

No. 21-468

IN THE
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL & 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 *AMICUS CURIAE* THE BUCKEYE
INSTITUTE IN SUPPORT OF PETITIONERS**

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street,
Suite 1300
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org

LARRY J. OBHOF, JR.
Counsel of Record
SHUMAKER, LOOP &
KENDRICK, LLP
41 South High Street,
Suite 2400
Columbus, OH 43215
(614) 463-9441
lobhof@shumaker.com

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.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT3

I. The Extraterritorial Reach Of Proposition 12
Undermines Our Federalist System3

 A. Ohio’s Livestock Care Standards are the
 Result of Substantial Consideration by the
 State’s Policymakers and Voters7

 B. Proposition 12 Threatens to Impermissibly
 Displace Ohio’s Regulation of Activity
 Which Takes Place Wholly Within Its Own
 Borders.....11

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935).....	14
<i>Brown-Forman Distillers Corp. v. New York State Liquor Auth.</i> , 476 U.S. 573 (1986).....	13
<i>C. & A. Carbone, Inc. v. Town of Clarkstown, N.Y.</i> , 511 U.S. 383 (1994).....	4
<i>H.P. Hood & Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949).....	4
<i>Healy v. Beer Inst., Inc.</i> , 491 U.S. 324 (1989).....	passim
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979).....	4
<i>Nat’l Pork Producers Council v. Ross</i> , 6 F.4th 1021 (9th Cir. 2021)	6
<i>New York Life Ins. Co. v. Head</i> , 234 U.S. 149 (1914).....	5
<i>Southern Pacific Co. v. Arizona ex rel. Sullivan</i> , 325 U.S. 761 (1945).....	13
<i>Tennessee Wine & Spirits Retailers Ass’n v. Thomas</i> , 139 S. Ct. 2449 (2019).....	4

Constitutional Provisions, Statutes, and Regulations

U.S. Const. art. I, § 8, cl. 3	3, 4
OHIO CONST. art. XIV, § 1	9
Colo. Rev. Stat.	
§ 35-50.5-102(1)(b)	12
Ohio Admin. Code	
901-12	11
901-12-8-02(G)(4)	5, 11, 12
901-12-8-02(G)(5)	5, 11
Ohio Rev. Code	
§ 904.02	9
§ 904.02(A)	10
§ 904.02(D)	11
§ 904.03	9
§ 904.03(A)(1)	10
§ 904.03(A)(3)	10
§ 904.03(A)(4)	10
§ 904.03(A)(7)	10
§ 904.03(B)	10
§ 904.04(A)	10
§ 904.04(B)	10
Rhode Island Stat.	
§ 4-1.1-4(7)	12

Other Authorities

- Am.Sub. SJR 6 (128th Gen. Assy.), *available at* Ohio Legislative Service Commission Archives,
http://archives.legislature.state.oh.us/res.cfm?ID=128_SJR_6 7, 8
- Am.Sub. SJR 6, *Unofficial Votes for Senate Resolution 6*, *available at* Ohio Legislative Service Commission Archives,
http://archives.legislature.state.oh.us/votes.cfm?ID=128_SJR_6..... 8
- THE FEDERALIST NO. 11 (Hamilton) 4
- Ohio Issues Report: State Issue Ballot Information for the November 3, 2009 General Election
available at
law.csuohio.edu/sites/default/files/lawlibrary/ohioc_onlaw/ohio_issues_report_2009.pdf..... 8, 9
- Ohio Secretary of State, State Issue 2: November 3, 2009 Official Results, *available at*
<https://www.ohiosos.gov/elections/election-results-and-data/2009-election-results/state-issue-2-november-3-2009/>..... 9

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and education institution—a “think tank”—to formulate and promote free-market public policy in the States. The staff at The Buckeye Institute accomplish the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Ohio and replication across the country. Through its Legal Center, The Buckeye Institute engages in litigation in support of the rights and principles enshrined in the United States Constitution.

The Buckeye Institute supports the principles of limited government and individual liberty. The Buckeye Institute has a strong interest in preserving the principles embodied in the United States Constitution, including the Commerce Clause. This case raises important questions about the principles of horizontal federalism and the regulation of interstate commerce in our federalist system. The Buckeye Institute supports a regulatory environment that is not unnecessarily burdensome, and which

¹ All parties gave written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

respects each State's ability to regulate activity within its own jurisdiction.

SUMMARY OF ARGUMENT

Proposition 12 purports to regulate activity in California. While that may be true in form, it is nearly the opposite in function. Petitioners allege that more than 99% of the pork consumed in California comes from hogs born on farms outside the State. *See* Pet. App. 150a-151a, ¶¶16-20. California's mandates, as well as other direct and indirect burdens of Proposition 12, fall almost exclusively on persons and activities outside of that State.

Amicus curiae The Buckeye Institute agrees with Petitioners that this type of extraterritorial regulation is incompatible with this Court's precedents. Here, there can be little doubt that the "practical effect" of Proposition 12 is to control commercial conduct "beyond the boundaries of the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

The Buckeye Institute writes separately to highlight the significant problem this poses to horizontal federalism. The extraterritorial reach of Proposition 12 infringes on other States' sovereignty, including their decisions to impose different regulatory requirements than California. In some cases, those States specifically allow activities that Proposition 12 prohibits. Thus, Proposition 12

threatens to effectively supersede those States' regulation of activities within their own borders.

The State of Ohio, for example, expressly permits behavior that California prohibits under Proposition 12. Ohio nonetheless has comprehensive livestock care standards. Ohio's standards were the product of careful consideration by the State's voters and policymakers, including the adoption of a state constitutional amendment. Yet the extraterritorial reach of Proposition 12 would effectively supplant the regulatory decisions of Ohio with those of California—for activity occurring *in Ohio*, not in California.

The Constitution cannot abide such regulatory displacement. To the contrary, “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority” and is invalid. *Healy*, 491 U.S. at 336. States are free to regulate economic activity within their own borders. They may not, however, reach beyond their jurisdiction to replace other States' policy choices with their own.

ARGUMENT

I. The Extraterritorial Reach Of Proposition 12 Undermines Our Federalist System.

The Commerce Clause reads, in relevant part, “The Congress shall have Power . . . To regulate Commerce ... among the several States” U.S.

CONST. art. I, § 8, cl. 3. These words “reflected a central concern of the Framers”—the belief that in order for the new Union to succeed, it would have to avoid the “economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

Indeed, as this Court has observed, “removing state trade barriers was a principal reason for the adoption of the Constitution.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019); *see also* THE FEDERALIST NO. 11 (Hamilton) (arguing that “unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions”). It was the “vision of the Founders” that “*every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation.*” *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (emphasis added).

The Commerce Clause and principles of federalism also work together to protect state sovereignty, including each State’s ability to regulate commerce within its own borders. Thus, this Court has indicated that “the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Healy*, 491 U.S. at 336-37; *cf. C. & A. Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) (indicating that States

and localities may not attach restrictions to imports “in order to control commerce in other States”); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

There can be little doubt that the practical effects of Proposition 12 are almost entirely extraterritorial. Petitioners allege that more than 99% of the pork consumed in California comes from hogs born on farms outside the State. *See* Pet. App. 150a-151a, ¶¶16-20; Pet. Br. at 3, 8. Thus, Proposition 12’s farm mandates fall almost exclusively on out-of-state farmers.

Petitioners argue that “Proposition 12 undermines our federalist system” because its “extraterritorial reach infringes on other States’ sovereignty.” Pet. Br. at 5; *see also id.* at 31. According to Petitioners, Proposition 12 runs counter to other States’ “decisions *not* to impose burdensome animal-confinement requirements on their farmers.” Pet. Br. at 5 (quoting States’ Am. Br. 16 (9th Cir. ECF 22)).

Amicus curiae The Buckeye Institute writes separately to underscore this problem. The State of Ohio expressly permits sow farmers to do what Proposition 12 forbids—confining sows in breeding pens post-weaning until a new pregnancy is confirmed. *See* Ohio Admin. Code 901:12-8-02(G)(4), (5). Yet under Proposition 12, farmers in Ohio would be required to meet California’s standards, irrespective of the rules of their own State.

The upstream effects of Proposition 12 are substantial and will be nationwide in scope. Petitioners and other *amici* explain the complexities of the national pork market; the massive costs that would be imposed by compliance with Proposition 12; and the practical difficulty of farmers, meat packers, or distributors attempting to opt-out of selling products that may eventually make their way to California. *See, e.g.*, Pet. Br. at 8-12, 14-16. The Ninth Circuit recognized that “[a]s a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers *will be forced to comply with California requirements.*” *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1028 (9th Cir. 2021) (Pet. App. 9a) (emphasis added).

California even plans to directly oversee the activities of farms located in other States. As Petitioners point out, “the proposed regulations provide for certification of sow farms as Proposition 12-compliant, which involves on-site inspections—‘announced or unannounced’—by agents of California.” Pet. Br. at 7 (quoting Pet. Reply App. 38a-39a, § 1326.5(a)). The proposed rules even “mandate that any out-of-state government entity certifying facilities as Proposition 12-compliant must use a ‘process equivalent’” to that required by California. Pet. Br. at 8 (quoting Pet. Reply App. 38a, § 1326.4(d)).

This is no small matter. Ohio has comprehensive livestock care standards, which were adopted after careful consideration by the State’s policymakers and

voters. The decisions of those policymakers and voters should not be superseded—whether in form or function—by the decisions of another State.

A. Ohio’s Livestock Care Standards are the Result of Substantial Consideration by the State’s Policymakers and Voters.

In 2009, the Ohio General Assembly presented the State’s voters with a proposed amendment to the Ohio Constitution to establish the Ohio Livestock Care Standards Board. The resolution proposing the amendment, Senate Joint Resolution 6, indicated that the purpose of the Board would be to “establish[] standards governing the care and well-being of livestock and poultry in this state.” *See* Am.Sub. SJR 6, § 1(A) (128th Gen. Assy.), *available at* Ohio Legislative Service Commission Archives, http://archives.legislature.state.oh.us/res.cfm?ID=128_SJR_6 (accessed June 15, 2022) (“SJR 6”).

The Ohio legislature focused on best practices and animal welfare, as well as economic concerns. Senate Joint Resolution 6 required the proposed Board to consider a range of factors when establishing livestock care standards. These include, but are not limited to, “agricultural best management practices for such care and well-being, biosecurity, disease prevention, animal morbidity and mortality data, food safety practices, and the protection of local, affordable food supplies for consumers.” SJR 6, § 1(B). The resolution also made clear that the Board must “endeavor to maintain food safety, encourage locally

grown and raised food, and protect Ohio farms and families.” *Id.* at § 1(A).

Senate Joint Resolution 6 enjoyed broad, bipartisan support and passed both chambers of the Ohio legislature with a supermajority vote. *See* SJR 6, *Unofficial Votes for Senate Resolution 6*, available at Ohio Legislative Service Commission Archives, http://archives.legislature.state.oh.us/votes.cfm?ID=128_SJR_6 (accessed June 15, 2022). The final version of SJR 6 passed the Ohio House of Representatives by a vote of 83-16 and the Ohio Senate by a vote of 31-1. *Id.*

The proposed state constitutional amendment was placed before Ohio voters on the November 3, 2009 general election ballot. An explanation of the amendment, as well as arguments for and against its adoption, were distributed by the Office of the Ohio Secretary of State. *See* Ohio Issues Report: State Issue Ballot Information for the November 3, 2009 General Election 6-8, available at law.csuohio.edu/sites/default/files/lawlibrary/ohioconlaw/ohio_issues_report_2009.pdf (accessed June 15, 2022) (“Ohio Issues Report”). Arguments in favor of the proposed amendment emphasized that “[a]griculture is the cornerstone of Ohio’s economy, generating billions of dollars and creating thousands of jobs for Ohioans.” *Id.* at 8. The ballot issue was presented to Ohio’s voters as “an opportunity for our state to lead the way in regulating safe food production.” *Id.* Arguments for the ballot language also specifically rejected the notion that other States

should dictate Ohio's policies. "Voting Yes on Issue 2 will keep control of agriculture *where it belongs, here in Ohio, under the guidance of Ohio experts* including family farmers, food safety experts, veterinarians, and consumers." *Id.* (emphasis added).

At the November 3, 2009 election, Ohio voters adopted the proposed amendment by a margin of nearly two-to-one. *See* Ohio Secretary of State, State Issue 2: November 3, 2009 Official Results, *available at* <https://www.ohiosos.gov/elections/election-results-and-data/2009-election-results/state-issue-2-november-3-2009/> (accessed June 15, 2022) (showing a vote of 63.76% in favor of the amendment). This added Section 1 of Article XIV to the Ohio Constitution. *See* OHIO CONST. art. XIV, § 1.

The Ohio General Assembly immediately implemented the amendment, passing a series of laws that took effect in March 2010. These laws created the Ohio Livestock Care Standards Board and required it to adopt regulations governing the care and well-being of livestock within the State. *See* Ohio Rev. Code § 904.02; Ohio Rev. Code § 904.03.

The statute creating the Ohio Livestock Care Standards Board ensured that the Board would be comprised of members representing a broad range of backgrounds and expertise. Accordingly, the law requires the Board to include, among others, the state Director of Agriculture; a member who is knowledgeable about food safety; two members representing statewide organizations that represent

farmers; two members who are veterinarians; the dean of the agriculture department of a college or university located in Ohio; two members of the public representing consumers; a member representing a county humane society; and two family farmers. *See* Ohio Rev. Code § 904.02(A).

Like the constitutional amendment, the Ohio Revised Code sets out factors to be considered when adopting rules governing the care and well-being of livestock within the State. These factors include, among others, best management practices for the care of livestock; the prevention of disease; and animal morbidity and mortality data. *See* Ohio Rev. Code §§ 904.03(A)(1), (3), & (4). They also include “[g]enerally accepted veterinary medical practices, livestock practice standards, and ethical standards established by the American veterinary medical association.” Ohio Rev. Code § 904.03(A)(7).

Ohio law provides for enforcement of the livestock care standards adopted by the Board. *See* Ohio Rev. Code § 904.03(B) (requiring the Board to adopt rules establishing civil penalties for violations). The Director of Agriculture is required by law to assist the Board in its enforcement efforts. *See* Ohio Rev. Code § 904.04(A). This includes investigating complaints (including through on-site inspections), as well as levying civil penalties. Ohio Rev. Code § 904.04(A), (B).

It was against this backdrop that the Ohio Livestock Care Standards Board proposed rules

affecting a wide swath of the agricultural industry within the State. Those rules went into effect in September 2011, and comprise fifteen sections of the Ohio Administrative Code. *See generally* Ohio Admin. Code 901-12. The Board meets regularly to review these rules and consider potential updates. *See* Ohio Rev. Code § 904.02(D).

In short, Ohio livestock care is already well-regulated. And it is regulated by the State of Ohio, as it should be.

B. Proposition 12 Threatens to Impermissibly Displace Ohio’s Regulation of Activity Which Takes Place Wholly Within Its Own Borders.

As Petitioners point out, Ohio’s regulations “expressly permit[] sow farmers to do what Proposition 12 forbids—to confine sows in breeding pens post-weaning until a new pregnancy is confirmed.” Pet. Br. at 5; *see also* Pet. Br. at 31. Specifically, the Ohio Administrative Code allows the use of gestation stalls “post weaning for a period of time that seeks to maximize embryonic welfare and allows for the confirmation of pregnancy.” Ohio Admin. Code 901-12-8-02(G)(4) (applying to use of gestation stalls after December 31, 2025); *see also* Ohio Admin. Code 901-12-8-02(G)(5) (applying the same rule to “new construction designed to house breeding/gestating sows”). Proposition 12, however, forbids this practice. It limits confinement of sows in such stalls to a five-day period prior to the breeding pig’s expected date of giving birth, and any day that

the breeding pig is nursing piglets. *See* Pet. App. 44a-45a.

The extraterritorial effects of Proposition 12, if permitted to stand, would effectively prohibit farmers in Ohio from using gestation stalls post-weaning. This would occur despite the fact that Ohio’s own regulations specifically allow the use of those stalls (with the limitations found in Ohio Admin. Code 901-12-8-02(G)(4)). And it would occur despite the fact that the Ohio rule is designed to “maximize embryonic welfare,” and literally says as much in its text. *Id.*

Ohio is not alone. Rhode Island permits farmers to confine pregnant sows in individual pens for up to 14 days before the expected date of birth, and until the piglets are weaned. *See* Rhode Island Stat. § 4-1.1-4(7). That State also allows the period to be modified upon the order of a veterinarian. *Id.* Colorado allows the use of a “farrowing unit” up to 12 days before the expected birth. Colo. Rev. Stat. § 35-50.5-102(1)(b).

In practice, Proposition 12 will require farmers in these States to adhere to California’s requirements, rather than engage in activity that is *specifically permitted* by their home States. This result is even more troubling when one considers that these conditions are permitted in States like Ohio because those States have determined that these conditions *are better for animal welfare*. *Compare* Pet. Br. at 11 (“very few farmers in the country satisfy Proposition 12’s sow-housing requirements, and most believe that those requirements *harm their animals*”) (emphasis

added). Nonetheless, if farmers in those States do not adhere to California's requirements, they will be excluded from a complex national marketplace for their products. The decisions of policymakers in Ohio and similarly-situated States will be rendered null.

The Constitution does not abide such regulatory displacement. This Court has made clear that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority," and is therefore invalid. *Healy*, 491 U.S. at 336. This is true regardless of whether the State's extraterritorial reach is intended. *Id.* "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.*; see also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986) (finding it "irrelevant" that a law is addressed only to sales in the enacting State, where its "practical effect" is extraterritorial) (citing *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945)).

Of particular relevance here, courts must consider "how the challenged statute may interact with the legitimate regulatory regimes of other States" *Healy*, 491 U.S. at 336. Indeed, this Court has emphasized that "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37; see also *Brown-Forman*, 476 U.S. at 582-83 (indicating that one State may not "project its legislation" into other

States) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

States are free to regulate economic activity within their own borders. They may not, however, reach beyond their jurisdiction and replace other States' policy choices with their own. *Amicus curiae* respectfully requests that this Court reaffirm its guidance from *Healy* and related cases, before additional States engage in extraterritorial regulation of additional industries.

CONCLUSION

For the reasons set forth above, as well as in the Brief for Petitioners, the decision of the court of appeals should be reversed.

Respectfully submitted,

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street,
Suite 1300
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org

LARRY J. OBHOF, JR.
Counsel of Record
SHUMAKER, LOOP &
KENDRICK, LLP
41 South High Street,
Suite 2400
Columbus, OH 43215
(614) 463-9441
lobhof@shumaker.com

Counsel for Amicus Curiae