No. 21-468

In The
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Questions Presented

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

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

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Interest of Amicus Curiae

Pacific Legal Foundation (PLF) was founded in 1973 and litigates at all levels of the federal and state judiciaries, nationwide.[1] PLF has experience directly representing plaintiffs presenting Commerce Clause claims, *see, e.g.*, *Minerva Dairy v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019); *People for Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service,* 852 F.3d 990 (10th Cir. 2017), *cert. denied,* 138 S. Ct. 649 (2018); *Sissel v. U.S. Dep't of Health and Human Services,* 760 F.3d 1 (D.C. Cir. 2014), *cert. denied,* 577 U.S. 1113 (2016); and filing amicus briefs in Commerce Clause cases. *See, e.g., Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); *Corey v. Rocky Mountain Farmers Union,* 573 U.S. 947 (2014); *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir.), *cert. denied,* 577 U.S. 1043 (2015); *Gonzales v. Raich,* 545 U.S. 1 (2005); *Pharmaceutical Research and Mfrs. of America v. Concannon,* 538 U.S. 644 (2003).

PLF represents entrepreneurs whose livelihoods are threatened by protectionist or extraterritorial regulations in violation of the Commerce Clause and other constitutional protections for individual rights. Among these are Minerva Dairy, which is effectively barred from the Wisconsin butter market because the

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

state's protectionist butter-grading scheme (based solely on taste; not any health or safety factors) forbade the company from selling ungraded artisanal butter. *See Minerva Dairy,* 905 F.3d 1047. Similarly, PLF represents Phillip Truesdell and his family-owned medical transport company located in Ohio one mile from the Kentucky border in a lawsuit against Kentucky under the dormant Commerce Clause because that state's "certificate of need" statute bars Truesdell from serving customers without undergoing an onerous, expensive, and time-consuming process akin to a trial where he must demonstrate a public "need" for his business. *Truesdell v. Meier*, No. 3:19-cv-00066-GFVT (E.D. Ky. Sept. 24, 2019) (pending). PLF believes the dormant Commerce Clause provides critical protection for entrepreneurs and individuals and supports our nation's commitment to free trade.

Introduction and Summary of Argument

In 2018, California voters passed Proposition 12, which forbids the sale of pork in California when the seller knows or should know that the meat came from the offspring of a sow that was confined "in a cruel manner." Cal. Health & Safety Code § 25990(b)(2). Every sale of covered pork in California that does not meet these standards is a crime punishable by a $1,000 fine or a 180-day prison sentence, and also subjects the seller to a civil action for damages. *Id.*, § 25993(b). Proposed regulations authorize California agents to conduct inspections of pork production and related facilities nationwide. Pet. at 6–7. And any Californian can sue to enforce the law under the state's broad Unfair Competition Law, Bus. & Prof. Code § 17200 et seq. Because California imports 99.87% of its pork, the law applies almost exclusively

to pork producers in other states—65,000 farmers raising 125 million hogs per year in a $26 billion industry—with virtually none of those farms in compliance with California's demands.

If California is permitted to govern pig farming standards nationwide, requiring farms to either reduce herd sizes or build new facilities, the inevitable result is increased prices in transactions with no California connection, farms driven out of business, and higher costs at the supermarket. Fortunately, the Framers of the Constitution were well aware of states' proclivity to diminish trade during the Articles of Confederation era, and multiple provisions of the Constitution ensure protection to individual tradespeople from overreaching state laws that extend beyond state borders. *See Tenn. Wine and Spirits*, 139 S. Ct. at 2460–61 ("removing state trade barriers was a principal reason for the adoption of the Constitution").

The overall structure of the Constitution values free trade among the states. The Commerce Clause should be read in a manner consistent with other constitutional provisions designed to ensure interstate parity, such as the Privileges and Immunities Clause of Article IV, *see, e.g.*, *id.* at 1261; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Equal Protection Clause of the Fourteenth Amendment, *see, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972), and the Privileges or Immunities Clause of the Fourteenth Amendment, *see, e.g.*, *Saenz v. Roe*, 526 U.S. 489 (1999). Moreover, the dormant Commerce Clause is not just important for states *qua* states; it is a vitally important source of constitutional protection for individual entrepreneurs who bear the

burdens of protectionist and extraterritorial regulations. The dormant Commerce Clause often is the primary source of protection in defense of the right to earn a living. The dormant Commerce Clause is a meaningful, important, and a constitutionally justified limitation on state regulatory power.

Finally, the doctrine checks a state's zeal for extraterritorial regulation on matters where no national consensus yet exists. California's moral views related to animal husbandry seek to alter production processes nationwide. The dormant Commerce Clause limits the extent to which a state can export such value judgments to Americans who have no opportunity to provide political accountability to the regulators. In this era of moral crusades—across the political spectrum—individuals and businesses are in especial need of constitutional protection from states' regulatory overreach on all manner of moral questions and social policy.

The decision below should be reversed.

Argument

I

The Constitution's Structure Requires Robust Enforcement of the Dormant Commerce Clause

A. The Dormant Commerce Clause Protects All States' Policy Choices on an Equal Basis

In our federal system, uniform national standards, where appropriate, are for Congress to set. As the Founders knew and this Court's dormant Commerce Clause jurisprudence recognizes, allowing one state to impose its laws on commerce nationwide would place

commerce at the mercy of local, parochial interests and create an anarchy of conflicting state legal regimes that destroys commercial confidence and creates hostility between the states. *See, e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 406 (1994) (O'Connor, J., concurring) (differing state regimes regulating flow of solid waste result in "the type of balkanization the Clause is primarily intended to prevent"). A state law using the state's leverage in one market to achieve a separate regulatory purpose elsewhere is subject to the dormant Commerce Clause as a state regulation; it is not market participation. *See South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 96–98 (1984) (holding that Alaska's statute limiting buyers of its timber to those who agreed to process the purchased timber in Alaska is subject to the dormant Commerce Clause); Abigail B. Pancoast, Comment, *A Test Case for Re-evaluation of the Dormant Commerce Clause: The Maine Rx Program*, 4 U. Pa. J. Const. L. 184, 197 (2001).

When states burden commerce outside their borders, they interfere in policy choices of other states, the federal government, or both. When this interference devolves into economic warfare, the producers and consumers in smaller and weaker states suffer most. Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 64 (1988). The free-trade objectives incorporated in the dormant Commerce Clause further the efficient allocation of resources within American society, just as free trade among nations helps to further the efficient allocation of resources in the world. Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a*

Consistent Free-Market Policy, 44 Emory L.J. 1227, 1227–28 (1995). Indeed, the dormant Commerce Clause calls for an American "common market." *C & A Carbone,* 511 U.S. at 423; *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 293 (1980).

The creation and preservation of a national common market is a central feature of "market-preserving federalism" that fosters economic growth by limiting the encroachment of a country's political system upon its markets. Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. Econ. & Org. 1, 3–4 (1995); Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 S. Ct. Econ. Rev. 233, 235 (1999). For private enterprise to flourish, a federal system must "preven[t] the lower governments from using their regulatory authority to erect trade barriers against the goods and services from other political units." Weingast, *Economic Role*, 11 J.L. Econ. & Org. at 4. When costs imposed by legislation are exported outside the state, there is less political pressure to minimize these costs and a greater likelihood that the law will reduce aggregate welfare. Collins, *Economic Union*, 63 N.Y.U.L. Rev. at 68.

The Commerce Clause is one of several constitutional provisions designed to ensure interstate parity. Others include the Privileges and Immunities Clause of Article IV, *see, e.g., Piper,* 470 U.S. 274,[2] the Equal Protection Clause of the

[2] *See also Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 314 (1998) (holding unconstitutional New York's denial to

Fourteenth Amendment, *see, e.g., Dunn v. Blumstein,* 405 U.S. 330, 333 (1972); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (Alabama's aim in passing a law "to promote domestic industry" represented "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent"), and the Privileges or Immunities Clause of the Fourteenth Amendment, *see, e.g., Saenz v. Roe*, 526 U.S. 489, 502–03 (1999). Still other provisions, such as the Import-Export Clause[3] and the availability of federal courts for diversity actions,[4] also promote national equality. While these constitutional provisions play different roles in the overall federal scheme, they reinforce one another and fill in gaps to achieve the overarching purpose of interstate parity. *See, e.g.*, *Hicklin,* 437 U.S. at 531–32 ("[T]he mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause . . . renders several

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nonresidents of tax deduction for alimony paid); *Hicklin v Orbeck*, 437 U.S. 518 (1978) (holding unconstitutional Alaska's hiring preference for state residents); *Austin v New Hampshire*, 420 U.S. 656, 665 (1975) (holding unconstitutional New Hampshire's commuter tax on nonresidents).

[3] "Guided by the experience of the evils generated by the parochialism of the new states, the wise men at the Philadelphia Convention took measures to make for the expansive United States a free trade area. . . . They accomplished this by two provisions in the Constitution: the Commerce Clause and the Import-Export Clause." *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534, 551 (1959) (Frankfurter, J., dissenting).

[4] Alexander Hamilton expressly linked the Privileges and Immunities Clause with "the concern over state parochialism that gave rise to the federal courts' diversity jurisdiction under Article III." *United Bldg. and Const. Trades Council of Camden Cnty. v. Mayor and Council of City of Camden,* 465 U.S. 208, 225 (1984) (Blackmun, J., dissenting).

Commerce Clause decisions appropriate support" for the Court's holding under the Privileges and Immunities Clause.). The Framers enacted these interlocking provisions specifically out of concern "about centralizing control over trade and ending discriminatory taxes." Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV,* 45 Loy. U. Chi. L.J. 1, 17 (2013).

The decision below enables trade restrictions contrary to the Framers' vision, and incites rather than quells bad trade relations among the states. Allowing states to leverage their market power to reach beyond their borders and control activity that is properly the subject of direct regulation by other states undermines the basic principles of federalism on which this nation was founded.[5] And it does so in a manner that leaves the invaded states with no legal or political recourse. The Constitution ties the "common market" economic policy to political processes, ensuring that individuals primarily affected by state regulation may register their approval or disapproval by voting. *Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 767 n.2 (1945) ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests

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[5] Moreover, citizens and companies must be assured that when they conduct themselves lawfully within their own state, no other state may permissibly regulate that conduct. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996) ("economic penalties . . . must be supported by the State's interest in protecting its *own* consumers and its *own* economy.") (emphasis added).

within the state are affected."). *See also* 1 Laurence H. Tribe, *American Constitutional Law*, § 6–5 (3d ed. 2000) ("The checks on which we frequently rely to curb the abuse of legislative power—election and recall—are simply unavailable to those who have no effective voice or vote in the jurisdiction which harms them.").

Competition for voters, taxpayers, and industries forces states to be accountable to those they govern and innovative in their search for solutions to vexing public policy problems. *See Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991). This competition allows states to function as laboratories of democracy. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Because of the relative ease of migrating within the United States, states must be responsive to the preferences of voters, taxpayers, and industries, any of whom may choose to leave for greener pastures. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures,* 64 J. Pol. Econ. 416, 416–18 (1956) (government power should be decentralized to allow people to "vote with their feet"). These competitive pressures ultimately lead to better results for all by aligning government with the preferences of the governed, favoring neither conservative nor progressive results. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design,* 54 U. Chi. L. Rev. 1484, 1498–1500 (1987). When states impose the costs of their regulations on their neighbors by requiring out-of-state activity to be conducted according to in-state rules, they blunt this positive, interstate competition.

B. The Dormant Commerce Clause Is Essential to Maintaining the Separation of Powers

The dormant Commerce Clause elicits mixed reactions and possesses a bad reputation in some quarters. It, however, embodies an important horizontal separation-of-powers principle that is uniquely American.

When Americans initially established their state constitutions, they did not mention the "police power" without making clear that this general domestic power belonged to the people rather than any one part of government. Pennsylvania's first constitution recited, "the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same." Pa. Const., Decl. of Rights, art. III (Sept. 28, 1776).[6] That same provision was adopted in North Carolina, Delaware, Maryland, and Vermont. Philip Hamburger, *Is Administrative Law Unlawful?* 446, note a (2014). New York's first constitution similarly stated that the power to establish "a new form of government and internal police" belonged to "the people." N.Y. Const., Preamble (Apr. 20, 1777).[7]

Nineteenth-century Americans, however, began to attribute "police power" to the states and even, partly, to the federal government. The words "police" or "plenary" offered a technical-sounding name for a general governmental power in domestic matters, and this increasingly attracted American lawyers. This consolidated vision of government commingled the

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[6] https://avalon.law.yale.edu/18th_century/pa08.asp.
[7] https://avalon.law.yale.edu/18th_century/ny01.asp.

separated powers and set the stage for "administrative absolutism." *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from denial of certiorari).

The uniquely American system of government as established by the United States Constitution and the state constitutions has "split the atom of sovereignty," *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019)—not once but thrice. First, division exists between state and federal governments. Second, federal power is divided among the Congress, the President, and the Judiciary. Third, the states under their respective state constitutions divide power among the state legislature, state executive, and state judiciary. These provisions serve to better protect the people from government overreach.

The dormant Commerce Clause therefore is not simply a negative implication derived from Article I, Section 8, Clause 3. It is necessary to give effect to the entire Constitution and ensure the horizontal separation of powers between states by prohibiting any one state from encroaching on the powers of any other state or insulating its residents from their out-of-state activities. When such encroachment or protectionism occurs at the state level, the vertical separation of powers allows the federal government to impede such state actions. These divisions supplanted the Articles of Confederation to create "a more perfect Union."[8] Call it the extraterritoriality doctrine, interstate parity, or federalism, the dormant Commerce Clause remains an essential separation-of-powers feature of the United States Constitution.

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[8] *See also* U.S. Const. art. I, §§ 9–10; art. IV; art. V; art. VII.

C. The Dormant Commerce Clause Protects the Right to Earn a Living

Amicus Pacific Legal Foundation represents entrepreneurs whose attempts to provide products and services to willing buyers are thwarted by protectionist legislation. These small companies rely on the protection offered by the dormant Commerce Clause to challenge laws that favor incumbent businesses. Here are some examples.

1. Protectionist state legislation prohibits sale of "ungraded" butter

Wisconsin is the only state that enforces a prohibition on the sale of ungraded butter. Wis. Stat. § 97.176(1); Wis. Admin. Code ATCP § 85.06. This antiquated law stands as a barrier to the flourishing artisanal butter market, harming both producers and consumers who would choose superior flavor, quality ingredients, and superior processes over cheap, mass-produced products. As a result of the state's warning that it would enforce the law against Minerva Dairy, the artisan butter producer stopped selling its butter at retail stores in Wisconsin. *Minerva Dairy*, 905 F.3d at 1052.

The butter-grading law effectively prohibits out-of-state artisanal butter makers from entering the Wisconsin market. But, because hypothetical in-state butter makers would face a similar—but not identical—burden to enter the Wisconsin butter market, Seventh Circuit precedent foreclosed Minerva Dairy's dormant Commerce Clause claim. *Id.* at 1059–60. The court denied that the butter-grading law imposes significant costs and burdens on interstate commerce, and that the state's purported justifications for the

law are speculative and illusory. *Id*. Yet as a result of Wisconsin's law, small artisanal butter makers are forced out of the market, while larger butter makers that conform to the state's taste standards can easily absorb the cost of grading and reap the benefit. The upshot is to benefit entrenched industry insiders at the expense of small businesses and consumers.

State-specific labeling laws like Wisconsin's threaten to create a state-by-state patchwork of labeling requirements. Thus, laws like the butter-grading law undermine the notion that "the peoples of the several states must sink or swim together." *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 523 (1935).

2. The dormant Commerce Clause supports challenges to protectionist "Certificate of Need" (CON) laws

Phillip Truesdell owns Legacy Medical Transport, LLC, a non-emergency ground ambulance business located in Ohio, just a mile from the Kentucky border. Legacy provides transportation services by ambulance for people who need non-emergency support because they require extra oxygen, are on dialysis, or cannot sit up for extended periods of time. Due to the company's proximity to the Ohio-Kentucky border, Legacy regularly transports clients from Ohio to medical appointments and facilities in Kentucky. But under Kentucky law, Legacy cannot transport those same clients back home to Ohio, or transport anyone between locations in Kentucky, without first obtaining a "Certificate of Need." Ky. Rev. Stats. §§ 216B.061; 216B.015(13).

Like all CON laws, the statute requires Legacy to submit to a procedure whereby other established ambulance companies—Legacy's competitors—can protest, and effectively veto, Legacy's entrance into the state market. Ky. Rev. Stats. § 216B.085; 900 Ky. Admin. Regs. 6:070 §2(2). To counter this opposition, Legacy must demonstrate a public "need" for its business such that it will not draw any customers away from competitors. As in most states with CON laws, applications that are protested are almost always denied—including Legacy's. To vindicate his right to earn a living free of regulation that serves only to favor existing businesses, Truesdell sued Kentucky officials under the dormant Commerce Clause and other constitutional provisions, claiming that Kentucky has substantially burdened or restricted the provision of intrastate ground ambulance services within Kentucky, and interstate ground ambulance services from Kentucky to other states by out-of-state companies, in a manner unjustified by any putative local benefit. *Truesdell v. Meier*, No. 3:19-cv-00066-GFVT (E.D. Ky. Sept. 24, 2019) (complaint filed).[9]

Economic regulations like CON laws pervasively impede the right of entrepreneurs and other workers to pursue their livelihoods. They have a particularly insidious effect on those of lesser means. Trevor Bratton, *Breaking Down Barriers to Work for Low*

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[9] Complaint *available at* https://pacificlegal.org/wp-content/uploads/2019/09/Legacy-Medical-Transport-LLC-and-Phillip-Truesdell-v.-Adam-Meier-et-al.-Complaint.pdf. *See also* Anastasia Boden & Angela C. Erickson, *Competitor's Veto: A Roadblock to New Businesses* (Feb. 1, 2021), https://pacificlegal.org/wp-content/uploads/2021/01/con-law-report.pdf.

Income Families, Goldwater Inst. at 2 (Mar. 2020) ("[O]ccupational licensure without universal recognition or reciprocity acts as a tax on interstate mobility and decreases economic mobility for low-income families.").[10] The dormant Commerce Clause offers to these innovators and entrepreneurs a bulwark against overreaching state regulation.

II

The Dormant Commerce Clause's Ban on Extraterritorial Regulations Counterbalances States' Moral Crusades

"States are finding ways to pretextually advance an 'in-state' hook to control out-of-state behavior that they find inconsistent with their policy, moral, or other preferences." Donald J. Kochan, *The Meaning of Federalism in a System of Interstate Commerce: Free Trade Among the Several States*, 95 Notre Dame L. Rev. Reflection 166, 168 (2020). The necessary corrective lies in the balancing test devised in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which says that nondiscriminatory statutes that effect interstate commerce will be struck down if "the burden imposed on commerce is clearly excessive in relation to the putative local benefits." A state's policies may cause adverse consequences to its own industries and economy. So be it. But a state may not address the resulting competitive disadvantage by extending its regulation to commerce occurring beyond its borders. We urge the Court to robustly apply the *Pike* test when a state's conception of the

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[10] https://goldwaterinstitute.org/wp-content/uploads/2020/03/Breaking-Down-Barriers-to-Work-for-Low-Income-Families_web.pdf.

good life primarily entails changing the way individuals and businesses in other states manage their affairs.

Efforts related to counter climate change may be the prominent moral crusade of the day. *Cf. Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) ("The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions."); *id.* at 1191 (Staton, J., dissenting) ("When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?"). States impatient with the federal government's pace in enacting laws and regulations are enacting their own. And given the global effects of climate change, states try to push their regulations as far as possible into other states across the nation. *See* Thomas Braun, *The Border Battle: North Dakota's Suit Against Minnesota and the Future of the Next Generation Energy Act*, 36 Hamline L. Rev. 479, 493–94 (2013) (if a state only regulates emissions occurring within it, "leakage" may occur as production shifts to other states); *see also* Cal. Health & Safety Code §§ 38505(j), 38562 (defining "leakage" and declaring policies to minimize this "environmental and economic" emigration).

Such laws have been challenged under the dormant Commerce Clause, but often without success. For example, in *Energy & Env't. Legal Inst.*, 793 F.3d at 1172–73, the Tenth Circuit upheld a Colorado law

that regulates emissions from the production of electricity that occurs wholly outside of its borders by limiting this Court's dormant Commerce Clause decisions to price-control regulations alone. Contrary to the position of Coloradans in that case, a different group of Coloradans objected to forced compliance with California regulations that imposed a "lifecycle analysis" to account for the greenhouse gas emissions occurring anywhere in the world during the production and distribution of those fuels. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080–81 (9th Cir. 2013). However, in *North Dakota v. Heydinger*, 15 F. Supp. 3d 891 (D. Minn. 2014), the district court acknowledged Minnesota's "admirable" goal of reducing carbon dioxide emissions, but nevertheless, by projecting its legislation and regulating in other states, the state violated the extraterritoriality doctrine of the dormant Commerce Clause. *Id.* at 918–19. The court noted that "if other states adopt[ed] similar legislation, it could lead to balkanization." *Id.* at 916. The Eighth Circuit affirmed. 825 F.3d 912, 921–22 (8th Cir. 2016).[11]

Moreover, extraterritorial legislation is unnecessary. While California must not unilaterally impose pig farming standards that cause nationwide increases in prices, consumers frequently *are* willing to pay a premium for food produced in ways they consider "better" for any number of reasons (sustainability, non-GMO, organic, locally-grown). *See* Alex Smolokoff, *Consumers willing to pay up for*

[11] Like the pork bits in this case, the electrons sought to be regulated in *Heydinger* could not be traced to a particular generation point and the practical effect of the regulation was to control activities occurring entirely outside of Minnesota.

sustainable products, Food & Beverage Insider (May 3, 2021);[12] Kristin Broughton, *Demand for Cage-Free Eggs Pressures Cal-Maine*, Wall St. J. at B4 (Apr. 5, 2022)[13] (noting that Walmart, Kroger, and Target committed to selling only cage-free eggs in response to consumer demand). One food industry publication reported on a study showing 35% of consumers will pay a 20% premium for a food product that "supports/is fair to local and global workers and communities" or "aligns with my personal values, morals, ethics and/or beliefs." Steve Williams, *More people will pay premium prices for products from "sustainable" companies*, Snack Food & Wholesale Bakery (Sept. 14, 2017).[14] Conversely, almost 25% of consumers have stopped purchasing products from a company that does not meet their standards for "environmental or social responsibility." *Id.* Consumers who reward these food producers will create a larger market that welcomes additional producers. *See* Lisa Lockwood, *Consumer Demand for Sustainable Products and Business Practices Spikes During Pandemic*, Women's Wear Daily (Mar. 30, 2021).[15] And stakeholders retain the ability to convince corporate boards to adopt policies consistent with their values. *See* Patrick Thomas, *Carl Icahn Targets Kroger Over Pork, CEO Pay*, Wall St. J. (Mar.

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[12] https://www.foodbeverageinsider.com/sustainability/consumers-willing-pay-sustainable-products.

[13] https://www.wsj.com/articles/cal-maine-steps-up-investment-to-meet-demand-for-cage-free-eggs-11649107116.

[14] https://www.snackandbakery.com/articles/90662-more-people-will-pay-premium-prices-for-products-from-sustainable-companies.

[15] https://wwd.com/sustainability/materials/consumer-demand-spikes-for-sustainable-products-and-business-practices-during-pandemic-1234790172/.

29, 2022) (investor seeks two board seats to push for adoption of certain farming practices for suppliers).[16]

There are many ways in which a state may promote its goals for the betterment of humanity and our planet. For example, California authorizes public employees to travel only to states that share California's social values. *See* NPR, *California Bans State Travel to Florida and 4 Other States* (June 29, 2021).[17] States may issue public service announcements advising consumers about products, even urging them not to purchase them. *See* Cal. Dep't of Public Health, *CDPH Launches New Campaign to Combat Teen Vaping* (Aug. 9, 2021).[18] But no state may steal each individual's—and other states'—ability to prioritize and balance competing values. States, producers, and consumers consider many factors when weighing the benefits of both animal welfare and affordable food; no one state may impose its judgment on the nation as a whole.

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[16] https://www.wsj.com/articles/carl-icahn-targets-kroger-over-pork-ceo-pay-11648594425.

[17] https://www.npr.org/2021/06/29/1011253354/california-bans-state-travel-to-florida-and-4-other-states-lgbtq. Currently, California bans employee travel to 17 states because it disapproves of those states' laws regarding the "LGBTQ community." *Id.*

[18] https://www.cdph.ca.gov/Programs/OPA/Pages/NR21-245.aspx.

Conclusion

The decision below should be reversed.

DATED: June 2022.

Respectfully submitted,

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