

No. 21-468

In The
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL AND
AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

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

Respondents.

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

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* SUPPORTING PETITIONERS**

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June 17, 2022

QUESTIONS PRESENTED

1. Whether allegations that a state law has dramatic economic effects largely outside the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant Commerce Clause, or whether the extraterritoriality principle described in this Court's decisions is now a dead letter.

2. Whether such allegations, concerning a law that is based solely on preferences about out-of-state housing of farm animals, state a *Pike* claim.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* to advance its view that the dormant Commerce Clause is key to our federal structure. *See, e.g., Pharm. Rsch. & Mfrs. of Am. v. Cnty. of Almaeda*, 575 U.S. 1034 (2015) (*per curiam*); *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362 (6th Cir. 2013).

WLF also regularly publishes, through its Legal Studies Division, articles by outside experts on the dormant Commerce Clause. *See, e.g., Boyd Garriott et al., The Case for Uniform Standards Grows as States Sew More Laws into Patchwork of Data-Privacy Regulations*, WLF LEGAL BACKGROUNDER (Sept. 27, 2019); Hyland Hunt, *Court Finds NY Unconstitutionally Shifted Cost Of “Opioid Stewardship Fund” To Out-Of-State Commerce*, WLF LEGAL OPINION LETTER (Mar. 15, 2019). WLF believes that enforcing the dormant Commerce Clause’s prohibition on burdening interstate commerce is crucial to economic growth and the continued viability of our federal form of government.

* No party’s counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for the brief’s preparation or submission. All parties consented to WLF’s filing this brief.

INTRODUCTION

“This Court has ‘long recognized the role of the States as laboratories for devising solutions to difficult legal problems.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). This allows “a single courageous State [to], if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Often, it is unclear whether an experiment will work. Some states require that cars have license plates on both the front and rear of vehicles. Theory alone does not predict whether front license plates are worth the increased expense. This is the type of experimentation our Constitution encourages.

But this does not mean that States can indirectly regulate out-of-state conduct with in-state regulations. For example, Maryland could not ban cars registered in Pennsylvania from entering the State just because they lack a front license plate. Doing so would force Pennsylvania to provide all cars with both front and rear license plates so that drivers could cross the Mason-Dixon Line. That would spell the end of our fifty laboratories of democracy.

The Framers wanted to avoid this outcome. Learning from their mistakes with the Articles of Confederation, they baked horizontal federalism into our Constitution. One way they ensured that States could make their own policy decisions was the dormant Commerce Clause. This prevents States

from enacting hegemonic statutes that interfere with other States' policy decisions.

As usual, California has ignored these constitutional safeguards. It doesn't like some other States' animal-welfare laws. So it imposes its animal-welfare laws on out-of-state farms by regulating what may be sold in California—the State with the largest market for most products.

If left to stand, the Ninth Circuit's decision will give Alaska, Arizona, California, and Hawaii a license to regulate activities outside their borders. That would be inconsistent not only with the Founders' vision but also with this Court's dormant Commerce Clause jurisprudence.

STATEMENT

In California, it is illegal to sell pork unless the pig's sow—or mother—was housed in a pen with at least 24 square feet per sow. But not every twenty-four square feet pen satisfies California policymakers. The sow must also be able to turn around freely without touching her enclosure. Almost no commercially bred sows in the United States are housed in conditions that satisfy California's Proposition 12. This is for two reasons. First, farmers believe that keeping sows in smaller individual pens is best for the sows' and their offspring's health. Second, it is not economically feasible to keep sows in California-compliant pens.

Proposition 12 has a large effect outside the State's borders. California imports 99.87% of its pork. Because it is nearly impossible to track a pig through

multiple facilities as it is raised, slaughtered, and processed into various cuts of meat that are sold nationwide, Proposition 12 essentially regulates wholly out-of-state commerce. Compliance would require significant and costly changes to existing sow housing nationwide.

The resulting changes will be either to reduce herd sizes or to build new California-compliant facilities. Either way, prices will increase for pork across the country, even for pork products lacking a California connection. If herd sizes decrease, the law of supply and demand will take over and prices will increase. On the other hand, if new facilities are built, the construction costs will be passed on to consumers.

Because of these negative upstream effects, the National Pork Producers Council and American Farm Bureau Federation sued to enjoin California from enforcing Proposition 12. The complaint alleged that Proposition 12 violates the dormant Commerce Clause because California's regulation of in-state commerce has outsized effects on purely out-of-state commerce. The District Court partially dismissed the complaint and granted the defendant-intervenors judgment on the pleadings. After the Ninth Circuit affirmed, the Court granted certiorari because the decision conflicts with this Court's dormant Commerce Clause jurisprudence.

SUMMARY OF ARGUMENT

I.A. When the thirteen colonies won their independence from England, they did not immediately form a constitutional republic. Rather, the Articles of Confederation governed States'

relations. This led to major problems because the States refused to respect each other's views. They acted aggressively by enacting laws that burdened interstate commerce and imposed their policy views on other States.

This Balkanization hurt the new nation's economic stability. Realizing these errors, the Founders desired a new governing document. They gathered in Philadelphia in the summer of 1787 and drafted the Constitution. The Framers came up with a solution to the problem of State aggrandizement by allowing States to govern their territory without interference from other States. Chief among these protections was the dormant Commerce Clause.

The dormant Commerce Clause, however, is not the only constitutional provision that protects horizontal federalism. The Founders erected many protections for State sovereignty. The Full Faith and Credit Clause headlines these protections. Others include the Extradition Clause and, later, the Fourteenth Amendment's Due Process Clause, which restricts a State court's power to exercise jurisdiction over persons and conduct outside the State's borders.

B. Ever since America's founding, States have wielded disproportionate amounts of power. Then, New York, Pennsylvania, and Virginia had outsized power. Now, it's Texas, California, and Florida that have significant power. Recognizing the possibility that these larger States might steamroll their smaller brethren, the Framers included the dormant Commerce Clause.

Proposition 12 disregards the horizontal-federalism principles underlying the dormant Commerce Clause. Given how the pork industry works and California's outsized market for pork, the upstream effects of Proposition 12 are large. Rather than regulate conduct only in California, Proposition 12 regulates out-of-state conduct by imposing burdens on pork producers nationwide. The Court should not permit this affront to horizontal-federalism principles to stand.

II.A. For many years, the world has been on the brink of a food shortage. Since Russia invaded Ukraine, that food shortage has increasingly become reality. Prices are rapidly rising and production is decreasing. Now is not the time to add fuel to the fire by further reducing the food supply.

B. The cost of complying with Proposition 12 is staggering. The fixed costs of building California-compliant farms could reach over \$2 billion. And then there is the decreased efficiency of having two separate supply chains: one providing pork for California and one for the rest of the country. Farmers will have to raise prices to compensate for these costs and consumers will pay more. Basic economics also tells us that the amount of pork produced will decrease when prices increase. In short, there will be less food if this Court affirms.

C. Allowing the Ninth Circuit's decision to stand will have devastating effects. Increased food prices will harm consumers here and abroad. They will also lead to more internal and external conflicts. There is no upside to higher food prices. Yet that is what California asks this Court to do by allowing

Proposition 12 to govern the pork industry nationwide.

ARGUMENT

I. THE DORMANT COMMERCE CLAUSE IS KEY TO HORIZONTAL FEDERALISM.

When people invoke federalism, they usually mean vertical federalism. Horizontal federalism is the other side of the federalism coin. It involves how the States interact with each other. The Ninth Circuit, however, ignored those principles when upholding California's de facto regulation of commerce outside its borders.

A. Successful Horizontal Federalism Requires States To Respect Other States' Policy Decisions.

1. When adopting the Articles of Confederation after the Revolutionary War, the thirteen States included no safeguards against burdening interstate commerce. See Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789*, 245-57 (1950). The Founders quickly recognized that the structure was broken and needed reform. A major impetus for the Constitutional Convention was the "Balkanization that [] plagued" the States "under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949)); see *The Federalist* No. 7, 62-63 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

To solve that problem, States gave Congress authority to “regulate Commerce * * * among the several States.” U.S. Const. art. I, § 8, cl. 3; *see* The Federalist No. 42 at 267-68 (James Madison). The Commerce Clause was so critical to a functioning federal government that it was the first substantive power the new Constitution delegated to Congress. States disclaimed any ability to regulate interstate commerce. They ceded this power so commerce could flourish.

The Framers thought all States were disposed “to aggrandize themselves at the expense of their neighbors.” The Federalist No. 6 at 60 (Alexander Hamilton) (quotation omitted). They feared this would lead to factions—the ultimate poison for the Union; the “most common and durable source” of factions is economic inequality. The Federalist No. 10 at 79 (James Madison).

Maintaining States’ sovereignty was the solution to the problem. The new Constitution thus built on the premise that “the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” *Baldwin v. G.A.G. Seelig*, 294 U.S. 511, 523 (1935). Its promise was unity in interstate trade and respect for the States’ sovereignty within their own borders.

Each State retained power over its “ordinary course of affairs, concern[ing] the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” The Federalist No. 45 at 293 (James Madison); *see Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 543 (2013).

Sovereignty necessarily includes prohibiting encroachment of state power across borders. Otherwise, state sovereignty disappears.

Factions quickly form if state borders are merely nominal. So the Court has zealously guarded them: “Laws have no force of themselves beyond the jurisdiction of the State which enacts them.” *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); see also *New York Life Ins. Co. v. Head*, 234 U.S. 149, 160-61 (1914).

The Commerce Clause reflects that the States “are not separable economic units”—and that state protectionism would lead to conflict. *H.P. Hood*, 336 U.S. at 538; see also The Federalist No. 7 at 63 (Alexander Hamilton). The dormant Commerce Clause prevents States from legislating extraterritorially. It strikes a balance that maintains “the autonomy of the individual States within their respective spheres.” *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). Properly limiting States’ jurisdiction “confine[s] each state to its proper sphere of authority[] in a federalist system.” Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1093 (2009). This is necessary because when “the burden of state regulation falls on” other States, typical “political restraints” are ineffective. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 n.2 (1945) (collecting cases).

True enough, States must “recognize, and sometimes defer to, the laws, judgments, or interests of another.” Gil Seinfeld, *Reflections on Comity in the*

Law of American Federalism, 90 Notre Dame L. Rev. 1309, 1309 (2015). Policy judgments must be respected even if the people or leaders of another State vehemently disagree. But the Constitution requires that “while an individual state may make policy choices for its own state, a state may not impose those policy choices on the other states.” Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Ore. L. Rev. 275, 292 (1999) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996)). Here California is imposing its animal-welfare views throughout the nation. This violates the principles of horizontal federalism that are key to maintaining our federal form of government.

2. The dormant Commerce Clause works hand in glove with other constitutional provisions to promote horizontal federalism. For example, States lack personal jurisdiction over other States’ residents absent a demonstrated connection to the forum State. See, e.g., *Bristol-Myers Squibb Co. v. Superior Court of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1781 (2017). This rule “respect[s] the interests of other States” to exercise their “own reasoned judgment” over conduct within their borders. *BMW*, 517 U.S. at 571; *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 Mich. L. Rev. 57, 78 (2014).

Similarly, the Full Faith and Credit Clause requires a State to recognize “public acts, records and judicial proceedings of every other state,” U.S. Const. art. IV, § 1—even if the State “disagrees with the reasoning underlying the judgment or deems it to be

wrong on the merits.” *V.L. v. E.L.*, 577 U.S. 404, 407 (2016) (*per curiam*). Agreeing in this way to respect the judgments of other States helped make the individual States “integral parts of a single nation.” *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

The Extradition Clause pushes in the same direction. It mandates that States give criminal defendants over to another State even if they believe “that what the fugitive did was not wrong or that rendition would be unfair.” Allan Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493, 546 (2008).

Underlying each of these constitutional provisions is the principle of state comity. In other words, each State must respect the sovereignty of the other forty-nine States. A law which has upstream effects on interstate commerce in the rest of the country violates the comity principle. The Ninth Circuit’s decision, however, ignores this principle and horizontal federalism. This Court should set the record straight and ensure that our nation of fifty distinct sovereigns can continue for another 230 years.

B. Proposition 12 Violates Horizontal Federalism Principles.

1. Proposition 12 creates large spillover effects. As described above, it is nearly impossible for commercial farms to track exactly where every pig comes from and goes to. The food chain is complex and parts of one pig may be sent to California while other parts of the same pig may be sent to Mississippi.

Small farms with only a few sows may be able to send pork to California only if the sow was kept in California-compliant accommodations. This would be costly, but doable. The farms would have to slaughter and then process the California-compliant product separately from the other product and then label and ship accordingly. This would decrease the farm's efficiency, which would raise prices.

But most of the pork in America, and in California, does not come from small farms that process and ship their own pork. Rather, it comes from large commercial farms that serve the entire nation. The profit margins for these farms is low and it is infeasible to treat pork sold in California differently from the rest of the nation's pork.

This means that large pork producers would have to comply with Proposition 12 for all of their pork—even pork that is shipped to the other forty-nine States. Again, this would cause a large decrease in the available pork supply because of land shortfalls caused by Proposition 12. These upstream effects of Proposition 12 violate horizontal federalism principles.

2. Although “states have de jure symmetry,” “de facto asymmetries exist among states such that their relative influence within the federal structure varies.” Ann O’M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. Pub. Admin. Res. & Theory 535, 536 (2004) (citations omitted). California, for example, has far more influence in the federal structure than Rhode Island does.

“These asymmetries matter because” States are self-interested entities that often act to advance their own interests while hurting other States’ interests. Bowman, 14 J. Pub. Admin. Res. & Theory at 536. Luckily, the Founding Fathers saw this coming. “Thus the U.S. Constitution establishes some basic rules for state-to-state conduct in an effort to produce a smoothly functioning federal system, one in which state-to-state issues can be accommodated and conflict can be minimized.” *Id.*

One of the basic rules that the Constitution establishes is that States cannot de facto legislate outside of their borders. Doing so causes massive tension with other States who are stripped of their sovereign ability to regulate conduct within their borders. Proposition 12 exemplifies California’s effort to take away the ability of Iowa, Minnesota, North Carolina, Illinois, and Indiana to set animal-welfare standards. This violates horizontal-federalism principles.

3. If California can regulate the living conditions for a sow in North Carolina, nothing stops it from regulating how chickens are kept in Georgia, Arkansas, and Mississippi. Nor is there anything to stop California from regulating non-agricultural products that are difficult to track. For example, imagine if California permitted only gold that it considered ethically sourced to be sold in the State. This would make selling gold in the State nearly impossible.

It is not economically feasible to determine the origin of every ounce of gold in a gold bar. Some of the gold may have been mined thousands of years ago by

slaves and then melted and recast hundreds of times. For a firm to determine the exact origin of every ounce of gold would be impossible. The same is true for pork. As detailed in Petitioners' brief (at 9), it is economically infeasible to track every bit of pork.

Because it is economically infeasible to have separate California-compliant productions, pork producers across the country will have to comply with California's requirements. These upstream effects on interstate commerce are de facto regulation of conduct outside California's borders. That is exactly the type of regulation that the Framers wanted to avoid by baking horizontal federalism into our constitutional structure. Thus, the Ninth Circuit's decision should be reversed to preserve these core federalism principles.

II. ALLOWING STATE AGRICULTURAL REGULATIONS THAT HARM THE NATION'S FOOD CHAIN WOULD HAVE DEVASTATING RESULTS.

A. Now Is Not The Time To Interrupt Food Supplies.

Anyone who has been to the grocery store in the past few months knows that now is not the time to mess with our food supply. "Fears of a global food crisis are growing." Robert Griffiths, *With food prices climbing, the U.N. is warning of crippling global shortages*, NPR (May 23, 2022), <https://n.pr/3MThvyb>. As the International Monetary Fund's managing director said, "[t]he situation is indeed very dire." Kristalina Georgieva, *Mornings with Maria* (Fox

Business television broadcast May 25, 2022), available at <https://fxn.ws/3xLHoLq>.

Some experts saw this coming. “For the past few years, scientists have been frantically sounding an alarm that governments refuse to hear: the global food system is beginning to look like the global financial system in the run-up to 2008.” George Monbiot, *The banks collapsed in 2008 – and our food system is about to do the same*, *The Guardian* (May 19, 2022), <https://bit.ly/3wP3Y5d>.

The tipping point, however, was reached far quicker than most experts expected. That is because they did not expect Vladimir Putin to invade Ukraine. The invasion has caused food prices to skyrocket as supplies dip. See Maegan Vazquez & Sam Fossom, *Biden blames Russia’s war in Ukraine for food supply shortages and price hikes*, *CNN* (May 11, 2022), <https://cnn.it/3mfAPdz>. “More than 20 million tons of grain are stuck in silos at Ukrainian ports, as Russian blockades prevent ships setting sail with wheat, corn and other exports.” Laura McQuillan, *Global food crisis fuelled by war in Ukraine could provoke unrest*, *CBC* (May 20, 2022), <https://bit.ly/3LQrzXm>. If those food supplies are not released shortly, they will rot. In other words, over 40 billion pounds of food will go to waste. Without that food flowing into Africa and the Middle East, those regions will turn to America for food. With more competition for the limited amount of food produced in America, prices will increase. This is economics 101.

B. The Ninth Circuit's Decision Will Interrupt The Food Supply.

Proposition 12 requires all farmers use group housing with at least twenty-four square feet of space per animal. Cal. Health & Safety Code § 25991(e). Almost no existing sow farms meet these requirements. So nearly every hog farmer in America must make extensive capital improvements or build new farms that satisfy California's ridiculous and unscientific requirements. *Cf.* Allen Zhong, *Largest US Pork Packer Closing California Plant, Citing High Costs and Red Tape* (June 12, 2022), <https://bit.ly/39vXU8K> (company closing operations because of increased costs associated with Proposition 12).

Constructing one California-compliant facility to house 5,200 sows would cost at least \$15.6 million. *See* Barry K. Goodwin, *California's Proposition 12 and its Impacts on the Pork Industry* (May 13, 2021). Farmers would have to build at least 130 of these facilities to meet the demand for pork in California. *See* Pet. App. 345a.

In other words, it would take over \$2 billion in expenditures to create California-compliant farms. But again, that would not be the only increased cost associated with forcing farmers in other States to comply with Proposition 12. Rather than use the normal supply chain, America's pork producers would need a separate supply chain for California-compliant pork products. This, of course, reduces efficiency. Rather than use economies of scale to reduce variable costs, the separate supply chains would cause unnecessary duplication.

C. The Effects Of Increased Food Prices Are Devastating.

Rising food prices may not have a large impact on those who thrive inside the rarefied bubbles of Silicon Valley or the District of Columbia. But it will have devastating consequences for many Americans and those across the globe. The only way to avoid these impacts is to reverse the Ninth Circuit's decision.

“Higher food prices reduce the poor's access to food, which has possible long-term, irreversible consequences for health, productivity, and well-being.” Mark W. Rosegrant, Dir. of Env't and Prod. Tech. Div. at the Int'l Food Policy Rsch. Inst., *Biofuels and Grain Prices: Impacts and Policy Responses* (May 7, 2008) (transcript available at <https://bit.ly/3NGx000>). Without access to pork or other nutritious food, the poor will turn to junk food. This causes health problems like obesity, hypertension, and diabetes.

Americans will feel these effects. But the larger effect may be seen overseas. Higher food prices “strain incomes in poorer countries, especially in some parts of Latin America and Africa, where some people may spend up to 50 or 60 percent of their income on food.” Ana Swanson, *Ballooning Food Prices Threaten the World's Poorest*, N.Y. Times, Feb. 4, 2022, at A9, <https://nyti.ms/3Q3K26j>. This is a “cause for worry” because it could spark “social unrest on a widespread scale.” *Id.* (cleaned up).

The fears about rising food prices causing millions—if not billions—of people to go hungry are

not merely theoretical. Last year, “[a]cute food insecurity [] soared 74%” because of “food price hikes” that “exacerbated existing pressures.” Maytaal Angel, *Higher food prices help fuel 74% jump in global hunger - UN agency*, Reuters (July 9, 2021), <https://reut.rs/3wVy3jL>. This, of course, was before Russia invaded Ukraine and placed even more pressure on worldwide food prices.

The effects of rising food prices are a real danger to the health and welfare of the world’s poor. But California doesn’t care about how those impoverished people are faring. Rather, it caters to the rich techies in San Francisco and the Hollywood elite, who feel more virtuous eating pork sourced from farms that provide twenty-four square feet of space per sow. This Court should reject this self-centered approach and look at the real-world effects of rising food prices. Thus, it should reverse the Ninth Circuit’s decision and hold that Proposition 12 violates the dormant Commerce Clause.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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June 17, 2022