required for otherwise valid legislation to survive a Commerce Clause challenge. And petitioners ignore other valid purposes of Proposition 12, such as ensuring California consumers can purchase meat in the State knowing it is not the product of animal cruelty and therefore inconsistent with their values. See pp. 33-34, *infra*.

By misconstruing or ignoring many of the undeniably legitimate local interests that Proposition 12 serves, petitioners present an imaginary question that this litigation does not genuinely present. That same defect infects their argument (at 28-32) that the Ninth Circuit incorrectly applied *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). That case requires petitioners to show a substantial burden on interstate commerce that outweighs any arguable in-state interest that Proposition 12 may further. *Id.* at 142. Because the courts below held that the burdens asserted by petitioners are insufficient or noncognizable, Pet. App. 16a-19a, 31a-35a, those courts had no need to evaluate the strength of California's local interests and have not done so. This Court generally

avoids addressing issues ahead of other courts because the Court is one "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And even if the Court wished to conduct *Pike* balancing in the first instance, petitioners have ignored many of the interests furthered by Proposition 12, depriving this Court of a complete record on which to resolve the *Pike* claim.

2. Petitioners' dire predictions of Proposition 12's impacts—made in an effort to show this case's importance—likewise bear no resemblance to the record or reality. Petitioners' fearmongering requires them to rewrite their own pleadings. For example, while the petition asserts that it would be "impossible" to segment supply chains to direct Proposition-12-compliant pork to California, Pet. 7, 17, the complaint alleges only that it would be "complicated" (Pet. App. 214a ¶348) or "very difficult" (Pet. App. 182a ¶132). Indeed, petitioners' own economist opined in a sworn declaration (submitted with the complaint) that he "expect[s] some packers and their producer suppliers to decide to continue to serve the California market," but that the number "remain[s] to be seen." Pet. App. 343a.

Nor have petitioners "allege[d] that Proposition 12 will in practice *require* every sow farm to adopt its standards" or that Proposition 12 will require "every U.S. pork consumer" to "pa[y] for California's preferred sow housing." Pet. 29-30. The complaint alleges some producers *may* decide to stop selling *in California* rather than comply with Proposition-12 standards, not stop selling *altogether*. See, *e.g.*, Pet. App. 161a-163a ¶58(d) (alleging productivity variations if declarant makes the choice to "[c]hange [his production] practices to comply with Proposition 12's housing requirements," and noting that absent those changes, he will not be able to sell his

product "*in California*" (emphasis added)); Pet. App. 169a ¶58(*l*) (contemplating alleged cost increases to comply with Proposition 12 and potential loss of some business relationships).[6] And petitioners never alleged that consumers outside of California will pay more for Proposition 12-compliant pork. Compare Pet. i, 2-3, 11-13, 15, 28, with Pet. App 168a, 176a ¶96; Pet. App. 335a ¶19 (explaining that "markets" outside of California "do not value these changes and will not pay an increased price").

Petitioners' predictions of doom also depart from reality. One of the Nation's largest pork producers, Hormel Foods, "has confirmed that it faces no risk of material losses from compliance with Proposition 12" and "is preparing to fully comply when the law goes into effect on January 1, 2022." *Hormel Foods Company Information About California Proposition 12*, Hormel (Oct. 6, 2020), https://www.hormelfoods.com/newsroom/in-the-news/hornews/hormel-foods-company-information-about-california-proposition-12/. The company's "Applegate portfolio of products already complies with Proposition 12." *Ibid.* The CEO of Tyson Foods stated in August 2021 that Proposition 12's impact is "not significant" for the company, which "*can do multiple programs si-*

[6] The arguments of petitioners' *amici* are more consistent with the pleadings than petitioners' hyperbole. See, *e.g.*, Brief of Canadian Pork Council as *Amicus Curiae* at 2a-3a (stating that "processing facilities and distributors will likely need to segregate California-compliant * * * from non-compliant whole pork meat and whole veal meat because Canada expects that *not all* pork or veal producers will be able to meet the proposed prescriptive housing standards" (emphasis added)); Brief of *Amici Curiae* Iowa Pork Producers Ass'n et al. at 22A (urging that "[t]hese changes will bring about costs associated with lost stall space, which will reduce the overall output of facilities of a given size that *choose* to convert" (emphasis added)).

multaneously, including" one that complies with Proposition 12. *Tyson Foods Third Quarter 2021 Earnings*, Tyson Foods, at 15 (Aug. 9, 2021), s22.q4cdn.com/104708849/files/doc_financials/2021/q3/08-11-21_Tyson-Foods-080921.pdf (emphasis added). Niman Ranch, a Perdue Farms subsidiary, publicly *supports* Proposition 12. Memorandum of *Amicus Curiae* Perdue Premium Meat Company, Inc. d/b/a Niman Ranch, *Iowa Pork Producers Ass'n* v. *Bonta*, No. 3:21-cv-3018, ECF No. 38-1 (N.D. Iowa July 20, 2021). It explained that "compliance [with Proposition 12] is *straightforward and economically feasible*," and that its member farms were already in compliance. *Id.* at 1-2 (emphasis added).[7]

Time has passed petitioners' positions by. Even a former president and board member of one of petitioners—and a declarant on whom their complaint and petition heavily depends—has changed his tune. He now avers that he will supply Proposition 12-compliant pork to California and can do so *without* converting all of his production to meet that law's requirements. Greta Kaul, *Why California's New Pork Rules Could Mean Big Changes for Minnesota Hog Farmers*, Minn. Post (Aug. 6, 2021), https://www.minnpost.com/economy/2021/08/why-californias-new-pork-rules-could-mean-big-changes-for-minnesota-hog-farmers/; see Pet. App. 168a-169a, 330a-335a; Pet. 9, 31.[8] The Court should not take up re-

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[7] The NPPC itself has elsewhere all but conceded that it would not be impossible to comply with Proposition 12. See Letter from Nat'l Pork Producers Council to Hon. Thomas J. Vilsack, U.S. Sec'y of Agric., at 2 (May 27, 2021), www.nppc.org/wp-content/uploads/2021/05/NPPC-Letter-to-Sec.-Vilsack-on-Prop.-12-Background-Study.pdf.

[8] See also Winders, *supra* (presenting "survey data showing that grocery stores, restaurants, foodservice companies, and pork pro-

view of a motion to dismiss on such a stale record. Major market participants have publicly stated since the complaint was filed that Proposition 12 will *not* have a significant impact on their bottom line, that their farms already comply with the law's requirements (or are well on their way to doing so), and that they are able to run Proposition 12-compliant programs alongside non-compliant programs. The Court should not grant review where the dispute "lack[s] * * * vitality." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(C) (11th ed. 2019).

C. This Case Presents No Circuit Conflict on the Scope of the Extraterritoriality Principle

Petitioners' claim of a circuit conflict fares worse still. Pet. 26-28. According to petitioners, the Ninth and Tenth Circuits have held that "the extraterritoriality doctrine" is "limit[ed] * * * to price-control statutes," while the "Fourth Circuit has disagreed." Pet. 26.

1. This case presents no such conflict, as neither the Ninth nor Tenth Circuit has limited the extraterritoriality doctrine as petitioners claim. As explained above, the very language petitioners quote from the decision below makes clear that the Ninth Circuit does not limit the prohibition on impermissible extraterritoriality to price-control and price-affirmation statutes. And *Christies* forecloses the contrary view. See pp. 9-10, *supra*.

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ducers are in fact prepared to comply with [Proposition 12] when it goes into effect on January 1"); Dennis W. Smith, *What I'm Seeing, What I'm Hearing, What I'm Expecting*, National Hog Farmer (Dec. 6, 2021), https://www.nationalhogfarmer.com/news/what-im-seeing-what-im-hearing-what-im-expecting (noting that the market indicates that "CA Prop 12 is not going to present a major disruption to pork distribution and pork pricing").

The petition also errs in asserting (at 26-27) that *Energy & Environment Legal Institute* v. *Epel*, 793 F.3d 1169 (10th Cir. 2015) (Gorsuch, J.), cert. denied, 577 U.S. 1043 (2015), creates a circuit conflict. In that case, the Tenth Circuit emphasized *this Court's* observation that "the *Baldwin* line of cases concerns only 'price control or price affirmation statutes' that involve 'tying the price of . . . in-state products to out-of-state prices.'" Pet. 26 (quoting 793 F.3d at 1174-1175 (quoting *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 669 (2003)). Petitioners attempt to convert that correct statement of fact—the *Baldwin* line of cases all concerned price-control or price-affirmation statutes—into a hard-and-fast limit on their reach. But the Tenth Circuit, like the Ninth Circuit, has applied the extraterritoriality doctrine beyond the price-affirmation context. *Hardage* v. *Atkins*, 619 F.2d 871, 872 (10th Cir. 1980).

In *Hardage*, the Tenth Circuit overturned an Oklahoma statute that prohibited the importation of hazardous waste unless the State of origin had enacted industrial-waste disposal standards that were substantially similar to Oklahoma's. 619 F.2d at 873. The Tenth Circuit held that prohibition—emphatically *not* a price-control or price-affirmation statute—was impermissibly extraterritorial. The Seventh Circuit overturned a virtually identical Wisconsin statute for virtually identical reasons. *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 63 F.3d 652, 661 (7th Cir. 1995).

Petitioners' reliance on *Epel*, moreover, underscores how extreme their position is. *Epel* upheld Colorado's requirement that 20% of electricity sold in-state must come from renewable sources (whether generation occurs inside or outside Colorado). 793 F.3d at 1170. Petitioners would invalidate that statute as extraterritorial, even

though it applies the same limit to in-state sales without regard to where energy is produced. *Id.* at 1173. Petitioners cite no decision of any court of appeals that has ever invalidated, on Commerce-Clause grounds, otherwise even-handed state laws requiring products sold in the State to have some percentage renewable (or recycled) origin.

Petitioners' invocation of the Fourth Circuit's decision in *Association for Accessible Medicines* v. *Frosh*, 887 F.3d 664, 671 (2018), cert. denied, 139 S. Ct. 1168 (2019), and the Sixth Circuit's decision in *Online Merchants Guild* v. *Cameron*, 995 F.3d 540, 559 (6th Cir. 2021), further emphasizes the absence of a conflict warranting review. Those cases acknowledge, as the Ninth Circuit did, that the extraterritoriality doctrine is not limited to price-control or price-affirmation cases. The Maryland "anti-gouging" statute in *Frosh* was invalidated precisely because it sought to regulate *the price* of drug transactions between manufacturers and wholesalers located wholly *outside* Maryland. See 887 F.3d at 671-672 (invalidating statute because it allowed "Maryland to enforce the Act against parties to a transaction that did not result in a single pill being shipped to Maryland"). And the Sixth Circuit's decision in *Online Merchants Guild* upheld the anti-gouging statute there, which was, like Proposition 12, limited to sales within the State. 995 F.3d at 559.

2. For those reasons, this case presents no opportunity to resolve petitioners' putative circuit conflict. The Ninth Circuit has adopted precisely the rule that petitioners advocate. See pp. 8-11, *supra*. Because petitioners lost even though the court below followed the rule petitioners advocate, this case does not properly present an opportunity to decide between two competing legal

rules. Instead, it reflects petitioners' challenge to the case-specific application of a legal rule that petitioners and the court below both accept.

More fundamentally, petitioners make no serious effort to show that *this case* comes out differently in different circuits. That is a fatal vehicle problem. Petitioners nowhere identify any reason to think the Fourth Circuit would—unlike the decision below—invalidate a statute that controls only food sales *within* the State. There is reason to believe the opposite: The Fourth Circuit appears to recognize that laws like the one at issue here validly protect critical local health-and-safety interests by reducing the transmission of zoonotic disease. See *McKiver*, 980 F.3d at 980 (Wilkinson, J., concurring) (explaining that it is "well-established that close confinement leads to the 'increased risk of the spread of disease' between hogs" and that "humans are not far behind"). This Court grants review where two circuits will reach different outcomes in sufficiently similar circumstances—where there is a "genuine" or "'intolerable' conflict"—not where courts will reach the same results on different reasoning or as a result of "an inconsistency in dicta or in the general principles utilized." Shapiro et al., *Supreme Court Practice*, *supra*, § 4.3.

II. The Decision Below Applies *Baldwin* Consistent With This Court's Precedent And The Decisions Of Other Courts Of Appeals

This Court's "modern Commerce Clause precedents" disavow "arbitrary, formalistic distinction[s]" and "'esche[w] formalism'" in favor of "'a sensitive, case-by-case analysis of purposes and effects.'" *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2092, 2094 (2018). The precedents petitioners invoke reflect those careful distinctions. Petitioners ignore those crucial considerations—as does

their effort to establish a conflict warranting this Court's review.

A. Petitioners Misread This Court's Precedents

Petitioners attempt to equate Proposition 12's incidental out-of-state practical effects with the sort of direct and "inevitable" control that constitutes impermissible extraterritorial regulation under this Court's decisions. *Walsh*, 538 U.S. at 669. But the impacts petitioners claim—untethered to reality or the allegations in the complaint—are not the inevitable or direct result of Proposition 12. They are at most a product of the way some of petitioners' members have structured their businesses—a product of market concentration and business decisions that the Constitution does not privilege.

Petitioners contend that the decision below is inconsistent with decisions of this Court applying the extraterritoriality doctrine to state statutes with an indirect "practical effect" on out-of-state transactions. Pet. 21-22, 24-26. As the district court and Ninth Circuit correctly recognized, however, this Court has never applied the extraterritoriality doctrine so expansively. Petitioners' reliance on *Baldwin*, see Pet. 24-25, is misplaced. *Baldwin* involved a New York statute that required milk sold in the State to have been purchased from suppliers at a minimum price, even if the transaction occurred out of state. 294 U.S. at 518-519 & n.1. That protectionist legislation sought "to promote the economic welfare" of New York farmers by "guard[ing] them against competition with the cheaper prices of Vermont." *Id.* at 522. Petitioners argue that, under *Baldwin*, a statute necessarily has an impermissible extraterritorial effect "even if that effect is the result of 'regulat[ion] by indirection.'" Pet. 24 (alteration in original) (quoting *Baldwin*, 294 U.S. at 524).

That contention is flawed. For one thing, *Baldwin* dealt with a protectionist price-control statute, while Proposition 12 has no protectionist purpose or effect. For another, this Court has explained that "[t]he rule that was applied in *Baldwin* * * * is not applicable" to laws that do not regulate the terms "'of any out-of-state transaction, either by its *express* terms or by its *inevitable* effect.'" *Walsh*, 538 U.S. at 669; see *Healy*, 491 U.S. at 345 (Scalia, J., concurring in part and concurring in the judgment) (observing that "innumerable valid state laws affect pricing decisions in other States—even so rudimentary a law as a maximum price regulation"). Proposition 12 does not "expressly" or "inevitably" regulate any out-of-state transaction. Pork producers may confine animals as they wish and sell them wherever they want; they need meet California's standards only for California sales. And pork producers have already indicated they can produce both Proposition-12-compliant pork for California, and non-compliant pork for other jurisdictions. See pp. 16-18, *supra*.

That some pork producers with massive operations want uniform production and distribution systems does not override California's sovereignty over in-state sales of products to its citizens. California's authority to regulate its own in-state market does not disappear just because petitioners want greater industry concentration or a single, undifferentiated production chain at a massive scale. The Ninth Circuit correctly recognized that principle, just as the Sixth Circuit recently did when online vendors selling goods into Kentucky demanded immunity from Kentucky's price-gouging laws. See *Online Merchs. Guild*, 995 F.3d at 559 (upholding Kentucky prohibition on in-state price gouging despite argument that online marketplace requires nationally uniform pricing,

because seller's choice to sell online cannot divest State of control over sales in-state).

The Court in *Baldwin*, moreover, distinguished statutes like Proposition 12. In *Baldwin*, New York attempted to defend its price-control statute by arguing that it promoted farmers' economic security, thereby eliminating the "tempt[ation] to save the expense of sanitary precautions." 294 U.S. at 523. The Court found that purpose too attenuated. *Id.* at 524. It observed, however, that New York could address "the evils springing from uncared for cattle * * * by measures of repression more direct and certain than the creation of a parity of prices between New York and other states." *Ibid.* Such measures included "exclud[ing]" milk from sale in New York "if necessary safeguards have been omitted." *Id.* That is indistinguishable from Proposition 12, which "excludes" products from animals housed in a cruel manner that threatens public health and safety. See pp. 2-3, *supra*.

Petitioners' invocation of *Healy* and *Brown-Forman Distillers Corp.* v. *New York*, 476 U.S. 573 (1986), suffers from the same flaws. Pet. 21-26. Both *Healy* and *Brown-Forman*, like *Baldwin*, dealt with protectionist statutes designed to fix prices for *out-of-state* sales. *Healy*, 491 U.S. at 328-329; *Brown-Forman*, 476 U.S. at 575-576. And to the extent *Healy* and *Brown-Forman* could potentially be read as broadly as petitioners suggest, *Walsh* makes clear that any such reading would be mistaken. The extraterritoriality doctrine, *Walsh* explains, extends only to statutes that regulate out-of-state

transactions by their "express terms" or "inevitable effect." See p. 23, *supra*.[9]

Ninth Circuit law is consistent with those precedents. Where a statute necessarily regulates transactions that "tak[e] place wholly outside of the State's borders," the statute has an impermissible extraterritorial effect. *Christies*, 784 F.3d at 1323 (quoting *Healy*, 491 U.S. at 336). If Proposition 12 had, for example, required *all* of a producer's operations to comply with its requirements, whether they produce pork for California or not, that could well have crossed the line. But Proposition 12 applies only to pork actually sold in California. Where a statute regulates in-state sales, and does not inevitably regulate transactions that occur solely out-of-state without any connection to the regulating State, the statute does not run afoul of *Baldwin* and its progeny. See pp. 22-25, *supra;* cf. *Christies*, 784 F.3d at 1324 (distinguishing cases, like the current case, that "concerned state laws that regulated in-state conduct with allegedly sig-

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[9] Petitioners' other cases are similarly inapposite. The two sentences addressing extraterritoriality in *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994), merely explain that the town could not justify "attach[ing] restrictions to exports or imports in order to control commerce in other States" to protect the environment in those States. *Id.* at 393 (emphasis added). *Carbone* ultimately stands for the unremarkable principle that "State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.* at 394. In *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), the statute at issue was struck down because it directly regulated transactions that took place wholly outside the State by requiring that any takeover offer for shares of a company be registered with the Illinois Secretary of State, even if no shareholder was a resident of the State. *Id.* at 626-627, 642-643.

nificant out-of-state practical effects" rather than "regulation of wholly out of state conduct").

The existence of the Court's balancing test under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), confirms that petitioners' expansive view of the extraterritoriality doctrine—that statutes with indirect, practical effects on out-of-state transactions necessarily violate the dormant Commerce Clause, Pet. 21-22, 24-26—is mistaken. Under *Pike*, nondiscriminatory statutes with "incidental" effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. In *Clover Leaf Creamery*, for example, the Court analyzed whether the out-of-state impacts of a Minnesota statute prohibiting the sale of milk products in certain containers violated the dormant Commerce Clause under *Pike*, not the extraterritoriality doctrine. 449 U.S. at 458, 471-474. The *Pike* balancing test—not the extraterritoriality doctrine—thus addresses precisely what petitioners complain of here: whether a statute regulating in-state sales of a product that may have upstream effects on out-of-state manufacturers of that product violates the dormant Commerce Clause. Petitioners' conception of the extraterritoriality doctrine would render *Pike* a nullity.

B. This Case Presents No Circuit Conflict on *Baldwin*'s Scope

1. For similar reasons, petitioners err in asserting "disagreement about the scope of the [extraterritoriality] test." Pet. 27. Petitioners invoke one case for that purported disagreement—*Legato Vapors, LLC* v. *Cook*, 847 F.3d 825 (7th Cir. 2017). The Indiana e-cigarette law there, however, bore none of the "relevant hallmarks of Proposition 12." Pet. 28. It imposed "remarkably spe-

cific security requirements," required out-of-state manufacturing facilities to outsource part of their out-of-state operations to an Indiana "security firm," regulated the duration of out-of-state contracts, and set "stringent certification standards" for security firms in circumstances that would not effectuate any legitimate purposes of the regulating State. *Legato*, 847 F.3d at 828, 833-834. The law in *Legato*, moreover, had "protectionist purposes"—its requirements granted a "legislative * * * monopoly" to "one favored" Indiana company. *Id.* at 833. No such protectionist purpose is alleged here.

The challenged law in *Legato* also could require out-of-state manufacturers to comply with its requirements in *all* of their operations—not just with regard to products destined for Indiana.[10] The law therefore "operate[d] as extraterritorial legislation, governing the services and commercial relationships between out-of-state manufacturers and their employees." 847 F.3d at 833; see *id.* at 835 (invalidating Indiana law that controlled choice of cleanser and structure of sinks in out-of-state facilities). The Seventh Circuit invalidated those regulations precisely because they "directly regulate * * * wholly out-of-state commercial transactions." *Id.* at 837.

Proposition 12 does the opposite. It says nothing about the confinement of animals used to produce meats sold outside California. Producers are free to sell Proposition-12-compliant pork in California and non-complaint pork elsewhere. If California had gone further and at-

[10] For example, the law required out-of-state manufacturers to enter five-year contracts with a security firm regardless of what percentage of their products would be sold in Indiana and regardless of whether they intended to sell products in the State for less than five years. *Legato*, 847 F.3d at 828.

tempted to regulate transactions entirely outside the State, the result may well have been different. The Ninth Circuit has not hesitated to invalidate any law that "regulates a commercial transaction that 'takes place wholly outside of the State's borders.'" *Christies*, 784 F.3d at 1323.

Petitioners' effort to accuse the decision below of deeming the dormant Commerce Clause "a dead letter," Pet. i, 19, 22, 26, is entirely misplaced. The decision below merely observed some members *of this Court* "have criticized dormant Commerce Clause jurisprudence as being 'unmoored from any constitutional text' and resulting in 'policy-laden judgments that [courts] are ill equipped and arguably unauthorized to make.'" Pet. App. 19a (quoting *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 610, 618 (1997) (Thomas, J., dissenting)). But the decision made clear that the "dormant Commerce Clause is *not yet* a dead letter"—in this Court or the courts of appeals. Pet. App. 19a. Ninth Circuit precedent applies the dormant Commerce Clause to invalidate impermissible extraterritorial legislation in accordance with this Court's decisions and those of other courts of appeals.

2. Petitioners do not so much argue a circuit conflict as they advocate for precisely the "sweeping"—and unprecedented—"expansion" of the extraterritoriality doctrine other courts have rejected. *Online Merchs. Guild*, 995 F.3d at 559. Petitioners argue for *per se* invalidation of any state law if the law, as a practical matter, has any effect on out-of-state commerce. See, *e.g.*, Pet. 14. Like the Ninth Circuit in this case, the Sixth Circuit refused to adopt that unwarranted expansion:

> The Guild argues for that expansion [of extraterritoriality doctrine] by focusing on the Supreme

> Court's instruction that we must consider a law's "practical effect," *Healy*, 491 U.S. at 336, to the exclusion of the Court's limitation of the extraterritoriality doctrine to state laws that "directly," *Healy*, 491 U.S. at 336, and "inevitabl[y]" control wholly out-of-state commerce, *Pharm. Research & Mfrs. of Am.*, 538 U.S. at 669. * * * [I]t makes little sense to read the Court's "practical effect" language so broadly when it has held state laws invalid under the doctrine in only three cases over the last century or so, and exclusively in the price-affirmation context. Indeed, courts and commentators—recognizing that in a modern economy just about every state law will have some "practical effect" on extraterritorial commerce—have cautioned against approaches like the one that the Guild advocates here. See *Epel*, 793 F.3d at 1173-75 (Gorsuch, J.); *Am. Beverage*, 735 F.3d at 378-79 (Sutton, J., concurring).

995 F.3d at 559. The Ninth Circuit recognized and correctly applied that key distinction between impermissible laws that directly and inevitably control out-of-state conduct, and permissible laws that (like Proposition 12) have only indirect practical effects on out-of-state conduct. See Pet. App. 10a ("[E]ven though the Council's complaint plausibly alleges that Proposition 12 has an *indirect 'practical effect'* on how pork is produced and sold outside California, we have rejected the argument that such upstream effects violate the dormant Commerce Clause." (emphasis added)); see also *Frosh*, 887 F.3d at 672 (citing *Healy* and *Baldwin* in overturning law that imposed penalty for price gouging outside the State, facially regulating commercial transactions wholly outside the State's borders).

III. THE NINTH CIRCUIT CORRECTLY APPLIED *PIKE*

Under *Pike*, this Court will uphold state laws unless the burden on interstate commerce "is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Petitioners do not suggest that the panel's application of *Pike* balancing below creates a division in circuit authority. Their argument for reexamining the fact- and case-specific *Pike* ruling below amounts to an invitation for error-correction in what they freely characterize as a unique industry context. Even on the merits, petitioners identify no error.

A. The Application of *Pike* Balancing to the Facts Here Does Not Warrant Review

"Error correction is 'outside the mainstream of the Court's functions.'" *Cavazos* v. *Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting). It is particularly inappropriate where, as here, the claimed errors are relevant only to an industry that, according to petitioners, is unique. They argue now, as they did below, that burdens allegedly imposed on their operations rest on "the nature of the industry and its product." Pet. 29. Petitioners thus argue "that Proposition 12's extraterritorial impact violates the underlying principles of the dormant Commerce Clause *in light of the unique nature of the pork industry*." Pet. App. 9a (emphasis added).

This Court, however, does not "sit for the benefit of the particular litigants" before it. *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Petitioners must show that this case is "importan[t] to the public," and not just "the parties." *Layne & Bowler Corp.* v. *W. Well Works*, 261 U.S. 387, 393 (1923). They make no effort to do that here. Even with respect to the allegedly "unique" pork industry, their claim of importance falls short. Major producers are now complying with, or plan

to comply with, Proposition 12—and report no material effect on their bottom line. See pp. 16-18, *supra*. The egg industry proffered similar protestations when California and other States set standards for the treatment of egg-laying hens. See *Ass'n of Cal. Egg Farms* v. *State*, No. 12CECG03695, 2013 WL 9668707 (Cal. Sup. Ct. Aug. 22, 2013). But that association has since changed its view, siding with the State to defend similar legislation addressing California egg sales against a Commerce-Clause attack. See Brief for Ass'n of Cal. Egg Farmers as *Amicus Curiae* in Support of Defendant, *Missouri* v. *California*, No. 22O148 (U.S. Mar. 5, 2018). Petitioners' alarmism, already contradicted by some of their largest members, is similarly unfounded and short-sighted.

At bottom, what petitioners call a constitutional problem is entirely the result of their desire to operate uniformly at massive scale. If taken seriously, petitioners' logic would mean that States are constrained in regulating industries that happen to have been captured by monopolistic or oligopolistic concentration that purport to demand uniform production across state lines. That is not the law.

B. The Ninth Circuit's Decision Is Correct

1. The application of *Pike* below is consistent with this Court's precedents. As the decision explains, "even a state law that imposes heavy burdens on some out-of-state sellers does not place an impermissible burden on interstate commerce." Pet. App. 17a. This Court's decision in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), fully supports that proposition.

In *Exxon*, a Maryland statute imposed burdens on the oil industry, leading to a lawsuit by oil refiners. The plaintiffs produced evidence that, because of the statute, some "refiners will stop selling in Maryland" altogether.

437 U.S. at 127. More broadly, they argued, "the statute 'will surely change the market structure by weakening the independent refiners.'" *Ibid.* The Court's rejection of both arguments likewise forecloses petitioners' arguments here.

First, the Court held, "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." 437 U.S. at 127. That eventuality, however, is exactly the harm alleged in the complaint. See, *e.g.*, Pet. App. 213a ¶341 (alleging that Proposition 12 will lead to "further consolidation of the pork industry, as larger farms with greater capital are able to adapt and smaller farms are forced to cease operation"). And it was precisely the harm considered by the Ninth Circuit. See Pet. App. 18a ("[P]roducers that do not comply with Proposition 12 would lose business with packers that are supplying the California market."). The Ninth Circuit's holding that a "'loss to [some specific market participants] does not, without more, suggest that the [state] statute impedes substantially the free flow of commerce from state to state'" follows directly from *Exxon*. Pet. App. 18a (brackets in original).

Exxon also rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." 437 U.S. at 127. But the complaint—and the petition—are replete with that debunked argument. See, *e.g.*, Pet. App. 152a ¶28, 204a ¶¶283, 288-289, 207a ¶305; Pet. 1-2, 12, 16, 29-30. The Ninth Circuit correctly applied *Exxon* in rejecting the argument that "increased costs" alone establish a Commerce Clause violation. See Pet. App. 18a-19a. Other courts have adopted the same view. See *Online Merchs. Guild*, 995 F.3d at 555 (holding that statute's impact on

plaintiff's "independent decisions in how it structures its online marketplace" did not violate the dormant Commerce Clause); see also pp. 28-29, *supra*.

Petitioners make no serious effort to distinguish *Exxon*. While repeatedly arguing that Proposition 12 will require a market reorganization, they ignore the Court's holding that such an impact—even if plausible—does not constitute an impermissible burden on interstate commerce. Having failed to meaningfully address *Exxon* in their petition—even though it was the basis of the decision below—petitioners cannot sand-bag by addressing that case for the first time in reply or on the merits.

2. Petitioners also attack some of the policies underlying Proposition 12. See Pet. 30-32. As in *Exxon*, however, those arguments "relat[e] to the wisdom of the statute, not to its burden on commerce." 437 U.S. at 128. Petitioners' efforts to sidestep Proposition 12's purposes are ineffectual regardless. As explained above, the law was enacted to protect the health and safety of California's populace. See pp. 11-18, *supra*.

Proposition 12, moreover, provides California purchasers with reassurance they can buy pork products anywhere in the State knowing the source animals were not subjected to the cruel confinement Proposition 12 addresses. As the California Department of Food and Agriculture recently noted in connection with its proposed rulemaking, "benefits accrue to Californians knowing that breeding pigs, veal calves, and egg-laying hens are raised with a minimum space requirement." Cal. Dep't Food & Agric., *supra*, at 74. Proposition 12 spares consumers the difficult task of researching the origin of meat and egg products and how the animals were treated, or deciphering and auditing often misleading producer representations. Indeed, consistent with that consumer-

protection goal, Proposition 12 provides a private cause of action that allows consumers to bring suit for violations under a California law banning "unlawful, unfair or fraudulent business act[s]." Cal. Bus. & Prof. Code §17200. This Court has recognized that legitimate goal of "prevent[ing] animal cruelty," Prop. 12, §2, traces all the way back to colonial times. *United States* v. *Stevens*, 559 U.S. 460, 469 (2010).[11] Proposition 12 ensures California purchasers are not unwittingly turned into economic supporters of practices they find morally reprehensible, cf. *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), and ensures that California standards regarding California-raised animals can be effectively enforced, see, *e.g.*, *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 40-41 (1908); *Andrus* v. *Allard*, 444 U.S. 51, 58 (1979).

Petitioners are free to promote their self-serving opinions that Proposition 12's minimal space standards are unnecessary. They are free to ignore substantial and growing scientific evidence demonstrating the link between extreme confinement of farm animals and threats to human health. They are free to disagree that California consumers are entitled to ensure their purchases do not support what they consider the cruelest farm animal confinement practices. The majority of Californians, however, feel otherwise. Absent some showing that Proposition 12's stated objectives are not genuine, this

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[11] See also *Cresenzi Bird Imps., Inc.*, v. *New York*, 658 F. Supp. 1441, 1447 (S.D.N.Y. 1987), aff'd, 831 F.2d 410 (2d Cir. 1987) (per curiam) ("'New York has a legitimate interest in regulating its local market conditions which lead * * * to the unjustifiable and senseless suffering and death of thousands of captured wild birds.' The State has an interest in cleansing its markets of commerce which the Legislature finds to be unethical." (citation omitted)).

Court is "'not concerned * * * with the wisdom, need, or appropriateness of * * * legislation.'" *Whalen* v. *Roe*, 429 U.S. 589, 597 n.19 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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