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Brief of Professors Michael Knoll and Ruth Mason as Amici Curiae Supporting Petitioners in *National Pork Producers Council v. Ross*

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No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, ET AL.,
Petitioners,

v.

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

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

BRIEF OF PROFESSORS MICHAEL KNOLL AND RUTH MASON AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are scholars who specialize in the economic analysis of law. *Amici* authored an amicus brief explaining the economic concept of tax neutrality that the Court cited in support of its opinion in *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 562, 564, 565, 567 (2015). In *Wynne*, this Court adopted the internal consistency test as a test for discrimination that violates the dormant Commerce Clause. *Amici* submit this brief to explain how the internal consistency test applies in this case and to emphasize that regulatory mismatch cases receive different doctrinal analysis under the dormant Commerce Clause than do more run-of-the-mill cases that deal with protectionism.

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[1] Petitioner and Respondents consented to the filing of this *amicus curiae* brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The district court erred when it concluded that because Proposition 12 applies only to in-state sales, it could not be extraterritorial. On the contrary, because California regulates pork production based on domestic, inbound, *and* outbound sales, its regulation is internally inconsistent and overbroad. As an obligation of interstate comity, this Court has understood extraterritoriality to require the basis of regulation to be internally consistent. A regulation is internally consistent when, if every state regulated using the same nexus as the challenged state, cross-border commercial activity would not be regulated by more than one state. Proposition 12 cannot meet this basic requirement.

Even if the California statute is not extraterritorial, the district court erred in dismissing the case because Petitioners plausibly alleged an undue burden on interstate commerce. Proposition 12 generates a burdensome regulatory mismatch because California's law differs from that of other states. For regulatory mismatches, the proper line of cases is not *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), but rather other mismatch cases, such as *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). This Court's balancing analysis in mismatch cases differs significantly from such non-mismatch cases, like *Pike*. Most importantly, in analyzing mismatches, a reviewing court must consider not only California's regulatory interest and the burden the mismatch imposes on interstate commerce, but also *other states'* regulatory interests. The district court failed to do that.

ARGUMENT

I. Proposition 12 is internally inconsistent and therefore extraterritorial.

Extraterritoriality has been called the "least understood" prong of the dormant Commerce Clause. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015). Within the dormant Commerce Clause, it sits between nexus and burdens. State laws that lack any nexus to conduct in or contact with the state are unconstitutional. But even when extraterritorial laws have nexus, they can be so broad that they are also unconstitutional. In contrast, state laws that have nexus and are not extraterritorial are reviewed for whether they discriminate against or unduly burden interstate commerce. Although the motivations for the three prongs overlap, each has a different core emphasis. Nexus promotes fairness and notice to the regulated party; extraterritoriality concerns state autonomy; and discrimination and undue burdens concern the national marketplace.

Three main justifications support the prohibition of extraterritoriality. First, it safeguards federalism by protecting state autonomy. If nexus is about fairness to the regulated party, extraterritoriality is about fairness to fellow states. Specifically, if there were no limits on the breath of state regulation, then some states' overbroad regulation would interfere with other states' legitimate ability to regulate matters that concern them. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36 (1989) (referring to "the autonomy of the individual States within their respective

spheres"). Second is a concern about interstate relations. If states are permitted to regulate in an overbroad way, such regulation may inspire retaliation, endangering national political union. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–72 (1996) (referring to "principles of state sovereignty and comity" and "the need to respect the interests of other States"). The first two justifications—autonomy and comity—are related, and amicus briefs in this case filed by fellow states and the United States indicate acute awareness of these issues. Third, by limiting overbroad state regulations, the prohibition of extraterritoriality indirectly safeguards the national marketplace by reducing regulatory mismatches that would unduly burden interstate commerce. *Healy*, 491 U.S. at 336–37 ("Generally speaking, the commerce clause protects against inconsistent legislation arriving from projection of one state regulatory regime into the jurisdiction of another.").

As important as preventing extraterritoriality is in a federation, this Court's tendency to use very broad language to describe extraterritoriality has led to considerable confusion about the principle's limits. For example, this Court declared in *Healy* that a statute was extraterritorial if it applied to commerce that "takes place wholly outside of the State's borders" or "directly controls commerce occurring wholly outside the boundaries of a State." 491 U.S. at 336. But such pronouncements are overbroad because they seem to forbid states from enacting regulations with any cross-border spillovers at all. This overbreadth led lower courts in this case to narrow the concept to cases concerning only price controls, even though nothing in the Supreme Court's doctrine supports such a narrow

interpretation. In addition to being impossible to meet, a standard that would forbid all cross-border spillovers is unnecessary to preserve fellow states' autonomy in a federation. *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 790–94 (2001) (giving examples—including the sending of spam or child pornography over the internet from other states—in which a state might legitimately seek to regulate out-of-state behavior based on its in-state effects). The Court's overbroad statements on extraterritoriality have led commentators to conclude that it "lack[s] a limiting principle." Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979, 998–99 (2013).

Although the extraterritoriality doctrine has waxed and waned, because it is vital to safeguarding state autonomy, and therefore federalism itself, this Court has never repudiated it and should not do so.

A. This Court has used internal consistency as a test for extraterritoriality that disadvantages interstate commerce.

A recurring theme in this Court's dormant Commerce Clause doctrine is hypothetical reasoning. When evaluating whether a state regulates too broadly, this Court often asks, "What would happen if all other states enacted a regulation on the same jurisdictional basis?" *See S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 775 (1945) ("If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The

practical effect of such regulation is to control train operations beyond the boundaries of the state."); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986) (observing that "proliferation of state affirmation laws . . . has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States" and that New York's regulation allowed it to "project[ ] its legislation into other states"); *Healy*, 491 U.S. at 336 (asking what effect would result "if not one, but many or every, State adopted similar legislation"); *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion of White, J.) (noting "if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled").

In tax cases, this hypothetical even has a name—the "internal consistency test"—though the name is not terribly helpful in understanding the concept. Essentially, it is a regulatory variation on Immanuel Kant's "categorical imperative" or the religious Golden Rule: would double or multiple tax result if every state taxed as State X has taxed? Or, to frame it "internal" to State X, would State X interfere with interstate commerce if its laws were the laws of every state?[2] And more than serving as a mere heuristic for

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[2] *See Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 574–75 (2015) (Scalia, J., dissenting) ("The test, it is true, bears some resemblance to Kant's first formulation of the categorical imperative[.]").

when states have asserted overbroad regulatory authority, in tax cases internal inconsistency is fatal.

This Court first developed the internal consistency test to resolve dormant Commerce Clause challenges to potentially overlapping exercises of state tax jurisdiction as applied to multistate companies. Companies may have tax nexus with more than one state. But each state needs a way to figure what portion of a multistate enterprise's overall income it can tax. Under this Court's doctrine, a state's rule for determining its share of taxable income must display *internal consistency* between the burdens on intrastate activity and interstate activity. A tax apportionment rule is internally consistent if its adoption by every state would lead to the same income being taxed by no more than one state. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983) (defining internal consistency). This Court explained: the "test . . . simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).[3]

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[3] This Court's hypothetical in *Wynne*, 575 U.S. at 564–65, is helpful:

Maryland's income tax scheme fails the internal consistency test. A simple example illustrates the point. Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further

This test was long viewed as part of the "fair apportionment" prong of *Complete Auto*'s four-pronged test for state taxes under the dormant Commerce Clause.[4] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977). Fair apportionment is conceptually similar to extraterritoriality. Specifically, it would be unfair to multistate companies—as well as inhibit interstate comity and the tax autonomy of other states—if a single state taxed a company's entire income merely because that state had tax nexus over the company. Apportionment formulas solve this dilemma by determining the ratio of the company's in-state activities to its overall activities, and a state uses that ratio to tax only a fraction of the overall income.

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that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

[4] This Court's views on internal inconsistency in taxes have evolved due to the coincidence of internal inconsistency in taxes with economic protectionism. *Wynne*, 575 U.S. 542; Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 Va. L. Rev. 309, 329–33 (2017). That coincidence is potentially absent in cases about internally inconsistent regulations. Thus, whereas internally inconsistent taxes are also discriminatory, internally inconsistent regulations are not necessarily discriminatory. The analog between tax cases and regulations we seek to draw out here concerns not economic protectionism, but rather overbreadth in the exercise of tax or regulatory jurisdiction.

Perceiving itself to lack authority to impose a particular apportionment formula on all the states, this Court held that structurally or "internally" consistent apportionment formulas would survive dormant Commerce Clause challenges. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278–79 (1978). By contrast, "a failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction." *Jefferson Lines*, 514 U.S. at 185.

This Court has repeatedly used internal-consistency-type hypotheticals—without referring to internal consistency by name—in regulation cases when the question was whether the challenged state's regulation was overbroad in scope. The issue for internally inconsistent regulation is not double or multiple taxation, but rather double or multiple regulation. As applied to regulations, the internal consistency test asks, "If every state regulated using the same nexus as the challenged state, would a single cross-border commercial transaction be subject to regulation by more than one state?"

B. Doctrine supports an internal consistency interpretation of extraterritoriality.

This Court has repeatedly used internal-consistency-type reasoning in regulation cases. For example, in *Brown-Forman*, New York prohibited producers from selling alcohol within New York at higher prices than the lowest price they charged in other states. *Brown-Forman Distillers Corp.*, 476 U.S. at 575. In effect, the regulation tied a producer's New

York prices to prices the producer charged for the same item out of state, and vice versa. New York's law did not lack nexus; in form, it regulated only New York prices. But as applied, the New York law regulated prices both within and outside New York;[5] prices charged outside of New York determined the maximum price that could be charged in New York, and consequently, producers could not lower prices charged out-of-state without first receiving permission from New York authorities. New York's law was internally inconsistent because it regulated prices using in-state and out-of-state sales; if every state adopted the same regulatory scope, then interstate sales would be subject to regulation by multiple states. The Court linked the statute's overbreadth to the federalism value of state autonomy, noting that, if sustained, the challenged regulation might "interfere with the ability of other States to exercise their own authority." *Id.* at 585.

Similarly, the Court struck down a regulation restricting takeovers of companies whenever Illinois residents held ten percent or more of the target's shares. *Edgar*, 457 U.S. at 627. If every state regulated using that nexus, then up to ten different states could regulate a single takeover transaction, whereas a company owned entirely (or slightly more than 90%) by a single state's residents would not face that burden. Writing for a plurality of the Court, Justice White explicitly considered what we have referred to as the

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[5] A substantively similar, but formally different, law that prohibited producers from selling alcohol outside of New York at a lower price than it sold inside New York presumably would have lacked nexus.

internal consistency of Illinois' regulatory basis. Justice White and three others would have invalidated the Illinois statute due to its internal inconsistency alone, condemning the regulation's "sweeping extraterritorial effect." *Id.* at 642.

There are also cases in which the Court pointed to the internal consistency of the challenged regulation's *jurisdictional* basis as a reason for upholding a regulation against a dormant Commerce Clause challenge. For example, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), involved a challenge to an Indiana anti-takeover law that applied only to companies incorporated in Indiana. Although not using the terms "internal consistency" or "extraterritoriality," the *CTS* Court expressly evaluated the challenged state's use of place of incorporation as the nexus for exercising regulatory jurisdiction. The Court reasoned that "[s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." *Id.* at 89. Thus, whereas the *MITE* Court struck down an internally inconsistent anti-takeover rule, the *CTS* Court upheld an internally consistent anti-takeover rule. *See id.* at 88 (considering whether the challenged rule would "adversely affect interstate commerce by subjecting activities to inconsistent regulations").

C. Normative arguments support an internal consistency interpretation of extraterritoriality.

Normative and practical arguments support the intuition by members of this Court—expressed in the

cases just mentioned—that internal consistency matters for interstate comity and the preservation of state sovereignty. Indeed, skepticism regarding the constitutional legitimacy of the "dormant" Commerce Clause should not spill over into a failure to recognize the sovereign prerogatives and equal dignity of each individual state in our federal system, which in other contexts is assumed and protected without much question.

First, application of the internal-consistency test as part of extraterritoriality analysis would not draw courts into difficult questions regarding *which state* was the correct state to regulate a particular matter or whether the challenged state's regulation was superior to similar regulations passed by other states. Thus, in evaluating the internal consistency of Proposition 12, for example, this Court would not have to consider whether California actually advances the welfare of sows, whether California has a legitimate interest in regulating sales and/or production, or whether regulation using sale as a nexus is superior to regulation using production. Nor would an internal-consistency interpretation of extraterritoriality demand that this Court determine *where* in the nation a regulated activity takes place. As the national economy becomes more service-oriented and digital, activity will become less connected to a physical location. Thus, suggestions for resolving the ambiguities in extraterritoriality doctrine by assigning commercial acts to unique physical places will seem increasingly

anachronistic.[6] Instead, an internal-consistency approach to extraterritoriality allows a state to decide for itself upon which nexus it will regulate an activity, so long as it picks an internally consistent one.

Second, eliminating internally inconsistent exercises of regulatory jurisdiction should reduce actual regulatory conflicts in the real world. Reducing regulatory conflicts is important not only to directly facilitate interstate commerce, but also to reduce the number of cases in which courts must evaluate regulatory mismatches under the undue-burden strand of the dormant Commerce Clause. Avoiding the need to resolve mismatch cases is useful because such cases force courts to consider not only the nexus of the challenged state's regulation, but also its content and impact on interstate commerce. This type of balancing review has long attracted criticism from judges and commentators.

Third, internal consistency as a formal test of extraterritoriality would channel states to choose a nexus that is meaningfully related to in-state effects. Consider Justice Cardozo's hypothetical about whether a state may insist that products sold in the state be produced using labor that was paid the market state's minimum wage. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935). Suppose California adopted a minimum wage of $20 per hour, higher than

[6] This Court's personal jurisdiction case law illustrates the anachronism of the facts and concepts. It is notable for both the heavy reliance on physical presence and the total absence of e-commerce cases.

any other state. Suppose further that California applied the wage to both goods *produced in California* and goods *sold in California*. If every state did that, producers in and out of California would face conflicting regulations if they wanted to engage in interstate commerce, whereas purely intrastate production and sale would not. The problem with such internally inconsistent regulation is not necessarily that it would be impossible for a single product to meet the minimum wage standards of both states simultaneously; to sell in California, out-of-state producers would simply have to pay workers $20 per hour. The problem arises because California has interfered with other states' sovereign prerogative to set *local* minimum wages. That is, California's wage regulation has spilled over into other states. And when the internal consistency test is applied, regulated parties are in the same position as taxpayer Bob (*see supra* note 3), getting hit twice with wage regulations and raising a risk of inconsistency if Bob wants to engage in interstate commerce.

Regulatory spillovers are inevitable in a federation. But internal consistency as a test of extraterritoriality would modestly limit them. Specifically, to survive the internal consistency test, California would have to choose whether to regulate wages by production or by sale because that is the only way it would avoid trampling on the sovereignty of other states and subjecting Bob to multiple conflicting regulations. If California were determined to regulate wages for the production of goods *sold in California*, California would have to forgo regulating the payment of minimum wages for *production in California* to be internally consistent.

Thus, the internal consistency test imposes a price on California for its spillover when it regulates based on sales into the state: California would have to forgo regulating wages based on *production in* California—to forgo regulating *local* wages. By constraining the *scope* (but not content) of state regulations, a requirement of internal consistency would encourage states to choose a nexus that would entitle them to regulate genuinely local activity, and the loss of authority to regulate local conduct would be a disincentive to overreaching into other states' regulatory domains.

D. Proposition 12 is internally inconsistent and therefore overbroad.

Petitioners argue that Proposition 12 will regulate commercial transactions that take place outside of California and that such effects are extraterritorial. Although we agree that Proposition 12 will have spillover effects in other states, thereby affecting commercial behavior having nothing to do with California, many regulations have effects outside the regulating state's borders, including product safety or labeling rules that traditionally have not been seen as extraterritorial. The problem with Proposition 12 is not only that it has spillover effects, but it is also internally inconsistent. Thus, it is not merely practically, but *structurally*, extraterritorial.

Just like the wage hypothetical above, California's Proposition 12 regulates based on two nexuses: sale *and* production within the state. If every state enacted a hog-husbandry regulation on the same nexuses, then cross-border sales of pork would inevitably be subject to regulation by more than one state. Such

structural overbreadth in the assertion of regulatory jurisdiction is problematic not only because it invades sister states' regulatory prerogatives, but also because—due to its overbroad scope—it subjects the interstate seller (but not the intrastate seller) to inconsistent regulations. If Ohio had different rules for pork produced and sold in Ohio, then pork produced in Ohio but sold in California would be subject to mutually inconsistent regulation by different states.

Notice that a determination that Proposition 12 is internally inconsistent in scope, and therefore extraterritorial, would not require any court to determine the proper basis for regulating animal welfare—whether by sale, by production, or on some other internally consistent nexus. Instead, an internal-consistency interpretation of extraterritoriality would merely force California to choose an internally consistent nexus for regulating. If forced to choose whether to regulate animal welfare using as the nexus *sale* of meat in California or *production* of meat in California, California may well choose to regulate animal welfare using production of meat in California, on the theory that Californians are more concerned about the treatment of local than out-of-state animals. Indeed, the history of Proposition 2, Assembly Bill 1437 (AB 1437), 2009–2010 Leg., Reg. Sess. (Cal. 2010), and Proposition 12 suggests that California's first priority was to regulate the treatment of local animals. App. to Pet. 193a (Compl. ¶¶ 216–17).

Of course, if it had to start from scratch, California might well choose to regulate animal welfare using the nexus of sales of meat in California, with the express aim of influencing the treatment of the more

numerous hogs living in other states. But as noted above, an internal consistency test would then require California to give up the power to regulate animal welfare of hogs produced in California. California might then become a haven for unethical treatment of animals, which could inspire local voters to advocate for a policy that would regulate closer to home, freeing interstate commerce of the spillovers that would attend a Proposition 12 applicable only based on sale.

E. Internal inconsistency may not be the exclusive test of extraterritoriality.

We express no view about whether internal inconsistency should be the exclusive test of extraterritoriality, or, as it was in *Healy*, one test among several. 491 U.S. at 336 (citing internal inconsistency as one indicator of extraterritoriality along with two others). Moreover, because Proposition 12 is internally inconsistent, there would be no need for any court to decide whether internal consistency constitutes the exclusive test of extraterritoriality or a minimum standard.

II. Because Proposition 12 generates a regulatory mismatch with the laws of other states, the applicable line of cases under the dormant Commerce Clause is *Southern Pacific*, *Bibb*, and *Kassel*, not *Pike*.

The dormant Commerce Clause limits state regulatory diversity for two reasons. The first is the interest in a smoothly functioning national marketplace. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520, 527 (1959); *S. Pac.*, 325 U.S. at 770–71; *South Dakota v.*

Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671 (1981). Mismatched regulations split the national marketplace along state boundaries, an effect this Court has decried as economic Balkanization. *Bibb*, 359 U.S. at 529 ("A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers . . . ."); Pet'rs' Br. at 23–24. The second reason is the need to appropriately safeguard the regulatory autonomy of each state. Put differently, the dormant Commerce Clause limits the extent to which states' regulations may spillover to other states. *Morgan v. Virginia*, 328 U.S. 373, 382, 386 (1946) (precluding on dormant Commerce Clause grounds a Virginia regulation requiring race segregation on trains at a time when other states forbade it, noting that "no state law can reach beyond its own border nor bar transportation of passengers across its boundaries").

Although the dormant Commerce Clause does not completely ban regulatory spillovers, limits are important to maintain the independence and autonomy of each state—particularly to protect smaller states from incursion by larger states that can leverage their authority to regulate the smaller states' markets and infringe on smaller states' ability to regulate activities occurring in their own territories.

A. Because this case involves a regulatory mismatch, *Bibb*, not *Pike*, is the correct type of balancing.

This Court's undue-burden doctrine can be divided based on the type of burden a challenged regulation imposes. Single-state burdens are those that arise from one state's regulation without regard to the regulations of any other state. A law that imposes a single-state burden would still burden interstate commerce even if all other states adopted the same law. For example, a state law requiring cantaloupes to be packed before shipped out of state adversely affects interstate commerce regardless of any actions or regulations of other states. When such single-state burdens display no facial discrimination, this Court analyzes them under *Pike*, which balances the state's local interest in the regulation against the burden the regulation imposes on interstate commerce. 397 U.S. at 142.

The second type of undue burden dormant Commerce Clause case—an "inconsistent-regulation" or "mismatch" case—involves a burden on interstate commerce that arises not from a single state's law but rather interactions among the laws of multiple states. Our federal system affords states regulatory autonomy, which sometimes leads to interstate regulatory mismatches. Such mismatches occur when two or more states regulate the same person or action in *different* ways. In contrast, if all states adopted the same regulation, there would be no mismatch and no adverse effect on interstate commerce. Regulatory mismatches inhibit interstate commerce by increasing compliance costs for entities doing business in more

than one state. When protectionist intent motivates the adoption of regulatory mismatches, they are unconstitutional. *E.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977). Even in cases where such intent is disputed, unclear, or absent, this Court has held that the dormant Commerce Clause precludes regulatory mismatches when they unduly burden interstate commerce. *E.g.*, *Bibb*, 359 U.S. 520; *Kassel*, 450 U.S. 662.

This Court conducts balancing analysis—which it usually describes as *Pike* balancing—in both single-state and mismatch cases. But balancing analysis has long reflected—if not explicitly acknowledged—important differences between single-state cases and mismatch cases. To highlight the difference, we refer to balancing in single-state cases as *Pike* balancing, and we refer to balancing in mismatch cases as *Bibb* balancing. Michael S. Knoll & Ruth Mason, *Blame* Bibb *Balancing*, ___ Geo. Wash. L. Rev. ___ (forthcoming 2023).

First, in mismatch cases but not single-state cases, the Supreme Court determines the burden the challenged regulation imposes on interstate commerce against an external benchmark consisting of another state's or states' laws. For example, when Arizona was the only state to limit the length of trains for safety reasons, the Court calculated the burden from Arizona's regulation as the cost to remove train cars at the border of Arizona. *S. Pac.*, 325 U.S. at 773. This analysis used other states' lack of a length limit as an implicit baseline. Likewise, in *Bibb*, Illinois required trucks driving on its highways to have curved mudflaps, while all other states either permitted or

required straight mudflaps. 359 U.S. at 523. Again, this Court used other states' laws as a baseline when it understood the burden of Illinois's rule to include the need to change mudflaps at the border. *Id.* at 525. When Iowa limited the length of trucks on its roads to 55 feet, but other states permitted longer trucks, the Court calculated the burden as the need for interstate truckers to unload their products into smaller trucks or divert around Iowa. *Kassel*, 450 U.S. at 662, 671. Thus, in mismatch cases, the Court uses other states' rules as an implicit benchmark in determining the challenged state's burden on interstate commerce. In single state cases, such as facial discrimination cases, however, the Court measures the state's treatment of interstate commerce against an *internal* benchmark: the state's treatment of in-state commerce. Knoll & Mason, *Blame* Bibb *Balancing*, *supra*.

Second, in mismatch cases, this Court calculates the state interest by benchmarking against other states' regulations and interests, not the interests of only the challenged state as in *Pike* balancing. For example, in *Bibb*, Illinois had to show that curved mudflaps presented a safety advantage over and above that derived from the straight mudflaps permitted by other states. 359 U.S. at 525. In *Kassel*, Iowa had to show that shorter trucks would provide safety advantages over the longer trucks permitted in other states. 450 U.S. at 672. Additionally, in mismatch cases this Court considers the ways in which the challenged regulation impinges upon other states' abilities to effectuate their own regulatory preferences. Specifically, in *Bibb* balancing, this Court has considered the extent to which the challenged regulation spills over to other states, thereby constraining those states'

abilities to regulate. *See, e.g.*, *S. Pac.*, 325 U.S. at 774 (precluding an "Arizona limitation . . . [that] controls the length of passenger trains all the way from Los Angeles to El Paso"); *Bibb*, 359 U.S. at 527; *Kassel*, 450 U.S. at 675–76. Such relative interest weighing, which involves consideration of other states' interests in their own different regulations, contrasts sharply with *Pike* balancing for single-state cases.

Mismatch cases thus raise additional horizontal federalism issues that single-state cases do not raise. When the reviewing court decides to preclude in a mismatch case, the decision to preclude involves either (1) an implicit decision about *which state's* rule will prevail to eliminate the mismatch or (2) a judgment that no state may regulate the disputed matter because it requires nationally uniform regulation that only Congress can provide. *Compare Bibb*, 359 U.S. at 529–30 (de facto choosing a straight mudflap rule over a curved mudflap rule), *with S. Pac.*, 325 U.S. at 781–82 (precluding any state from regulating train length). As a result, mismatch cases are more prone than single-state cases to criticism for judicial legislation. Knoll & Mason, *Blame* Bibb *Balancing*, *supra*.

B. The district court erred in concluding that dormant Commerce Clause balancing was not needed.

Understanding the differences between *Pike* and *Bibb* balancing highlights the district court's errors.

The district court incorrectly concluded that because pork was not a matter that required nationally uniform regulation, Petitioners failed to make a

dormant Commerce Clause claim. App. B to Pet. for Writ of Cert. Conclusions about the need for national uniformity are just that—conclusions—that result from balancing analysis that the lower court never performed. For example, the district court cited *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), for the proposition that what we have been calling *Bibb* balancing does not apply unless the regulated matter is one requiring "national uniformity in treatment." App. to Pet. at 34a (citing *Exxon*, 437 U.S. at 127–28). But this analysis transforms a possible conclusion of *Bibb* balancing into a prerequisite for *Bibb* balancing. Indeed, speaking specifically to the possibility of mismatches, the *Exxon* Court noted that "[t]he evil that appellants perceive in this litigation is not that the several States will enact *differing* regulations, but rather that they will all . . . impose *similar* bans on vertical integration" between petroleum refiners and retailers. 437 U.S. at 128 (emphasis added). Thus, the *Exxon* Court concluded that the problem was "not one of national uniformity." *Id.* In contrast, the complaint here is that California imposes different and stricter standards for hog husbandry than do other states, and that this mismatch imposes significant burdens on the national market for pork production and threatens to disrupt and balkanize the market.

Likewise, Respondents wrongly argued below that the mismatch doctrine applies only when regulations are "inconsistent," not when they are "complementary." Defendant-Intervenors' Reply in Support of Motion for Judgment on the Pleadings at 4, *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-02324). But this Court has pre-

cluded regulations that were merely stricter than, rather than mutually inconsistent with, the regulations of other states. *E.g.*, *Kassel*, 450 U.S. 662 (precluding regulation requiring shorter trucks when other states allowed longer trucks). This Court has even precluded a regulation when the nature of the mismatch was that one state enacted a regulation that burdened interstate commerce while other states had *no relevant regulation* in the area. *S. Pac.*, 325 U.S. 761.

Here, there is a mismatch between the new California regulation regarding hog pen sizes and other states' preexisting regulations of the same matter. For example, Ohio regulations allow breeding pens that Proposition 12 forbids. Pet'rs' Br. at 5. Under the mismatch precedents of this Court, including most recently *Kassel*, such mismatches should be analyzed under the dormant Commerce Clause using balancing. *But see S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938) (upholding a mismatched regulation against a dormant Commerce Clause challenge on the grounds that mismatch burdens were not judicially cognizable).

C. However measured, the burden Proposition 12 imposes on interstate commerce is substantial.

Here, the Ninth Circuit held that compliance costs[7] —by which it meant the increased costs incurred by hog farmers outside of California to adjust

[7] In the compliance area, compliance costs often refer more narrowly to the costs incurred by a firm or industry to comply with regulations, such as for ensuring fidelity and reporting. They often do not include the costs of changing operations and the

their operations to accord with the new California law–were not interstate commerce burdens for dormant Commerce Clause purposes. This was manifest error. The main burden at issue in any dormant Commerce Clause regulations case is the cost to comply with the challenged regulation. Specifically, under this Court's precedent, costs incurred by multistate commercial actors to comply with regulations that *differ* in content across states are relevant costs under the dormant Commerce Clause. *Wayfair*, 138 S. Ct. at 2093 (acknowledging compliance costs from "subjecting retailers to tax-collection obligations in thousands of different taxing jurisdictions" as relevant costs to the dormant Commerce Clause); *see also Kassel*, 450 U.S. at 667 (identifying as the relevant burden under the dormant Commerce Clause the need to switch to smaller trucks or to divert around the challenged state); *Bibb*, 359 U.S. at 527 (burden was the need to switch mudflaps).

Once we understand that compliance costs arising from regulatory diversity are the relevant burden under *Bibb* balancing, the next question concerns how to measure that burden. As noted above, this Court consistently uses an external benchmark consisting of other states' laws to measure burdens in mismatch cases, but it does not always use the same benchmark in every case. In *Kassel*, the Court judged the challenged rule against a baseline of the *dominant rule* adopted by other states. 450 U.S. at 671–73 (describing Iowa's rule as "out of step with the laws of all other

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higher costs of operating according to regulations. Both types of costs are at issue here.

Midwestern and Western States"). In *Bibb*, the Supreme Court calculated the burden by reference to the rule that *most sharply contrasted* with the challenged rule. 359 U.S. at 525 (comparing challenged states curved mudflap requirement against one state's straight mudflap requirement, even though many states permitted both types of mudflaps). In *Southern Pacific*, the implicit benchmark against which the Supreme Court measured the burden on interstate commerce consisted of *no regulation at all*. The *Southern Pacific* Court considered the burden imposed by Arizona's train-car limit against a background of the absence of regulations dictating train-car limits in other states. 325 U.S. at 774–75.

Thus, when this Court has measured interstate commerce burdens arising from mismatches, it has used several different benchmarks, including (1) the dominant regulation imposed by other states, (2) the most sharply contrasting regulation imposed by another state, and (3) the absence of regulation by other states. As detailed in Petitioner's complaint, by any of these measures, Proposition 12 imposes extensive costs, and therefore significant burdens, on interstate commerce.

D. California's interest is likely not sufficient to overcome the burden Proposition 12 imposes on interstate commerce.

The district court's incorrect conclusion that Proposition 12 imposed no relevant burden for dormant Commerce Clause purposes led the court erroneously to conclude that it did not have to consider California's

regulatory interest. Because *Bibb* balancing remains good law, however, and because pro constitutes a heavy burden on interstate commerce no matter how measured, the district court should have weighed that burden against California's legitimate local interest in Proposition 12.

1. Impermissible protectionist intent may have motivated Proposition 12, and that would be sufficient for preclusion in a mismatch case.

A finding of protectionism is sufficient for preclusion in a mismatch case. *Hunt*, 432 U.S. at 352–53.

Proposition 12 is not overtly protectionist on its face, but the history of anti-animal cruelty legislation in California supports Petitioner's allegation that protectionist intent motivated Proposition 12. The regulation challenged in this case began with Proposition 2, which applied strict animal husbandry rules to hens, pigs, and calves *produced in California*. App. to Pet. 192a (Compl. ¶ 213). Because Proposition 2 applied to only California producers, out-of-state producers not subject to its strictures would be able to undersell California producers in the California market. The California legislature responded via Assembly Bill 1437, which expanded Proposition 2 to eggs *sold* in California. *Id.* 193a (Compl. ¶ 216). The bill's analysis stated that the "intent of this legislation is to level the playing field so that in-state producers are not disadvantaged." Brief of the United States in Support of Appellants at 6, *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631); *see also*

App. to Pet. 193a (Compl. ¶ 216). The expansion of Proposition 2's scope stripped out-of-state producers of comparative advantages offered by their home state's regulatory regime for egg production. Such a purpose is impermissible under the dormant Commerce Clause. *Hunt*, 432 U.S. at 351 (identifying one form of the statute's discriminatory nature as its "effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system").

Given the history of AB 1437, it is plausible that the basis for Proposition 12's expansion to sales in California was protectionist in intent. In *Bibb* balancing, the presence of protectionist intent undermines other non-protectionist interests, which would include any anti-animal cruelty interest. *Kassel*, 450 U.S. at 681–85 (Brennan, J., concurring).

2. Even absent protectionist intent, under *Bibb* balancing, California's interest in the regulation must outweigh the burden on interstate commerce.

Assuming that the scope of Proposition 12 was not chosen for a protectionist purpose, the trial court should consider whether California's interest in the regulation outweighed the regulation's burden on interstate commerce. The parties in this case disagree as to what constitutes the state interest. Respondents argue that "the law's clearly stated purpose is 'to prevent animal cruelty.'" Notice of Motion and Motion for Judgment on the Pleadings; Memorandum of Points

and Authorities at 8, *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-02324). Respondent-intervenors characterize California's interest as ensuring that Californians buying meat do not become morally complicit in the cruel treatment of animals. Defendant-Intervenors' Reply in Support of Motion for Judgment on the Pleadings at 5, *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-02324). Petitioners argue that California's true goal with Proposition 12 was to use the state's market power to impose the moral preferences of Californians on commerce outside the state, which Petitioners characterize as an impermissible purpose under the dormant Commerce Clause. Brief of Plaintiff-Appellants, *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631).

This Court regards protectionism as an illegitimate interest under the dormant Commerce Clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). The Court has also suggested—in cases dealing with extraterritoriality—that states have no legitimate interest in regulating activities that take place wholly outside the state. *Healy*, 491 U.S. 324.

But even assuming that the purpose of Proposition 12 is to prevent animal cruelty (both within and outside California) and that is a legitimate local interest for dormant Commerce Clause purposes, identification of a legitimate local interest is not the end of the inquiry in a *Bibb* balancing case. The court must then consider whether California's interest outweighed the burden it imposed on interstate commerce. As discussed above, this Court uses a relative

approach in a mismatch case, evaluating state interests against a benchmark consisting of other states' regulatory interests. This is a significant difference between *Pike* and *Bibb* balancing.

In past mismatch cases, this Court has considered not whether the challenged law confers *absolute* benefits on the challenged state, but rather whether the challenged law achieves any local benefit *over and above* that conveyed by the other preexisting regulatory regimes in other states. Thus, in *Southern Pacific*, this Court asked whether the shorter trains demanded by Arizona offered meaningful safety advances over the longer trains permitted by other states. 325 U.S. at 774–76. In *Bibb*, this Court asked whether curved mudflaps provided safety benefits over straight mudflaps permitted in other states. 359 U.S. at 525. Similarly, in *Kassel*, this Court asked whether shorter trucks conferred safety benefits over the longer trucks allowed in other states. 450 U.S. at 672–73.

Because this is a mismatch case, not a single-state case, the district court should have compared California's interest with the interests of other states whose regulations differ from California's. The court should not have ignored Petitioners' allegations regarding the relative well-being of animals kept in different types of living conditions, because these allegations were directly relevant to the constitutional question. Petitioners alleged that, as measured by cortisol levels, injuries to hogs, loss of pregnancy, and mortality, conforming to Proposition 12 would injure hog welfare more than retaining the current cage regulations applicable in other states. App. to Pet. 190a–91a, 219a.

The district court should have taken these facts as true and denied the motion to dismiss. If Petitioners claim that other states' regulations promote hog welfare better than the proposed California regulation, then California's state interest in animal welfare could not outweigh the interstate commerce burden Proposition 12 imposes. And even if California's law promoted hog welfare better than other states' laws, California's interest in animal welfare does not necessarily outweigh other states' interests. The interests of other states go beyond "hog welfare" and include the wealth created by hog production and the marginal benefits of producing hogs more efficiently. Thus, the court failed to weigh California's alleged interest in hog welfare against other states' interests in hog welfare and the wealth created by efficient production in their hog industries.

Because the district court did not weigh California's interest in Proposition 12 against the interests of other states in their respective regulatory regimes, it improperly granted the motion to dismiss.

E. *Bibb* balancing prevents the largest states from becoming the nation's de facto regulators.

Mismatch cases raise issues that single-state cases do not raise. Specifically, due to their spillover effects, regulatory mismatches can threaten the ability of other states to regulate within their own borders. In the absence of dormant Commerce Clause review of undue burdens caused by mismatches, the nation's largest states could de facto regulate the entire nation. Even recourse to Congress would not always

be availing, as harmonized federal legislation—for example that specifies a national square footage requirement for breeding hogs—would not return power to states with small markets. This is not to say that small states must be shielded from all regulatory spillovers. This Court has sustained regulatory mismatches against dormant Commerce Clause challenges. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (upholding regulation requiring milk to be sold in paper cartons, even though other states permitted plastic jugs, because the state's environmental goals outweighed the burden on interstate commerce arising from the mismatch). The dormant Commerce Clause does not require national uniformity in all regulation. Instead, it requires that states imposing regulations that generate significant burdens on interstate commerce because those regulations differ from other states' regulations must have sufficient reasons to justify those burdens. Such balancing requires a highly fact-based inquiry that the district court failed to permit.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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