

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 NATIONAL PORK PRODUCERS COUNCIL,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 21-468
7 KAREN ROSS, IN HER OFFICIAL)
8 CAPACITY AS SECRETARY OF THE)
9 CALIFORNIA DEPARTMENT OF FOOD &)
10 AGRICULTURE, ET AL.,)
11 Respondents.)
12 - - - - -

13
14 Washington, D.C.
15 Tuesday, October 11, 2022
16

17 The above-entitled matter came on for
18 oral argument before the Supreme Court of the
19 United States at 10:02 a.m.
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12 et al., Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-468, National Pork Producers versus Ross.

Mr. Bishop.

ORAL ARGUMENT OF TIMOTHY S. BISHOP

ON BEHALF OF THE PETITIONERS

MR. BISHOP: Mr. Chief Justice, and may it please the Court:

The facts we allege are assumed to be true for purposes of decision here. They state a claim that Proposition 12 violates the Commerce Clause almost per se because it's an extraterritorial regulation that conditions pork sales on out-of-state farmers adopting California's preferred farming methods, for no valid safety reason. Proposition 12 also fails the Pike test because it burdens interstate commerce for no local benefit.

California wants to change farming methods everywhere to "prevent animal cruelty by phasing out extreme methods of farm animal confinement." That confinement occurs in other states. California imports 99.9 percent of its

1 pork.

2 Decisions like Baldwin establish that
3 even when a law is triggered only by in-state
4 sales, a state may not project its legislation
5 into other states in that way. To do so
6 infringes the territorial autonomy of sister
7 states and it impedes our national common
8 market.

9 No other state makes its farmers house
10 pigs the way that California does. And very few
11 farmers do. They keep sows in individual pens
12 during the vulnerable breeding period, and they
13 provide less than 24 square feet of space in
14 group pens. An Iowa farmer doesn't know where
15 pork from his sows will be sold. Pigs go to a
16 nursery, a finisher, then a slaughterhouse,
17 where the packer butchers them into parts that
18 are sold around the world in response to demand.

19 The only safe course is to raise all
20 pigs the California way, which is what we see
21 buyers demanding, and the costs of doing that
22 inhere in pork parts sold in places where buyers
23 are unwilling to pay more to satisfy
24 California's policy preferences.

25 If Proposition 12 is lawful, New York

1 can say that pigs have to have 26 feet of space
2 and send inspectors into farms to police
3 compliance as California does. Oregon can
4 condition imports on workers being paid the
5 minimum wage. And Texas can condition sales on
6 the producer employing only lawful U.S.
7 residents. And at that point, we have truly
8 abandoned the framers' idea of a national
9 market.

10 I invite the Court's questions.

11 JUSTICE THOMAS: Mr. Bishop, when
12 exactly is a state -- intra-state regulation
13 impermissibly extraterritorial?

14 MR. BISHOP: Well --

15 JUSTICE THOMAS: Because this, as I
16 read California's law, it is about products
17 being sold in California. Unlike some of the
18 cases you cite, it's not reaching out and
19 regulating something across state line or
20 regulating prices.

21 MR. BISHOP: Well, the test that we
22 propose is that a state law that conditions
23 sales on an out-of-state business operating in a
24 particular way is almost --

25 JUSTICE THOMAS: And how does

1 California exactly do that?

2 MR. BISHOP: You cannot sell pork in
3 California unless you raise your sows in a
4 particular way out of state. It's a condition
5 on sale. That's very little different from
6 Baldwin. Baldwin conditioned the sale of milk
7 in New York predicated on the Vermont producer
8 being paid the New York rate, and it did that
9 because it thought that it was necessary to pay
10 Vermont farmers that much in order for them to
11 use sanitary methods on the dairy.

12 JUSTICE THOMAS: Right, but --

13 MR. BISHOP: This Court held that --

14 JUSTICE THOMAS: -- but what if --
15 what --

16 MR. BISHOP: -- New York could not
17 project its legislation that way on Vermont.

18 JUSTICE THOMAS: But what if -- what
19 if California -- I'm sorry to interrupt you, I
20 apologize.

21 MR. BISHOP: That's all right.

22 JUSTICE THOMAS: What if California
23 said a house has to be built according to
24 certain rules by certain standards with certain
25 products, hence, excluding products that are

1 made in another state? For example, it says
2 that you can't build a house entirely out of
3 wood, so you can't import wood from another
4 state like -- that's a lumber state like
5 Georgia.

6 MR. BISHOP: That's -- that's
7 different, Justice Thomas. We -- we have --

8 JUSTICE THOMAS: Why is it? I mean,
9 it's affecting -- it's affecting your product
10 from your -- from -- extraterritorially.

11 MR. BISHOP: No, a state may ban a
12 product. There's no doubt about that. It could
13 ban pork. It can ban lumber to be used in
14 building houses. What it can't do is condition
15 sales in the state on a business in another
16 state adopting particular methods of production.
17 That tramples on the other states' rights.

18 JUSTICE KAGAN: I understand New York
19 has a law that says that if you want to import
20 firewood into the state, you have to have used a
21 certain kind of pesticide to make sure that
22 various pests don't come in with the firewood.
23 Would that be forbidden?

24 MR. BISHOP: Well, I think you can --
25 you can ban a product that contains certain

1 pests. The -- the -- Maine -- Maine versus
2 Taylor, I think, establishes -- establishes
3 that. And there is a --

4 JUSTICE KAGAN: But you -- but you
5 can't -- New York can't say any producers that
6 don't use -- that don't use some -- you know --

7 MR. BISHOP: A particular --

8 JUSTICE KAGAN: -- some list of
9 approved pesticides?

10 MR. BISHOP: A particular pesticide.
11 I think -- and this won't always be easy --

12 JUSTICE KAGAN: Your answer is that
13 you can't?

14 MR. BISHOP: You can't, right.

15 JUSTICE KAGAN: So anytime a state
16 does something that I say forces -- it doesn't
17 really force, but it -- you know, if you want
18 the -- the state's market, it forces you.

19 MR. BISHOP: Right.

20 JUSTICE KAGAN: Anytime a state does
21 something that forces you to change production
22 methods in any way, that would be --

23 MR. BISHOP: Yes.

24 JUSTICE KAGAN: -- banned?

25 MR. BISHOP: Anytime -- well, banned,

1 I mean, I say this is almost a per se rule, even
2 for discrimination cases. There's always a
3 safety out if the -- the state can show that the
4 -- the rule is necessary --

5 JUSTICE JACKSON: But, counsel --

6 MR. BISHOP: -- for safety --

7 JUSTICE JACKSON: -- can I just --

8 MR. BISHOP: -- and can't be achieved

9 --

10 JUSTICE JACKSON: -- can I just --

11 MR. BISHOP: -- but, yes, that is the

12 -- that's our position.

13 JUSTICE JACKSON: Can I just clarify?

14 Because I -- I perceive a difference in the rule
15 that you're articulating right now than what's
16 in your briefs, and I just want to make sure I
17 understand the per se rule that you are
18 articulating.

19 I thought your briefs were asking us
20 for a rule that says that a state may not enact
21 laws that have the practical effect of
22 controlling conduct outside the state's borders.
23 And that's different, I think -- and maybe I'm
24 wrong, so you can tell me -- than the rule that
25 you're now saying, which is a state law that

1 conditions sales on an out-of-state business
2 operating in a particular way is prohibited.

3 So which --

4 MR. BISHOP: Well --

5 JUSTICE JACKSON: -- which one of
6 these --

7 MR. BISHOP: -- Well, I think, you
8 know, our -- our -- our view is that an
9 extraterritorial -- an extraterritorial rule
10 always has that practical effect on -- on
11 commerce. It does two things. It affects
12 commerce out of state, and it tramples the
13 rights of the states in which the business is
14 located.

15 JUSTICE JACKSON: But I -- I see a
16 delta between the question of whether or not the
17 state's regulation controls conduct outside of
18 the state's borders and a -- what seems to me to
19 be a narrower proposition that you want a per se
20 rule that says if a state conditions sales on
21 out of -- on an out-of-state business operating
22 in a particular way.

23 Am I wrong --

24 MR. BISHOP: Well, it may --

25 JUSTICE JACKSON: -- that that's a

1 narrower --

2 MR. BISHOP: -- it may be a
3 narrower -- it may be a narrower subset, but
4 this Court has used that control language in --
5 in cases like Carbone and -- and Baldwin to
6 stand for this proposition that you may not
7 condition in-state sales on out-of-state --
8 out-of-state operations.

9 JUSTICE ALITO: Mr. Bishop, you have
10 -- you have several arguments, and I gather that
11 your answer to Justice Kagan based on your
12 extraterritoriality argument is no, New York
13 can't do that.

14 MR. BISHOP: It can't do that, right.

15 JUSTICE ALITO: But what -- how would
16 that play out under your other argument, which
17 is that the Pike balancing test would apply?

18 MR. BISHOP: Well -- well, Pike --
19 Pike is a -- you know, it's a factual -- it's a
20 factual test. It's a factual test and so you
21 consider what is the impact on interstate
22 commerce, and then you weigh that against --
23 that burden against the local interest.

24 But, I mean, what I -- what the rule
25 -- what the extraterritorial rule that we are

1 proposing does really operates at that first
2 level, the burden level, and what it says is
3 it's so clear that laws that condition sales on
4 out-of-state operation, changes in operations is
5 always going to be a significant burden on
6 interstate commerce that implicates the very
7 concerns that the framers had about
8 balkanization.

9 JUSTICE KAGAN: So suppose it were
10 Wyoming or Rhode Island --

11 MR. BISHOP: It wouldn't --

12 JUSTICE KAGAN: -- that passes a law
13 like this.

14 MR. BISHOP: -- it wouldn't make any
15 difference.

16 JUSTICE KAGAN: It -- it certainly
17 makes a difference in the kind of burden that's
18 involved, right?

19 MR. BISHOP: It -- it does.

20 JUSTICE KAGAN: Somebody could easily
21 just cut off the Wyoming market.

22 MR. BISHOP: But what we are
23 proposing, Your Honor, is a -- is a -- a per se
24 rule that these conditions on sale in state --

25 JUSTICE BARRETT: But that's not a

1 matter of Pike balancing. Your per se rule goes
2 to the extraterritorial rule, and I think
3 Justice Alito was asking you about Pike.

4 MR. BISHOP: Right. Well, and I --
5 what I'm trying to explain is the -- is the
6 relationship between extraterritoriality and
7 Pike, which is that the extraterritoriality rule
8 establishes per se that that burden is -- is
9 present in every case. It cuts out the need to
10 do the --

11 JUSTICE ALITO: It establishes --

12 MR. BISHOP: -- individual --

13 JUSTICE ALITO: -- it establishes that
14 there is a substantial burden on interstate
15 commerce.

16 MR. BISHOP: Yes, exactly, Justice
17 Alito.

18 JUSTICE ALITO: Or there -- there
19 certainly is in the case where the state is a
20 behemoth like California, but if you go to Pike
21 balancing, then you would also take into account
22 in a situation like the one that was posited by
23 Justice Kagan the strength of the state's
24 interest. And so, if New York has a --

25 MR. BISHOP: Yes. If this Court

1 doesn't think --

2 JUSTICE ALITO: -- has a very strong
3 interest in preventing a really dangerous
4 product from coming into its borders, that would
5 be taken into account.

6 MR. BISHOP: Yes, and we think that's
7 taken into account under extraterritoriality
8 too. I mean, even -- even in cases like Oregon
9 Waste, where it's a discriminatory law, this
10 Court does consider the safety rationale that is
11 offered by the -- by the state, but the state
12 has to offer a -- a real non-speculative safety
13 rationale that is not --

14 JUSTICE GORSUCH: Counsel, why -- why
15 isn't this Pike balancing test a bit reading too
16 much into too little? It's one paragraph in a
17 short unanimous opinion and it relies on three
18 very old cases, Baldwin, Healy, and Brown, which
19 were all --

20 MR. BISHOP: They're not so old, Your
21 Honor.

22 JUSTICE GORSUCH: Well, they're a
23 hundred years old around about -- that involve
24 price fixing or price affirmation statutes that,
25 in effect, are a form of discrimination against

1 out-of-state market participants. At least
2 that's how many people in many courts have read
3 them.

4 I confess I'm guilty of that too on
5 the Tenth Circuit. That was my understanding of
6 what Pike was about. What's wrong with that
7 understanding, especially when the alternative
8 you are selling us appears to be that this Court
9 should engage in a freewheeling balancing test a
10 la Lochner to protect an economic liberty rather
11 than defer to state regulation on health and
12 safety?

13 MR. BISHOP: Well, let me make two
14 points. I mean, it -- Pike -- Pike -- you know,
15 Healy is a 1989 case, and Brown-Forman is 1986.
16 I mean, these are not ancient cases.

17 There -- Pike is an extremely
18 well-established precedent not only in this
19 Court but in the lower courts, and it has been
20 applied --

21 JUSTICE GORSUCH: That's not a
22 question. The question is what it means.
23 And -- and it could either mean what many lower
24 courts have thought it meant, looking at these
25 very old dairy statutes, things like that, or it

1 could mean something very broad that would endow
2 this Court to weigh competing interests.

3 Does California have enough of an
4 interest in pork compared to lumber, compared to
5 fireworks, compared to whatever you want to come
6 up with?

7 MR. BISHOP: The narrow read we --

8 JUSTICE GORSUCH: What business do we
9 have in that?

10 MR. BISHOP: The narrow reading would
11 not satisfy the interests of the Commerce
12 Clause. The Commerce Clause is intended to
13 prevent balkanization. It was a reaction to --
14 to balkanize rules at the time of the
15 constitutional convention.

16 And it was intended to stop interstate
17 -- interstate strife over these sorts of rules.
18 A narrow rule focused on old dairy statutes is
19 not going to achieve that. And what we're
20 proposing, this per se rule that we are
21 proposing --

22 JUSTICE GORSUCH: It's new, right?

23 MR. BISHOP: -- it's away from --

24 JUSTICE GORSUCH: It's -- it's a new
25 rule?

1 MR. BISHOP: No. Well, we don't think
2 it's new. We think it's firmly grounded --

3 JUSTICE GORSUCH: Where -- where is
4 that --

5 MR. BISHOP: -- in Baldwin.

6 JUSTICE GORSUCH: -- in Pike? I don't
7 see per se --

8 MR. BISHOP: It's -- it's in Baldwin,
9 Your Honor.

10 JUSTICE GORSUCH: It's in Baldwin?
11 Okay.

12 MR. BISHOP: That's what -- that's
13 what Baldwin --

14 JUSTICE BISHOP: With respect to price
15 affirmation and price fixing?

16 MR. BISHOP: Price affirmation cannot
17 conceivably be an appropriate limitation of this
18 rule because it doesn't achieve what the
19 Commerce Clause is supposed to achieve.

20 JUSTICE GORSUCH: Well, then let me
21 ask you how this --

22 MR. BISHOP: -- which would be a
23 national market.

24 JUSTICE GORSUCH: -- let me ask you
25 how this works, though. You say -- you say

1 California could ban pork.

2 MR. BISHOP: Yes.

3 JUSTICE GORSUCH: Okay. Why doesn't
4 that affect interstate commerce in some
5 impermissible way?

6 MR. BISHOP: Well, it -- it does
7 affect it. But the -- the -- the difference
8 between a ban is that that seems to us to be
9 much more -- which are commonplace, bans are
10 commonplace, they're much more in-state focused.
11 All they do is reduce the size of the market for
12 out-of-state businesses. That is very different
13 from conditioning a sale on the precise way that
14 an out-of-state business conducts itself, how it
15 operates.

16 JUSTICE KAGAN: But -- but,
17 presumably, the reason why out-of-state
18 businesses care about change in production
19 methods is that those production methods will be
20 more costly. And if you're thinking about
21 costs, California banning your product would be
22 the greatest costs of all.

23 So why would you, you know, divide the
24 world in that way?

25 MR. BISHOP: Well -- well, we're not

1 only talking about costs, Justice Kagan.
2 We're -- we're talking about the impact on the
3 state where the business is located.

4 You know, Iowa has 65,000 sow farms.
5 It has a very great interest in how those sows
6 are -- are housed. And what California is doing
7 is essentially trampling on Iowa's ability to
8 say, no, you know, our farmers really ought to
9 be able to use --

10 JUSTICE KAGAN: Right. But its --

11 MR. BISHOP: -- breeding sows.

12 JUSTICE KAGAN: -- interest is
13 cost-related. Its interest is, look, we think
14 that this is, you know, sufficient and we don't
15 want to do anything that's more expensive.

16 MR. BISHOP: It's not only
17 cost-related. It could be morally related.
18 California's moral position, moral view that
19 pigs shouldn't be kept this way can be matched
20 in Iowa by a view that the most important thing
21 about sows is -- is producing --

22 JUSTICE KAGAN: Well, I must say --

23 MR. BISHOP: -- inexpensive --

24 JUSTICE KAGAN: -- that seems
25 unlikely.

1 MR. BISHOP: -- inexpensive pork.

2 JUSTICE KAGAN: I must say that seems
3 unlikely.

4 MR. BISHOP: No, not at all.

5 JUSTICE KAGAN: The -- the question
6 from Iowa's position, and it's an important
7 question, is you're making this incredibly
8 costly for us.

9 MR. BISHOP: No, I don't think -- I
10 don't see how that -- how you say that's
11 unlikely. If California can tell folks in Iowa
12 how to raise their sows, then Iowa can take the
13 moral position that the most important -- the
14 most important moral thing to do here is to feed
15 people at a reasonable cost by -- by raising
16 sows using pens.

17 But people -- or the 350 --

18 JUSTICE KAGAN: I mean, we're supposed
19 --

20 MR. BISHOP: -- billion people in the
21 country --

22 JUSTICE KAGAN: -- you're suggesting
23 that we decide this case on the premise that the
24 interests at stake in Iowa and among pork
25 farmers have nothing to do with costs?

1 MR. BISHOP: No, that you should
2 decide this case on the basis that Iowa's views
3 on how pork should be raised, whatever those
4 are, are just as weighty as California's.

5 JUSTICE SOTOMAYOR: But why?

6 MR. BISHOP: And that --

7 JUSTICE SOTOMAYOR: I -- I mean, I
8 know that you dismiss the moral objection, and
9 I'm going to put it aside, but we have a brief
10 from scientists that point out that there are
11 some genuine scientific reasons for fearing the
12 -- the -- the raising of pigs.

13 You may disclaim it, and I know your
14 complaint says something different, but some
15 people could reasonably believe that close
16 confinement of farm animal increases the
17 likelihood of new diseases jumping from humans
18 -- from animals to humans or vice versa. That
19 -- we know that's happening.

20 It is also reasonable to think that
21 reducing close confinement of pigs may reduce
22 the use of antibiotics in pigs, thus reducing
23 the development of antibiotic-resistant
24 bacteria. And some think that the use of
25 gestation crates increases the presence of

1 diseases in piglets that carry -- can carry
2 through to time of slaughter.

3 Now I know you're going to tell me
4 there's no scientific proof, but there is
5 certainly a reasonable basis for these people to
6 think this.

7 MR. BISHOP: We don't think there's a
8 reasonable basis. Our -- our veterinarians say
9 exactly the opposite. But, for current
10 purposes, Justice Sotomayor, what counts is
11 we're here on motion to dismiss, okay? There
12 has been no opportunity to test these
13 propositions in --

14 JUSTICE SOTOMAYOR: Well, how about --

15 CHIEF JUSTICE ROBERTS: Thank -- thank
16 you -- thank you, counsel.

17 Mr. Kneedler?

18 JUSTICE SOTOMAYOR: Chief?

19 CHIEF JUSTICE ROBERTS: Oh, I'm sorry,
20 Mr. Kneedler.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: Very
23 interested to hear from you.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: Would -- I think you
2 touched on this in your final comments, but let
3 me just make sure about it.

4 Most of your argument seemed to be
5 arguing the merits of the extraterritoriality
6 argument and the Pike balancing argument to a
7 lesser extent. But is that the question we have
8 here? This is on the pleadings. So what is the
9 standard that we're supposed to apply?

10 MR. BISHOP: Well, under Iqbal, we
11 have to plausibly allege facts that are
12 sufficient to -- basis for our legal claims.
13 You've got two counts in the complaint, one
14 based on extraterritoriality, one based on -- on
15 Pike. We think that we have easily pled both an
16 extraterritorial regulation and a significant
17 burden on interstate commerce and that at that
18 point, the state has to show that it has good
19 reason for these rules. And that -- that whole
20 process has been curtailed by the dismissal. We
21 should get a remand in order to make our case.

22 JUSTICE ALITO: Justice Sotomayor
23 recited factual allegations made in an amicus
24 brief submitted in support of California, and,
25 certainly, those merit serious consideration.

1 But was any of that evidence in the
2 record here?

3 MR. BISHOP: No. In fact, to the
4 contrary. We think that we should be entitled
5 to judgment as a matter of law on remand because
6 California's expert agency, its Food and
7 Agricultural Department, looked at the law and
8 it concluded that the confinement standards,
9 which is what Prop 12 is, confinement standards,
10 are not based on specific peer-reviewed
11 scientific literature or accepted as standards
12 within the scientific community to reduce human
13 foodborne illness, promote worker safety, the
14 environment, or other human and safety concerns.

15 When they realized that that was a
16 litigation issue and they tried to claw some of
17 it back, the best they could come up with is
18 this: That the California voters -- it was
19 reasonable, not unreasonable, for them to adopt
20 this law as a "precautionary measure to address
21 any potential threats." All right?

22 That is not enough under Pike or our
23 extraterritoriality test to justify a law that
24 has massive effects on interstate commerce.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, your
4 complaint acknowledges at paragraph 160 that
5 consumer demand has led roughly 28 percent of
6 the pork industry -- not quite a third, but
7 that's a very high percentage -- to convert from
8 individual gestation stalls to group housing.
9 To meet that consumer demand, 28 percent of the
10 industry already must be able to trace its pork
11 meat back to how individual pigs were housed
12 because consumer demand demands it.

13 We have marketed already pork marked
14 as organic, crate-free, antibiotic-free, and
15 beta-agonist free. I have no idea what that
16 means.

17 (Laughter.)

18 JUSTICE SOTOMAYOR: But I know it's
19 there. I've seen it in supermarkets, okay? So
20 some tracing is already happening. This is
21 already recognized in your complaint.

22 MR. BISHOP: No. With all due
23 respect, Justice Sotomayor, you're talking about
24 two different things there.
25 Twenty-eight percent of the market uses group

1 housing after confirmation of pregnancy.

2 What -- what Prop 12 does is to
3 prohibit the most critical period for individual
4 confinement, which is the period after weaning
5 through the confirmation --

6 JUSTICE SOTOMAYOR: You're missing my
7 point.

8 MR. BISHOP: -- of pregnancy. No, but
9 that -- that --

10 JUSTICE SOTOMAYOR: No, no --

11 MR. BISHOP: So it's not 28 percent.
12 So let me tell you what --

13 JUSTICE SOTOMAYOR: Let me finish my
14 question.

15 MR. BISHOP: So --

16 JUSTICE SOTOMAYOR: Let me finish my
17 question.

18 California's 13 percent of the market.
19 It's a huge market. But there are people -- you
20 have to concede there are some people who can
21 sell there. They're already labeling themselves
22 as organic or crate-free or antibiotic-free or
23 something free.

24 What is the critical difference? How
25 much of the market does the producers in Iowa

1 have to control? All of it?

2 MR. BISHOP: No. No, here's --

3 JUSTICE SOTOMAYOR: Or just a small
4 part of it?

5 MR. BISHOP: No, no --

6 JUSTICE SOTOMAYOR: And why does that
7 make a difference? Because no one's forcing
8 them to sell to California. They can sell to
9 any other state that they prefer to sell to.

10 MR. BISHOP: Your Honor, nationwide,
11 13,500 pigs are slaughtered each day that comply
12 or about comply with Prop 12. California needs
13 65,000 pigs a day to satisfy its proper --

14 JUSTICE SOTOMAYOR: And so its people
15 are going to go without pork?

16 MR. BISHOP: Half a million pigs are
17 slaughtered in the state every day. What's
18 organic Prop 12 is a tiny, tiny proportion.
19 It's sold in Whole Foods --

20 JUSTICE SOTOMAYOR: You still haven't
21 --

22 MR. BISHOP: -- for \$8 a pound.

23 JUSTICE SOTOMAYOR: -- you still
24 haven't answered my question. What's the line
25 that we draw to say that this is an

1 impermissible control by California of others
2 when it's giving it a choice to say sell my way
3 or don't sell my way? If you want to sell my
4 way, you can sell here. If you don't, sell in
5 New York.

6 MR. BISHOP: Well, we think the rule
7 derived from your cases, from Baldwin, from
8 Healy, from Brown-Forman, from Carbone, is the
9 one that I've expressed, that -- that it
10 violates the Commerce Clause to condition
11 in-state sales on out-of-state producers
12 operating a particular way.

13 And there's very good reasons for that
14 in the reasons for the -- for the -- for the
15 adoption of the Commerce Clause in the first
16 place, to avoid balkanization, to avoid
17 California imposing its philosophical views in
18 other states, and to -- and to avoid trampling
19 on the sovereign prerogative of other states.
20 And a rule like this does all of those.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Mr. Bishop, suppose I
23 asked you to for a moment ditch the
24 extraterritoriality argument and just go to Pike
25 balancing. What would your position sound like?

1 MR. BISHOP: That Prop 12 has a very
2 significant effect on interstate commerce, that
3 essentially what will happen, as we've explained
4 in the briefs, is that farmers won't have --
5 most farmers won't have any choice but to adopt
6 this form of -- of raising sows, and the reason
7 for that is that farmers don't know where the
8 offspring, where the meat from the offspring of
9 their sows is going --

10 JUSTICE KAGAN: And on the other side?

11 MR. BISHOP: -- until much, much
12 later. I'm sorry, Your Honor?

13 JUSTICE KAGAN: And on the other side?
14 You know, there's a balance, two sides.

15 MR. BISHOP: Yeah, there's a balance,
16 and -- and California, we think, has given up
17 its safety -- any claim to -- to a genuine
18 safety rationale here. But that would be a
19 matter for --

20 JUSTICE KAGAN: Are you saying that
21 California has no distinctly moral interest
22 here?

23 MR. BISHOP: It -- it has a moral
24 interest that it can satisfy in-state but not
25 one that by these conditions on sales --

1 conditioning sale on what is done elsewhere.

2 JUSTICE KAGAN: So, within Pike
3 balancing, there's a little bit of a per se rule
4 of its own, which is that moral interests cannot
5 justify conduct out of state? Is that the idea?

6 MR. BISHOP: Well, I -- I think that
7 that's sort of an essential -- you can say
8 that's in Pike balancing. I mean, it's an
9 essential feature of our horizontal federalist
10 system, which is that each state is sovereign
11 within its own territory.

12 And the reason this gets brought into
13 the Commerce Clause is because the framers were
14 concerned about the sort of balkanization that
15 arises when -- when states adopt these rules.

16 JUSTICE KAGAN: And -- and, again,
17 just to make sure I understand your position,
18 you're saying that California could adopt a
19 complete ban on the product --

20 MR. BISHOP: Yes.

21 JUSTICE KAGAN: -- under your initial
22 territoriality rule? But also under Pike, it
23 can't -- but can't do --

24 MR. BISHOP: Yes. And --

25 JUSTICE KAGAN: -- what California is

1 doing here?

2 MR. BISHOP: But there are other
3 things that it can do. I mean, Justice
4 Sotomayor mentioned labeling. Labeling is
5 commonplace. You know, San Francisco requires a
6 label on meat disclosing where --

7 JUSTICE KAGAN: Well, gosh, that seems
8 to regulate out-of-state conduct too.

9 MR. BISHOP: Well, no -- well, no,
10 it really -- I mean, the label can be put on
11 in-state, but it's really just a question of,
12 you know, putting a stamp on a -- a stamp on
13 a -- on a package. It really -- it's something
14 that --

15 JUSTICE KAGAN: That's trivial?

16 MR. BISHOP: -- that's not
17 substantial.

18 JUSTICE KAGAN: Is that trivial?

19 MR. BISHOP: Yeah, it's trivial. I
20 think it's trivial.

21 JUSTICE KAGAN: Okay.

22 MR. BISHOP: And what it does is it
23 allows California not to be complicit, if they
24 don't want to be complicit in raising pork the
25 way we raise it, then they have the information

1 in front of them to make that decision whether
2 to buy it or not.

3 JUSTICE KAGAN: Thank you.

4 MR. BISHOP: And also, you know,
5 whether to -- to -- to pay \$8 a pound for pork
6 at Walmart or 5.25 a pound at -- at -- at Whole
7 Foods or 5.25 a pound at Walmart.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: Mr. Bishop, just to
11 follow up on Justice Kagan's line of questioning
12 where we've kind of laid out the costs and
13 benefits in our balancing test that you're
14 asking us to do, why isn't that just a form of
15 enshrining non-textual economic liberties in --
16 into the Constitution, something this Court -- a
17 project this Court disavowed a long time ago?

18 We're going to have to balance your
19 veterinary experts against California's
20 veterinary experts, the economic interests of
21 Iowa farmers against California's moral concerns
22 and their views about complicity in animal
23 cruelty.

24 Is that any job for a court of law? I
25 mean, the Commerce Clause, after all, is in

1 Article I, which would allow Congress to resolve
2 any of these questions.

3 MR. BISHOP: Well, I'd say two things
4 in response. One is the courts have not had
5 difficulty applying the Pike test.

6 JUSTICE GORSUCH: Well, with respect
7 --

8 MR. BISHOP: I mean, we have not seen
9 a slew --

10 JUSTICE GORSUCH: -- let's put that
11 aside because I think a lot of lower court
12 judges would disagree with you.

13 MR. BISHOP: Well, I mean, we don't
14 see a lot of state laws struck down under Pike
15 balancing. When you do, it's generally because
16 the state has completely failed. If you look at
17 Kassel and Bibb and those cases, the state has
18 completely failed to make a case for the
19 necessity of the law.

20 But, you know, doctrinally, Your
21 Honor, you said that the -- the Dormant Commerce
22 Clause, which is -- you know, is just a label
23 for an interpretation of the Commerce Clause
24 that this Court has --

25 JUSTICE GORSUCH: Well, you -- you've

1 picked on a line of cases dating to 1935 that is
2 maybe the most dormant line of our Dormant
3 Commerce Clause jurisprudence.

4 MR. BISHOP: Well -- well, Your Honor,
5 you -- I mean, you've said that these -- that
6 these principles may be misbranded, but at this
7 point, the misbranding goes pretty deep, right?
8 I mean, the -- the -- this interpretation of the
9 Commerce Clause dates back to -- to Cooley.

10 The other ways in which the --
11 preventing the balkanization, preventing the
12 trampling of states' territorial sovereignty
13 that the doctrine is -- is -- is supposed to
14 protect against.

15 The other sources in the Constitution,
16 the P&I clause has been interpreted not to --
17 you know, not to apply to corporations. The
18 export and import clause has been interpreted
19 to -- to apply only to foreign trade.

20 Maybe the Court got it wrong when it
21 said that the Commerce Clause -- under the
22 Commerce Clause, Congress doesn't have exclusive
23 authority over true interstate commerce, but
24 it's too late to fix all of those things.

25 JUSTICE GORSUCH: Okay. Let me ask

1 another line --

2 MR. BISHOP: So the only way to
3 achieve --

4 JUSTICE GORSUCH: -- line -- line of
5 questioning. I'm sorry to interrupt, but I do
6 want to respect others' time.

7 Protecting interstate commerce, I
8 would have thought as an old -- just from an
9 antitrust mindset that we wouldn't be concerned
10 about protecting particular firms, but we'd be
11 concerned about protecting consumers at the end
12 of the day. And -- and a similar analysis might
13 apply here, it seems to me.

14 Your -- your complaint definitely
15 alleges harm to large pork producers in certain
16 places who would have difficulty segregating out
17 pieces of -- of pork. That -- I understand
18 that.

19 But less clear to me is whether you've
20 plausibly alleged harm to competition or harm to
21 interstate commerce itself. We have other pork
22 producers who say they're perfectly happy to
23 step into the void that your firms don't wish
24 to -- to fill and -- and to segregate out pork
25 parts, including, I think, Perdue is saying

1 that. And we also have one of your own members
2 attesting that prices will not increase to
3 consumers outside of California because they
4 won't bear it. And we have economists saying
5 the same thing on the other side, agricultural
6 economists.

7 So in what way have you plausibly
8 alleged harm to interstate commerce or consumers
9 rather than to your member firms?

10 MR. BISHOP: Well, we are here on
11 motion to dismiss, and what we have alleged is,
12 first of all, that prices -- prices cannot be
13 contained. The price increase from Prop 12
14 cannot be contained within California because,
15 at the time the farmer raises the sow, it
16 doesn't know where six months later the pork is
17 going to be sold to.

18 You know, we sell everything except
19 the oink is the phrase. So the blood, the fat,
20 the collagen, everything is sold, and it's sold
21 around the world in response to demand. Every
22 piece of that pig is going to bear the cost --
23 the significant cost of raising pork the way
24 that California demands.

25 As to the -- as to the -- you know,

1 the trace -- the difficulty of sort of tracing,
2 the organic market, Niman Farms, which is the --
3 the -- filed the amicus brief here, part of
4 Perdue, these are a tiny, tiny proportion, as I
5 said, 13,500 pigs a day slaughtered all around
6 the country compared to the 500,000 that are
7 slaughtered to supply the 350 million people in
8 this country with reasonably priced pork.

9 So this is not, and we would prove at
10 trial, that this is not something you -- you
11 suddenly -- you suddenly adapt to.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

14 JUSTICE KAVANAUGH: To the extent we
15 have historically overinterpreted the Commerce
16 Clause, I think you were getting at something
17 that the amicus briefs also point out, is that
18 you couldn't correct that without correcting
19 also a historical underinterpretation perhaps of
20 the export/import clause and the privileges and
21 immunities clause. And Justice Thomas and
22 Justice Scalia wrote about the export/import
23 clause, and others have written about the
24 privileges and immunities clause.

25 Correct?

1 MR. BISHOP: Yes. I mean, my -- it
2 seems to me that it's just -- it's too late, all
3 right? Maybe -- maybe the problem with --

4 JUSTICE KAVANAUGH: But -- but even if
5 it's not too late, you can't do one without
6 correcting the others, it would seem to me, or
7 else you're going to --

8 MR. BISHOP: Yes. It's -- it's deeply
9 -- there -- there are -- there are very few so
10 deeply entrenched principles in American
11 constitutional law as the Dormant Commerce
12 Clause going back to Cooley, and it serves --

13 JUSTICE KAVANAUGH: But the point
14 there --

15 MR. BISHOP: -- a very important
16 function.

17 JUSTICE KAVANAUGH: -- is the
18 principle behind it is embedded in our
19 Constitution, even if mislabeled.

20 MR. BISHOP: Yes.

21 JUSTICE KAVANAUGH: You couldn't just
22 say, oh, let's get rid of all those cases
23 because they're mislabeled without thinking
24 about the other clauses --

25 MR. BISHOP: Exactly right.

1 JUSTICE KAVANAUGH: -- might pick up
2 that same principle.

3 MR. BISHOP: Exactly, Your Honor.

4 JUSTICE KAVANAUGH: Okay. And second,
5 there are a lot of far-reaching arguments in
6 this case, but it seems to me picking up on
7 Justice Alito's question, the -- Pike is a
8 long-standing precedent. You have a complaint
9 that alleges a claim under Pike that's on its
10 face sufficient.

11 Isn't that just the easiest way to
12 resolve this for now and we can deal with a lot
13 of these far-reaching arguments down the road?

14 MR. BISHOP: Well, we don't think the
15 extraterritoriality is far-reaching. I mean,
16 the way to think about -- I think the way to
17 think about it is, as I've said, it's -- it just
18 means that you get into that first step of Pike
19 without having to go through all the factual
20 considerations that, you know, Justice Alito has
21 referred to as being potentially problematic.

22 If -- if you are conditioning sales on
23 -- on businesses in other states operating a
24 different way so that that rule is all about
25 what happens out of state, then per se you get

1 into that top --

2 JUSTICE KAVANAUGH: Okay. I've --

3 MR. BISHOP: -- top level.

4 JUSTICE KAVANAUGH: Thank you.

5 JUSTICE BARRETT: Counsel, I want to
6 ask you about extraterritoriality. So can you
7 tell me why you answered Justice Kagan that the
8 labeling wouldn't matter?

9 I mean, if it's a per se rule that you
10 can't control what's going on in other states,
11 and you said, well, it's just insignificant,
12 it's de minimis, but wouldn't the per se rule,
13 the principle, still apply?

14 MR. BISHOP: Well, I -- I don't think
15 so. I mean, I think the de minimis point is --
16 you know, is an important one. This does have
17 to be a -- you know, a real impact on -- on
18 commerce and almost always, with a
19 extraterritorial law, it is.

20 But simply --

21 JUSTICE BARRETT: So it's not a per se
22 rule it would be balancing. I mean, you're --
23 the principle that you're asking for -- and I
24 guess this kind of goes to Justice Jackson's
25 question about what exactly is the principle

1 that you're articulating here.

2 It seems to me that you're not just
3 saying, well, if it controls markets and -- or
4 the way that production is conducted in other
5 states, it's if it does so in a significant way
6 or a burdensome way?

7 MR. BISHOP: No, no. If it does that
8 at all, then it's impermissible. But the --

9 JUSTICE BARRETT: Well, then why
10 doesn't the labeling do it?

11 MR. BISHOP: The labeling doesn't
12 affect the way that the operation is run, the
13 way that the pig is raised. If you are -- if
14 you have to put a label -- all you have to do is
15 put a label on that says, you know, this does
16 not comply with Prop 12 or this was raised in 24
17 feet, it's -- it's -- it's a factual statement
18 --

19 JUSTICE BARRETT: Well, it seems to me
20 --

21 MR. BISHOP: -- about how you raised
22 the --

23 JUSTICE BARRETT: -- that you're still
24 then having to weigh it in. But -- but let me
25 shift gears and just ask a different question

1 also about extraterritoriality.

2 It seems to me -- you know, Justice
3 Gorsuch was pointing out that this line of
4 cases, the Baldwin line, is the most dormant of
5 the Dormant Commerce Clause cases, and I think
6 his points was that Baldwin was decided in 1935,
7 before Darby, before Wickard, and the idea of
8 what constituted interstate commerce was very
9 different then. We were trying to draw lines
10 between intrastate and interstate commerce that
11 don't exist anymore.

12 We have these three cases that are in
13 the pricing context, and it seems to me that
14 you're asking for an extension of those. I
15 mean, I get that you can draw on the principle
16 and the reasoning of those cases and the dicta,
17 but it would still be an extension. And I'm
18 wondering, how many laws would fall? I mean,
19 California has higher emissions standards on
20 automobiles than many other states. Does that
21 fall?

22 MR. BISHOP: No. No. Absolutely not.
23 I mean --

24 JUSTICE BARRETT: Why?

25 MR. BISHOP: -- that -- that is --

1 that -- that's -- that's entirely federalized.
2 The -- they have a waiver from -- the -- the
3 federal government regulates emissions, and
4 California has a waiver from the federal
5 government for that. If you look at the --

6 JUSTICE BARRETT: What if they didn't?
7 What if -- I understand California has some new
8 legislation --

9 MR. BISHOP: Well --

10 JUSTICE BARRETT: -- about electric
11 cars and electric vehicles and by 2035, that
12 would be --

13 MR. BISHOP: Again, all -- and all
14 done under waivers. But take -- I mean, take
15 the equities of --

16 JUSTICE BARRETT: Okay. Well -- well,
17 let's assume -- I guess what I'm saying is
18 Justice Kagan gave you the example of the
19 firewood and the pesticide. If they have a
20 waiver about emissions, fine. There must be
21 many, many state laws that regulate
22 extraterritoriality, extra- -- outside of their
23 territory in the way that you are saying is
24 impermissible. So would this have --

25 MR. BISHOP: No.

1 JUSTICE BARRETT: -- far-reaching
2 consequences?

3 MR. BISHOP: No, it wouldn't have
4 far-reaching consequences. Let -- two examples.
5 Apple, in -- in Apple, that -- that involved
6 the -- you know, the rule that you have to -- in
7 order to sell electricity in Colorado, you have
8 to buy 20 percent of the power from renewable
9 sources. Clearly, that has a very important
10 safety impact in Colorado. Air pollution
11 anywhere is universal. So, I mean, those rules
12 are not going to fall.

13 The sort of rule that will fall is the
14 Seventh Circuit's rule -- the one the Seventh
15 Circuit considered in Legato Vapors, where
16 Indiana, on a safety rationale, tells vape
17 companies how -- exactly how they have to
18 operate if they want to sell into -- into
19 Indiana.

20 I mean, it is notable that there are
21 -- there are not cases like this in the books.
22 There are cases like Baldwin Brown-Forman and
23 Carbone, which we think are very much on point,
24 but the -- the closest by far is Legato Vapors,
25 where the Seventh Circuit struck down that

1 Indiana law.

2 JUSTICE BARRETT: Okay. Let me just
3 ask, because I don't --

4 MR. BISHOP: States don't do this.

5 JUSTICE BARRETT: Okay. I -- I don't
6 want to take up too much time, so let me just
7 ask you one last clarifying question.

8 In your interchange with Justice
9 Kagan, did I understand you right when -- to say
10 that morals, just when you're doing Pike
11 balancing, can't count as a state interest as
12 opposed to safety and health?

13 MR. BISHOP: Right. Because, if the
14 -- if -- if they could, then the common -- the
15 common national market would just fall apart
16 because Texas can say you have to certify that
17 -- that everything was produced by lawful
18 residents. Oregon can say, unless you provide
19 particular healthcare, which we think is -- you
20 know, X is included in the healthcare plan,
21 we're not going to buy those -- those products.

22 JUSTICE BARRETT: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yes. So I just have

1 one set of questions about extraterritoriality
2 and one quickly about Pike balancing.

3 So you've said repeatedly, I think,
4 that extraterritoriality is about the burden.
5 Am I right about that? It's about the sort of
6 rule that you want us to establish, is related
7 to the burden part of the Pike balancing?
8 Didn't you say that?

9 MR. BISHOP: Extraterritoriality is a
10 shortcut into burden, into the --

11 JUSTICE JACKSON: Yes, for -- for
12 establishing the burden. But the problem I
13 think you might have is that if that's the case,
14 then you're about to lose the benefit of a per
15 se rule or a bright-line rule because, as
16 Justice Kagan pointed out, the burden might vary
17 depending upon whether it's California versus
18 Rhode Island, that you can't have a per se rule
19 that relates to the effect because then we've
20 got to figure out how much control, how
21 significant is this regulation, as opposed to
22 the rules in -- or the way in which the rule
23 played out in -- in Brown and Healy, where it
24 was about the nature of the regulation, not its
25 effect.

1 So I worry that you really aren't
2 talking about a per se rule. It's more --
3 always, as Justice Barrett pointed out, really a
4 balancing.

5 MR. BISHOP: No, it's a per se -- it
6 is a per se rule. I mean, it does have a -- a
7 per se test, which is that if you -- you cannot
8 condition in-state sales on out-of-state changes
9 in business operations. If you do that, then
10 you look at what the state's rationale is on the
11 other side, but always, because a rule like that
12 has one goal, and that is controlling conduct --

13 JUSTICE JACKSON: Right, but it's --

14 MR. BISHOP: -- in the other states.

15 JUSTICE JACKSON: -- but it's not
16 about the degree of control. It's just if you
17 do that kind of thing. Is that what you're
18 saying?

19 MR. BISHOP: Yes.

20 JUSTICE JACKSON: All right. So with
21 -- my other set of questions is about the Pike
22 balancing. So let me ask you, would there be a
23 problem under Pike if, instead of banning sales
24 based on morality concerns or whatever else,
25 California allowed the sales but required the

1 pork to be labeled?

2 You've said a couple times that you
3 suggested that labeling was fine.

4 MR. BISHOP: Labeling is fine. It
5 happens all the time. You know, you walk into
6 the market, organic --

7 JUSTICE JACKSON: Right.

8 MR. BISHOP: -- is labeled, it's --
9 it's --

10 JUSTICE JACKSON: So, if it's fine,
11 let me just ask you to react a little bit to
12 this thought: I'm wondering whether the problem
13 is that Pike balancing might not be nuanced
14 enough. Justice Gorsuch suggests, you know,
15 we've got to do the balancing and that's a
16 problem.

17 But it seems to me that the Pike
18 balancing has courts looking on the one hand to
19 the burden, on the other hand to the benefit,
20 but not whether there's a way to achieve that
21 benefit in a less burdensome way.

22 And -- and -- and so I would wonder
23 whether the Pike balancing actually is amenable
24 as it now stands or whether it needs to be
25 corrected to allow for an assessment of a state

1 that has a morality concern, for example, that
2 it considers to be a benefit.

3 Do courts or should courts analyze
4 whether or not that benefit could be achieved in
5 a less burdensome way?

6 MR. BISHOP: Well, there -- there is a
7 less burdensome factor in Pike itself. I mean,
8 the Pike test ends with -- by asking the
9 question whether the state's goals could be
10 promoted as well with a lesser impact on
11 commerce. So there is a sort of
12 least-restrictive means type element to the Pike
13 -- to the Pike test.

14 But morality should not be part of
15 that because, you know, we live in a very
16 divided nation and these are --

17 JUSTICE JACKSON: Right, but why not?
18 What if -- so the morality, as Justice Sotomayor
19 says, is animal welfare. We have science, says
20 the state. We really believe that, you know,
21 these animals should not be kept in pens in this
22 way.

23 Why couldn't that be a reason that the
24 state says so any animals that come in from Iowa
25 we're going to label --

1 MR. BISHOP: Oh.

2 JUSTICE JACKSON: -- as non-compliant,
3 you know, to our moral views about how this
4 should be done?

5 MR. BISHOP: Yeah. Labeling --
6 labeling can be required.

7 JUSTICE JACKSON: But there's -- but
8 it would be based on morality. It's just the
9 way in which they're achieving the --

10 MR. BISHOP: Yes, a state is perfectly
11 entitled to enforce its morals in state. I
12 mean, that's what Justice Brandeis said,
13 right --

14 JUSTICE JACKSON: Yeah.

15 MR. BISHOP: -- with his, you know,
16 experimentation. The states can -- can -- can
17 experiment as much as they like. They can be
18 laboratories, but the laboratory is the state.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Kneedler.

23

24

25

1 ORAL ARGUMENT OF EDWIN S. KNEEDLER
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MR. KNEEDLER: Mr. -- Mr. Chief
5 Justice, and may it please the Court:

6 Taking the allegations in the
7 complaint as true, Proposition 12's sales ban is
8 invalid under Pike because it imposes a
9 substantial burden on interstate commerce
10 without serving a legitimate local public
11 interest. Proposition 12 imposes a trade
12 barrier based on conduct beyond California's
13 borders. It fails to respect the autonomy of
14 California's sister states. It invites conflict
15 and retaliation and threatens the balkanization
16 of the national economic union.

17 California's disagreement with the
18 manner in which pigs are housed in other states
19 is not a cognizable local interest of California
20 that could support the imposition of such a ban.

21 A state's interest in protecting the
22 health and safety of its residents can support a
23 state law if that local interest is substantial
24 and not outweighed by its effects on commerce.
25 But the state here has taken the position that

1 Proposition 12 does not rest on any scientific
2 determination of such a basis, and Petitioners
3 also plausibly allege that Proposition 12 does
4 not substantially advance such an interest.

5 The judgment of the court of appeals
6 there should be reversed on the basis of Pike.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Kneedler,
9 couldn't you circumvent or avoid this problem
10 completely by having national legislation, and
11 then you would just simply have a preemption
12 issue?

13 MR. KNEEDLER: Yes, Congress could
14 certainly act in this field. And I -- I would
15 point out, for example, that with respect to
16 labeling, the -- the Meat -- National Meat
17 Inspection Act regulates labeling. Labeling has
18 to be approved by USDA, and so the content of
19 the labeling could be localized, could be --
20 could be national.

21 And, in fact, USDA has approved labels
22 such as cage-free or Proposition 12 compliant,
23 but it requires an explanation of what that
24 means in order that the consumer can understand.

25 So the -- the -- the state's interest

1 in allowing its citizens to exercise their right
2 not to be morally complicit if an individual
3 consumer believes that is furthered by the
4 labeling provisions that USDA has approved and
5 would be prepared to approve.

6 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
7 you mentioned the state's interest in health and
8 safety. Does that extend to moral values of the
9 state beyond health and safety?

10 MR. KNEEDLER: Well, the -- the -- the
11 state can certainly have moral -- rest on moral
12 values or its determination of them for
13 regulating conduct within the state. But the
14 question with respect to the raising of pigs in
15 other states, that -- the -- the -- how the
16 moral issue should be weighed there as against
17 economic, as against countervailing interests on
18 behalf of the pigs, is something that that state
19 should regulate, not California.

20 CHIEF JUSTICE ROBERTS: But what if
21 they're totally unrelated? You can't sell eggs
22 in California unless, you know, you have a
23 certain amount of energy, I guess it could be
24 related at some level, whatever, something
25 totally unrelated to eggs.

1 Is -- is that all right?

2 MR. KNEEDLER: No, I -- I would think
3 not. I mean, I -- I think that the -- under --
4 under Pike balancing, there would have to be
5 some legitimate basis for the -- for imposing
6 such a burden on interstate commerce.

7 CHIEF JUSTICE ROBERTS: Well, the
8 legitimate basis is not some unrelated moral
9 objective?

10 MR. KNEEDLER: No, I -- I think a
11 moral objective --

12 CHIEF JUSTICE ROBERTS: In other
13 words, the state is trying to drive conduct in
14 the other state, just as it is here, but without
15 any connection to a particular industry or
16 activity.

17 MR. KNEEDLER: Well, I think, if it is
18 trying to regulate conduct in other states,
19 whether related or not related, where it doesn't
20 have a concrete, on-the-ground, scientifically
21 based, in the case of health and welfare, basis,
22 I -- I -- I think that's invalid under Pike
23 balancing, whether it's a related or unrelated
24 issue abroad.

25 The Court made this point in Baldwin

1 when it said in -- in responding to the argument
2 that perhaps the way farms are run in Vermont
3 are not adequate, the Court said, if the manner
4 of -- of farms being operated in Vermont is
5 deficient, that's up to the legislature of
6 Vermont, not up to the legislature of New York
7 to address.

8 CHIEF JUSTICE ROBERTS: The cases that
9 you -- I think the cases that you cite most
10 frequently in your brief or at least cite a lot,
11 I think can be distinguished on the grounds that
12 they're dealing with the arteries of commerce.
13 Kassel, you know, you have to change the length
14 of the truck, trucks, interfering with the
15 movement of commerce as opposed to production.

16 Is that a fair distinction?

17 MR. KNEEDLER: Well, a -- a number of
18 those -- I think it's particularly strong, but
19 part of the reason that's so is because a
20 limitation on truck length or on train length or
21 on mud flaps inevitably has the effect of
22 controlling conduct in another state because
23 changes would have to -- have to be made at the
24 border or before it reaches the border.

25 CHIEF JUSTICE ROBERTS: Well, that's

1 why I'm suggesting maybe you're overreading them
2 because it is inevitably going to have an -- an
3 impact on interstate commerce.

4 MR. KNEEDLER: But the Court has not
5 limited its -- Pike balancing, for example, to
6 that sort of case at all. In fact, Carbone, for
7 an example, is a case, sort of the mirror image
8 of Baldwin -- Baldwin, which had to do with a
9 sales restriction on milk produced out of state.

10 Carbone was a -- a local ordinance
11 that restricted the export of a product out of
12 the state, and it had the effect of -- of -- an
13 effect on interstate commerce that was not a
14 channel of commerce and it was not a pricing
15 issue.

16 And the Court held that it was an
17 impermissible basis for the state among other
18 things, for the -- excuse me -- locality to
19 regulate the disposition of waste because of
20 concerns about environmental impacts in another
21 state. That would be for that other state to
22 determine, not -- not the City of Clarkstown
23 that was involved in -- in Carbone.

24 JUSTICE ALITO: Under --

25 JUSTICE KAGAN: Mr. --

1 JUSTICE ALITO: -- under Pike, do you
2 think that a state's safety interests are
3 treated -- should be treated differently from
4 its moral interests?

5 MR. KNEEDLER: Yes. If -- if -- if it
6 is -- if the moral interest is a moral interest
7 in objecting to the way -- to conduct that
8 occurs in another state, yes, because we think
9 there has to be, you know, concrete evidence
10 showing an in-state, you know, tangible impact
11 on the citizens' states.

12 And, for example, the -- the director
13 of the state agency involved here, while
14 acknowledging there was no scientific basis for
15 the -- for this as a matter of safety or health
16 said still California citizens might benefit
17 from knowing that the pigs that come into the
18 state have been humanely handled in the way
19 Californians discussed.

20 JUSTICE ALITO: Does that distinction
21 really work? Because I understand that part of
22 California's argument and part of the reasons
23 why the voters of California adopted this
24 provision was to avoid the feeling of moral
25 complicity that they would experience if they

1 consumed -- if they purchased and consumed pork
2 that had been produced in what they regard as an
3 inhumane way.

4 So, in the case -- if -- if the pork
5 presents a safety problem, it's a safety problem
6 that -- that the people, the consumers in
7 California, would experience. If it presents a
8 moral problem, it's a -- a moral damage -- it's
9 a moral danger that they -- they don't want to
10 incur.

11 MR. KNEEDLER: Well, as I was
12 explaining before, the labeling alternative,
13 Pike -- Pike, as has been pointed out, contains
14 a sort of less restrictive means sort of
15 standard or -- or -- or safety valve.

16 And labeling allows those citizens of
17 California who -- who want to avoid purchasing
18 pork because they believe they would be morally
19 complicit in conduct that they think is improper
20 in another state, enables them to do so. So
21 it -- it's -- it's tailored to the interest in
22 allowing individual citizens in California to
23 exercise their moral choice.

24 JUSTICE KAGAN: I mean, just to take
25 an extreme example of this, Mr. Kneedler,

1 suppose we imagine ourselves back into slavery
2 days.

3 Would it have been impermissible for a
4 state to have said we're not going to traffic in
5 products that have been produced by slavery?

6 MR. KNEEDLER: I -- I think the logic
7 of our position would say yes, but that -- that
8 was at a much earlier -- earlier time, both in
9 Commerce Clause and, of course, now we have the
10 13th Amendment that -- that would prohibit --
11 and -- and that conduct is prohibited in the --
12 in the state where it occurs. This is the
13 important thing to recognize.

14 JUSTICE KAGAN: Right. I was
15 presuming -- I was imagining ourselves back into
16 a world where it wasn't, but I -- I -- I take
17 the point.

18 How about, you know, you've -- you
19 also have said total product bans are -- are
20 permissible. But some total product bans are
21 based on moral feelings or even sort of feelings
22 of disgust, like a ban on horse meat. There's
23 nothing dangerous about eating horse meat.
24 People in Iceland do it all the time.

25 There's a kind of yick, disgust

1 factor, a kind of moral factor. So could a
2 state not do a ban on horse meat?

3 MR. KNEEDLER: No. I think, of
4 course, a state acting within -- within its own
5 territory can act on moral or other bases. And
6 a lot of laws have moral underpinnings.

7 JUSTICE KAGAN: Well, this is a ban on
8 the importation of horse meat for sale.

9 MR. KNEEDLER: Well, I -- I -- I
10 think, on the -- on the premise that you're
11 explaining, it would be -- it would be a total
12 ban on horse meat because the state has said
13 it's yucky to -- to allow it.

14 JUSTICE KAGAN: Right, but -- but --
15 but it's a moral interest that's involved, and
16 -- and the people who are going to be affected
17 are all of these out-of-state producers and
18 horse people.

19 MR. KNEEDLER: Well, there is an
20 incidental effect on commerce in that respect,
21 but -- but I think the important distinction is
22 the state's judgment and its action is focused
23 on conduct within the state.

24 There will be no horse meat in this --
25 in this state. And, in fact --

1 JUSTICE KAGAN: Well, there won't be a
2 sale of horse meat, just as there won't be a
3 sale of pork produced in a certain way. I guess
4 I just don't really understand the distinction.
5 Naturally seems like, you know, the greater
6 includes the lesser.

7 MR. KNEEDLER: But there are
8 situations in which the greater does not include
9 the lesser. This --

10 JUSTICE KAGAN: I'm trying to figure
11 out why this is one of them.

12 MR. KNEEDLER: Well, I -- I -- I think
13 one of them is or the important one is -- is the
14 interstate Commerce Clause addresses whether the
15 state is trying to address interstate commerce
16 as opposed to a domestic issue. And this case
17 turns on the fact that the product was produced
18 in a certain way out of state and then is
19 brought into the state. That is interstate
20 commerce.

21 If the state is simply regulating the
22 production or the consumption of a product
23 within the state, that is not -- that is not
24 regulating interstate commerce. It may have an
25 incidental effect on commerce because people

1 won't ship it to the state anymore, but the
2 important thing is that it's regulating within
3 the state on the basis of valid state interests.

4 But when it comes to moral judgments,
5 a state can make moral judgments for its own
6 people, but when it comes to conduct in another
7 state, that's for that state's legislature to
8 decide.

9 If that -- a lot of laws can be -- can
10 be explained or -- or described as based on
11 moral determinations. Minimum wage laws, for
12 example. And this was true in Baldwin. The
13 Court made clear that a court could not limit
14 the import of goods from another state on the
15 ground that the workers were not paid a certain
16 amount.

17 Or I would say parallel to the housing
18 of the pigs here, if -- if California objected
19 to the importation of pigs because the workers
20 who worked at the pig farms were not housed
21 properly, that would be -- that would be wrong
22 too because that would be making -- that would
23 be resting California law on a judgment about
24 whether conduct in another state is proper or
25 not.

1 JUSTICE BARRETT: Mr. Kneedler, can I
2 ask you a question? I had understood your brief
3 to really focus on Pike balancing.

4 MR. KNEEDLER: Yes.

5 JUSTICE BARRETT: And to dismiss
6 the -- say we need not -- we need not reach the
7 extraterritoriality point. The way that you're
8 describing Pike balancing in response to Justice
9 Kagan's questions seems like it very much
10 incorporates extraterritoriality into the
11 analysis, because your answers have been very
12 focused on the fact that California was trying
13 to do something to reach outside of its borders
14 and regulate conduct in -- in Iowa.

15 What benefit would we get from
16 considering that part of Pike balancing rather
17 than just its own line of the dormant Commerce
18 Clause?

19 MR. KNEEDLER: Well, I -- I -- I -- I
20 think the points I was making actually fit into
21 both sides of the -- of the Pike balancing.
22 Pike balancing, when it comes to the enacting
23 state's interest, the Court said it has to be a
24 legitimate local public interest. And
25 California does not have a cognizable local

1 interest in California in the conduct that is
2 occurring elsewhere.

3 So it's -- so the point I made about
4 California regulating conduct outside the state
5 is built in, in that respect. But also when
6 California is, by -- by virtue of a sales ban,
7 excluding products from other states, that is --
8 that is a pretty direct imposition on interstate
9 commerce. It's effectively a trade barrier by
10 saying it's not -- it's not a tariff, because it
11 doesn't -- you don't have to pay more, but it's
12 excluding the product altogether by -- by the
13 avenue of a -- of a sales ban.

14 JUSTICE JACKSON: Mr. Kneedler --

15 JUSTICE BARRETT: So is Justice
16 Kagan's example of just banning horse meat all
17 together. I mean, it seems like that would be a
18 trade barrier as well, right?

19 MR. KNEEDLER: Well, but it's -- it's
20 not -- its basis is not a trade barrier. Its
21 basis is not this product was produced out of
22 state and is coming into the state. Its basis
23 is entirely on the local -- focusing entirely on
24 the -- on the local consumption or -- or sale
25 within the state.

1 JUSTICE JACKSON: But, Mr. Kneedler,
2 is that really a line you can draw? Because it
3 seems lining it is totally based on the state's
4 subjective interest in the particular
5 circumstances.

6 Like in both cases, the horse meat
7 isn't coming in, to use Justice Kagan's analogy.
8 In scenario 1, you say the state says we don't
9 want any horse meat because, say, you know, the
10 science is such that we don't like horse meat
11 and we're not going to offer it. And you say
12 that's okay, even though it has impacts from all
13 the horse farmers around the country.

14 But in scenario 2, if the state says
15 we don't like the horse meat because the -- of
16 the way the horses were raised in Kentucky,
17 that's not okay. And I'm just wondering if
18 that's something that we can really take account
19 of in a reasonable, you know, per se kind of
20 way.

21 MR. KNEEDLER: I'm not -- we're not
22 proposing a per se rule. We believe this case
23 should be decided under Pike balancing. But --

24 JUSTICE JACKSON: But even under Pike
25 balancing, how do we draw the line between those

1 two scenarios based solely on whether the state
2 is saying we don't like it because of what -- of
3 the way in which these animals were raised
4 versus we don't like it because we think the
5 animals are going to harm our people?

6 MR. KNEEDLER: Again, I think it's the
7 distinction between -- and it reflects the
8 horizontal federalism that -- that is spread
9 throughout the Constitution. California has to
10 respect the autonomy of its sister states, its
11 sister states' ability to regulate conduct
12 within its borders. And if Kentucky thinks that
13 the -- a particular method of raising horses is
14 okay, that's up to Kentucky.

15 But the horizontal federalism and
16 autonomy of the states allows California, for
17 example, to say we don't want horse meat in our
18 state at all, irrespective of interstate
19 commerce. In that situation, the law doesn't
20 turn on -- doesn't -- its operative -- its
21 operation does not turn on interstate commerce
22 --

23 JUSTICE JACKSON: And it doesn't --

24 MR. KNEEDLER: -- whereas this law
25 does.

1 JUSTICE JACKSON: -- turn on the
2 effect? It doesn't -- the effect is identical
3 in both places in terms of the, you know, burden
4 on the people who would otherwise sell into the
5 state, but that's not the critical piece of
6 this?

7 MR. KNEEDLER: In the -- in the total
8 ban, it's an incidental effect on out-of-state
9 people. On the -- where the law itself turns on
10 the -- the fact, the manner in which it was
11 produced out of state, then that is -- that
12 brings interstate commerce into it, and that --
13 that raises the Pike issue.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas?

16 Justice Alito?

17 JUSTICE ALITO: Yes. Excuse me,
18 Chief.

19 Mr. Kneedler, this law applies to pork
20 that is shipped into the United States from
21 Canada and Mexico, doesn't it?

22 MR. KNEEDLER: Yes.

23 JUSTICE ALITO: Does the United States
24 have any position on whether regulating that is
25 consistent with federal treaty law?

1 MR. KNEEDLER: I --

2 JUSTICE ALITO: Is that consistent
3 with NAFTA?

4 MR. KNEEDLER: I -- I don't know the
5 answer to that. I don't know that the
6 government has taken a position on that, but --
7 but NAFTA and other trade agreements are
8 examples of concerns about trade restrictions
9 that are not price-based. And so we think the
10 -- the Commerce Clause also should not be
11 price-based for similar reasons.

12 JUSTICE ALITO: Well, I know this is
13 unfair, so you can just tell me that it's --
14 it's not within the arguments presented to us,
15 but could California ban the importation from
16 Mexico or Canada of any products that were not
17 produced in a factory that complies with U.S.
18 environmental laws?

19 As I said, it's --

20 MR. KNEEDLER: I --

21 JUSTICE ALITO: You can just --

22 MR. KNEEDLER: I -- no, I -- I don't
23 think so. I mean, that would -- that would
24 raise questions under the foreign Commerce
25 Clause and the -- and -- and some of the issues

1 that this Court has considered before with
2 respect to a state regulating with respect to
3 things that -- that happen in a foreign country.

4 That -- there's an additional concern
5 under our constitutional structure.

6 JUSTICE ALITO: So if the dormant
7 Commerce Clause applies to foreign commerce, do
8 you think there should be a heightened standard?
9 Would it be tougher to -- for a state to satisfy
10 -- to -- to survive a dormant Commerce Clause
11 challenge when the challenge concerns
12 international commerce?

13 MR. KNEEDLER: I -- I think there may
14 well be. In fact, if -- if a -- if a state law
15 is expressly directed at interstate commerce,
16 then, you know, it's singling out foreign -- not
17 interstate -- foreign commerce. It's singling
18 out foreign commerce for special treatment,
19 which I think, under the Constitution and under
20 the framers' intent, would be a -- would be a --

21 JUSTICE ALITO: Thank you.

22 MR. KNEEDLER: -- serious problem.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: Mr. Kneedler, if

1 Petitioner did not claim that there were these
2 unique tracing and separation problems, already
3 could do the tracing, could do the separation,
4 would you still say that there was a substantial
5 burden on interstate commerce? And if so --

6 MR. KNEEDLER: Yes. Our --

7 JUSTICE SOTOMAYOR: -- why?

8 MR. KNEEDLER: -- our position does
9 not turn on -- does not turn on whether a
10 product can be traced. Our position turns on
11 the fact that the conduct on the farm would have
12 to be changed to comply --

13 JUSTICE SOTOMAYOR: Is that because --

14 MR. KNEEDLER: -- which would in turn
15 have costs. But --

16 JUSTICE SOTOMAYOR: Well, so any cost
17 is a substantial burden on interstate commerce?

18 MR. KNEEDLER: No. I mean, under --
19 under Pike balancing, if there is a
20 substantiated legitimate local public interest,
21 that -- that would prevail unless --

22 JUSTICE SOTOMAYOR: So whether --

23 MR. KNEEDLER: -- it's greatly
24 exceeded --

25 JUSTICE SOTOMAYOR: So you are going

1 -- you're asking us to do what Justice Gorsuch
2 said, give moral objection zero or maybe .5
3 importance, and a dollar increase in production,
4 the balance then goes against the law?

5 MR. KNEEDLER: Well, I -- I think
6 there would probably be a -- you wouldn't -- you
7 wouldn't have to get there because if the burden
8 is trivial, the case -- the suit wouldn't be
9 brought, but it wouldn't be --

10 JUSTICE SOTOMAYOR: Has there ever --

11 MR. KNEEDLER: -- it may not be a
12 cognizable claim in that situation.

13 JUSTICE SOTOMAYOR: Any of our cases
14 in Pike, even in extraterritoriality, can you
15 point to one where just increased cost has
16 created an objectionable interstate burden?

17 MR. KNEEDLER: Well, the Court in Pike
18 itself discussed the fact that the -- that the
19 requirement there would effectively impose a
20 requirement on the company to build a warehouse
21 for \$200,000 in Arizona in order to be able to
22 ship its cantaloupes out of -- out of state.

23 And there have been other situations,
24 some of the other -- I think Kassel, several
25 other cases have focused on costs.

1 JUSTICE SOTOMAYOR: So give me that --
2 give me that line. Explain it to me. How much
3 cost?

4 MR. KNEEDLER: I think it -- I think
5 it's difficult to quantify, but let -- let me
6 make a -- an important antecedent point. Costs
7 are a manifestation of the burden on interstate
8 commerce.

9 But, when California law requires a
10 foreign producer to change its operation because
11 California disagrees with the way it's done,
12 that is itself a burden on interstate commerce.
13 It will, in turn, cost a lot of money, but --
14 but in terms of regulating interstate commerce,
15 you --

16 JUSTICE SOTOMAYOR: So why do we let
17 consumer demand do it?

18 MR. KNEEDLER: I'm sorry?

19 JUSTICE SOTOMAYOR: Why do we let
20 consumer demand do it? I mean, consumer demand
21 is requiring changes in production.

22 MR. KNEEDLER: Well, as I say, the --
23 the -- the state -- producers can voluntarily do
24 that. They can ship their product into
25 California. And, as I say, USDA --

1 JUSTICE SOTOMAYOR: They can -- they
2 can voluntarily do that even under the state
3 regulation. They can choose to or not choose
4 to.

5 MR. KNEEDLER: Yes. But -- but -- but
6 I --

7 JUSTICE SOTOMAYOR: They can forego
8 the California market or they can stay in it.

9 MR. KNEEDLER: But I -- but I -- I
10 think that that's -- that would prove far too
11 much because, if you have a trade barrier
12 preventing the shipment of a product from one
13 state to another, the -- the -- the shipper in
14 the other state can always say I won't ship
15 there. I'll just -- I'll just trade elsewhere.

16 That's not an answer to the Commerce
17 Clause's concern about a -- about a national
18 economic union, not its concern with
19 balkanization and its respect for horizontal
20 autonomy of -- of the respective states.

21 I also want to point out --

22 JUSTICE SOTOMAYOR: You've answered my
23 question. Thank you.

24 MR. KNEEDLER: Okay.

25 CHIEF JUSTICE ROBERTS: Justice Kagan.

1 JUSTICE KAGAN: Mr. Kneedler, maybe
2 I'm misunderstanding, but your argument here
3 today seems stronger than your argument in the
4 briefs, and I just want to say why I think that
5 and -- and have you respond to it.

6 I had understood in your briefs that
7 you were putting a lot of weight on the fact
8 that this is in the pleading stage and you were
9 just saying: Look, the pleading requirements
10 have been satisfied. We should go on and do the
11 hard work at summary judgment or at trial or
12 something.

13 And if I understand your answers to a
14 lot of these questions, I honestly don't
15 understand how you think California could win at
16 summary judgment or at trial.

17 So I guess my question to you is, is
18 that fair? Is your argument basically
19 California can't win? And, if not, what it
20 could say to win?

21 MR. KNEEDLER: Well, first of all, our
22 brief made two points about the asserted local
23 interests of California. With respect to the
24 moral interest, we, I think, pretty clearly said
25 that California's moral opposition or

1 philosophical opposition really --

2 JUSTICE KAGAN: Can't count.

3 MR. KNEEDLER: -- can't count.

4 JUSTICE KAGAN: And I guess what --
5 what -- what really led to this question was
6 your answer to Justice Sotomayor when you -- on
7 the one hand, you say the moral can't count.
8 There -- there is then the health. And we
9 haven't really talked about that much.

10 But then, in answering Justice
11 Sotomayor, you said it really doesn't matter if
12 Petitioners are right about the tracing and
13 about, you know, whether they could segregate
14 different kinds of products. That just doesn't
15 matter because there's a sort of -- you know
16 there just -- there's just an effect on
17 production processes. I suppose this gets into
18 Justice Barrett's comment that it's -- it's just
19 getting to sound a lot more per se.

20 MR. KNEEDLER: No, I -- I didn't mean
21 to say that costs are irrelevant. I think costs
22 are an important factor under -- under Pike
23 balancing, and the costs at least here that are
24 alleged are -- you know, are substantial.

25 But I also think that the -- that

1 the --

2 JUSTICE KAGAN: But the costs that are
3 alleged are substantial because Mr. Bishop has
4 this point about the difficulty of segregation
5 given the nature of the industry.

6 If that turns out not to be true, does
7 California then win? Can California then win?

8 MR. KNEEDLER: I mean, there's still
9 the cost of the individual pork producers having
10 to reconfigure their farms. And so the ability
11 to trace is only part of the -- part of the
12 question.

13 But -- and that there's allegations
14 and -- and declarations supporting the complaint
15 that explain what would be entailed in expanding
16 to 24 square feet or -- or pen -- group pens
17 rather than individual pens.

18 The -- the -- the adverse effects that
19 may have on both the productivity and health of
20 the sows, I mean, there are a lot of competing
21 considerations.

22 JUSTICE KAGAN: Would it be fair to
23 say that you think California should lose this
24 case?

25 MR. KNEEDLER: No, we have not taken a

1 position on whether their health and safety
2 rationale would -- would prevail. But the fact
3 that California has not relied on that and --
4 and the plausible allegations we think in the
5 complaint do -- do require that the plaintiffs
6 be given a chance to prove their case.

7 But -- but this statute is also
8 unusual in that it is trying to project
9 California's law into other states, which, for
10 example, Carbone, not just Baldwin, said was a
11 problem.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

15 JUSTICE GORSUCH: Mr. Kneedler, you --
16 you place a lot of stress on the fact that there
17 would be increased costs to certain producers
18 out of state.

19 But what if all of those costs are
20 borne by California consumers who are willing to
21 pay a higher price for a certain kind of
22 product, pork products produced in compliance
23 with their laws?

24 Is there any reason -- would that pose
25 a problem under your theory? Let's say all of

1 the costs are borne by California consumers.

2 MR. KNEEDLER: I -- I -- I don't think
3 -- excuse me. I don't think in the main that
4 the Pike analysis would -- would turn on how the
5 costs played out. I mean, for example, you
6 could have a --

7 JUSTICE GORSUCH: So -- so, if that's
8 the case, then -- then this is really an
9 argument about protecting certain modes of
10 production by certain manufacturers out of state
11 rather than letting the market play out. Even
12 if some other persons might come into the market
13 or might already be in the market who are happy
14 to participate in California's system and
15 fulfill that need at a higher price, we still
16 have an interstate commerce problem.

17 MR. KNEEDLER: Well, the first point I
18 wanted to make is a tariff might increase the
19 cost, and consumers in California might be
20 willing to pay it, but that doesn't render it
21 okay under the Commerce Clause.

22 JUSTICE GORSUCH: Okay. All right.

23 MR. KNEEDLER: But --

24 JUSTICE GORSUCH: No, I just want to
25 understand your argument. So even if California

1 consumers pay all of the cost of this law, all
2 of it, it's still a problem?

3 MR. KNEEDLER: Yes, because --
4 because, again, California is -- in -- in this
5 instance --

6 JUSTICE GORSUCH: Okay.

7 MR. KNEEDLER: -- is regulating
8 conduct outside the state.

9 JUSTICE GORSUCH: I want to pick up on
10 that, all right, and the moral objection. You
11 keep coming to the idea that they're trying to
12 regulate something outside of the state.

13 But, as I understand California's
14 position charitably, it's that Californians,
15 63 percent of them, voted for this law. They
16 don't wish to have California be complicit, even
17 indirectly, in -- in -- in livestock practices
18 that they find abhorrent, wherever they occur,
19 in California or anywhere else.

20 Why isn't that a correct understanding
21 of California's asserted moral interest and why
22 isn't that an in-state moral interest?

23 MR. KNEEDLER: First of all, it's
24 individuals who ordinarily have moral objections
25 to start with.

1 JUSTICE GORSUCH: Oh, no, I thought --
2 well, hold on. Hold on.

3 MR. KNEEDLER: And a state can --

4 JUSTICE GORSUCH: Do -- can states --

5 MR. KNEEDLER: A state -- a state --

6 JUSTICE GORSUCH: Okay. All right.

7 MR. KNEEDLER: -- a state --

8 JUSTICE GORSUCH: So let's put that
9 aside then.

10 MR. KNEEDLER: But -- but a -- a state
11 can enact a law regulating conduct within the
12 state on the basis of morals.

13 JUSTICE GORSUCH: So we can put that
14 aside.

15 MR. KNEEDLER: But -- but, when it
16 comes to conduct outside the state, that would
17 open a -- a -- a huge invitation and -- and --
18 and I think greatly undermine the Commerce
19 Clause because a lot of regulation can be
20 described --

21 JUSTICE GORSUCH: So, if all pig
22 producers --

23 MR. KNEEDLER: -- as based on morals.

24 JUSTICE GORSUCH: -- were in
25 California, this law would be okay. It's just

1 because pig producers are by and large mostly
2 out of state that it poses a problem?

3 MR. KNEEDLER: Well, California has
4 independently imposed a -- a ban on pork
5 production under these standards within the
6 state.

7 JUSTICE GORSUCH: I'm asking -- I
8 understand that. But answer my question, if you
9 will. If pork producers were in state, this law
10 would be okay. It's just because they're out of
11 state that it poses a problem?

12 MR. KNEEDLER: Yes.

13 JUSTICE GORSUCH: Okay.

14 MR. KNEEDLER: And --

15 JUSTICE GORSUCH: But -- but, if
16 that's the case, again, why -- why is it
17 uncharitable -- why isn't it uncharitable to
18 suggest that they're trying to regulate
19 out-of-state conduct when they may just be
20 saying we don't wish to participate in this at
21 all wherever it occurs --

22 MR. KNEEDLER: Oh, I -- I -- I -- I --
23 I --

24 JUSTICE GORSUCH: -- whether it's
25 slavery or horse meat or pig production?

1 MR. KNEEDLER: I think that is -- you
2 know, I think that is their asserted interest in
3 the end. What I'm saying is that -- that the
4 Commerce Clause and -- and our system of
5 horizontal federalism generally can really not
6 allow for that because it would -- it would
7 create the very Balkanization of not just
8 commercial regulation but retaliatory
9 non-commercial regulation between the states as
10 one state tries to limit sales, and sales are a
11 way of -- of regulating, prohibiting sales is a
12 way of regulating, by -- by prohibiting sales in
13 the state of anything that comes from a state
14 where it was produced in a way they don't agree
15 with. Produced by union labor, produced by
16 non-union labor, produced -- not paying a
17 sufficient minimum wage, not paying enough for
18 milk as in Baldwin, not disposing of their waste
19 in a -- in a way that the enacting state finds
20 -- finds reasonable.

21 All those could be described in moral
22 terms.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE KAVANAUGH: Two questions.

1 One, the flip side of Justice Thomas's question.
2 If Congress and the President agreed with
3 California's moral judgment, could they pass a
4 law regulating how pigs are housed, at least
5 pigs that are involved in the interstate market?

6 MR. KNEEDLER: Sure. Yes. I mean,
7 that would -- they could definitely do that.

8 JUSTICE KAVANAUGH: And, second, you
9 said this law is unusual. Can you elaborate on
10 that? How unusual is it? And from the
11 perspective of the United States, is it
12 concerned about how usual it will become if
13 California's law is upheld here?

14 MR. KNEEDLER: Yes, it -- as I was
15 just explaining, I think there would be a
16 concern about inviting state laws regulating
17 conduct in another state. And the fact that
18 it's done through sales as opposed to an
19 outright prohibition -- I mean, this Court made
20 a similar point in the -- in the National Meat
21 Association case ten years ago, the preemption
22 case, where the Court said California could not
23 implement its preferred policies with respect to
24 pork coming out of the slaughterhouses by making
25 their regulation on sales rather than a -- than

1 a prohibition.

2 So the sales, the local sales can't be
3 enough to justify the action. So what we have
4 here is basically an attempt by California to
5 regulate what is happening in other states. And
6 as I said, it -- that -- that is a -- a
7 proposition that once -- once unleashed would be
8 -- would be difficult to contain.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: Just one question,
13 Mr. Kneedler.

14 I asked Mr. Bishop how many laws this
15 might affect if -- if we said that it was not
16 permissible. So if this fails either the
17 extraterritoriality principle or Pike balancing,
18 how many other laws would fall, that it might
19 affect? And he said California's -- as I
20 understood him to say, California's is
21 essentially an outlier. States haven't tried to
22 do this.

23 You were talking about what might
24 happen in the future if we allowed California to
25 do it, opening up a can of worms of retaliation.

1 What about the question I asked Mr.
2 Bishop? Are there other laws like this? Is it
3 really the case -- you know, Justice Kagan was
4 giving the example of the pesticide and the
5 firewood -- treatment of firewood. I mean, are
6 -- would we have to worry about calling into
7 question a lot of laws that are pretty common?

8 MR. KNEEDLER: No, I -- I -- I don't
9 think so. With respect to the specific
10 conduct -- context here, there are states that
11 ban raising pigs that are using gestation pens,
12 let's say. Most of those are just limited to
13 the state where the pigs are being raised.
14 Massachusetts also has an extra ban.

15 But in -- in other cases, for example,
16 in the -- in the firewood case, the state has a
17 legitimate interest, unlike here, we think on
18 the moral basis, has a legitimate interest in
19 protecting against the entry of firewood if
20 there -- if there are pests in there that might
21 infect local --

22 JUSTICE BARRETT: Because all the
23 cases that you're aware of or that would be
24 normal rest on safety and health rationales,
25 rather than morals legislation, that this really

1 is --

2 MR. KNEEDLER: They -- they --

3 JUSTICE BARRETT: -- a unique effort
4 in the moralist context?

5 MR. KNEEDLER: Right. Yes. They
6 would be judged under Pike -- under Pike
7 balancing, and -- and if there is a legitimate
8 state interest, and there was not a less
9 invasive way to -- to control the problem, then
10 the -- the state -- state may well be able to do
11 that.

12 But there may be other ways to protect
13 against the entry of injurious products into the
14 state but that would -- that -- that's what Pike
15 balancing is for in the way we think the Court
16 should decide the case.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Yes. Mr. Kneedler,
20 you've said a couple of times that the Commerce
21 Clause cannot allow for what it is that
22 California is doing in this situation. And that
23 sounds pretty categorical to me.

24 And I know that you have been trying
25 to disclaim any reliance on the sort of

1 extraterritoriality principle, that you say we
2 should proceed under Pike balancing. But -- but
3 I also hear you making a claim that sounds to me
4 like an extraterritoriality principle. And can
5 I just focus your attention on that for a
6 second?

7 I think that the Petitioners have
8 actually introduced two different kinds of
9 extraterritoriality principle. In their briefs,
10 they say that the rule should that a state may
11 not enact laws that have the practical effect of
12 controlling conduct. And I worried about that
13 when I read the brief because, to the extent
14 we're talking about effect, then it introduces
15 all kinds of questions, how much, how
16 significant, and it doesn't sound like a
17 bright-line rule anymore to me.

18 But here today the Petitioners kind of
19 move a way a little bit from the controlling
20 effect idea, and they say the per se rule should
21 be essentially focused on the nature of the
22 regulation, that the state law that conditions
23 sales on out-of-state businesses operating in a
24 certain way is the principle. And that's the
25 one that you seem to be agreeing with.

1 To the extent that you say that the
2 problem is that a state who has a morality
3 interest can't have a morality interest that is
4 directed at the manner in which another state is
5 conducting its business or other businesses are
6 operating, why isn't that the same thing that
7 the Petitioners are saying with respect to their
8 extraterritoriality principle and, therefore,
9 doesn't the government agree with them?

10 MR. KNEEDLER: Well, with respect to a
11 regulation like this -- and when I said what --
12 what -- allowing California to do what it's
13 doing would be a serious problem, I was focusing
14 on the -- on the moral justification, which is
15 -- which is a philosophic or political
16 disagreement with what's happening in another
17 state, which we think is not, to use the
18 language of Pike, a legitimate local public
19 interest of California.

20 JUSTICE JACKSON: But isn't that the
21 same thing he's saying when he says --

22 MR. KNEEDLER: Well, it's -- this is a
23 place --

24 JUSTICE JACKSON: -- it's conditioning
25 -- yeah.

1 MR. KNEEDLER: -- this is a place
2 where I think the -- the two arguments might
3 converge.

4 JUSTICE JACKSON: Okay.

5 MR. KNEEDLER: And, in fact, in -- in
6 this Court's decision in Wayfair, the Court said
7 that the Commerce Clause has two principal
8 prohibitions, a prohibition against
9 discrimination and a prohibition against undue
10 burdens. And these are subject to exceptions
11 and variations.

12 So the extraterritoriality principle,
13 as it becomes stronger in a case like this,
14 putting health and safety to one side, could be
15 seen as an independent argument, which is the
16 way Petitioners are presenting it. And -- and
17 you could read language in Baldwin or Healy to
18 say that. Or -- or simply a particularly strong
19 version of Pike balancing where you're -- where
20 you're- - comparing the effect on interstate
21 commerce to what, under this rationale, is an
22 insubstantial or nonexistent in-state interest.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 General Mongan.

1 ORAL ARGUMENT OF MICHAEL J. MONGAN
2 ON BEHALF OF THE STATE RESPONDENTS

3 MR. MONGAN: Mr. Chief Justice, and
4 may it please the Court:

5 Proposition 12 bars the in-state sale
6 of certain pork products. California voters
7 chose to pay higher prices to serve their local
8 interest in refusing to provide a market to
9 products they viewed as morally objectionable
10 and potentially unsafe.

11 The Commerce Clause does not prohibit
12 that choice. Prop 12 is not protectionist or
13 discriminatory. It doesn't implicate the rule
14 in Baldwin and Healy because it doesn't control
15 prices in other states, and it doesn't violate
16 the general principle against regulating wholly
17 extraterritorial commerce.

18 That principle has not been understood
19 to bar states from setting standards for how the
20 goods sold within their borders are manufactured
21 or produced. States routinely enact that kind
22 of law. And, Justice Barrett, at least 24
23 states have done so to serve local moral
24 interests. Sales restrictions often have
25 upstream out-of-state effects, but they're

1 permissible as long as the condition on in-state
2 sales focuses on the actual process for
3 producing the goods sold in the regulating
4 state.

5 In this case, Prop 12's sow housing
6 restrictions are tied to the production process
7 for California-bound pork. They only address
8 the particular breeding sows that are literally
9 the mechanism for creating that pork. And the
10 market already treats that aspect of the
11 production process as a basis for
12 differentiating between products. That's why
13 stores sell crate-free pork.

14 Prop 12 places no restrictions on how
15 out-of-state businesses produce pork for sale in
16 other states, and Petitioners' own allegations
17 show that producers can continue selling pork to
18 other states using different production methods.

19 If Petitioners think Prop 12 raises
20 policy concerns, the solution the framers
21 provided was for them to ask Congress to
22 regulate under the express terms of the Commerce
23 Clause, not for courts to expand the dormant
24 Commerce Clause.

25 JUSTICE THOMAS: Mr. Mongan, does it

1 matter whether or not you focus directly on the
2 upstream effects, that that's the point of the
3 legislation, as opposed to a collateral effect
4 of your legislation?

5 MR. MONGAN: Your Honor, what matters
6 is whether the state is regulating, with respect
7 to the goods sold within its borders, and
8 setting production standards, manufacturing
9 standards for those goods.

10 JUSTICE THOMAS: So it doesn't matter
11 that the purpose could be to have the upstream
12 effect?

13 MR. MONGAN: Well, Your Honor, I think
14 in -- in this case, and -- and what will often
15 be the case, is that these laws are motivated by
16 in-state local interests. And here there is two
17 interests that were reflected in the ballot
18 materials. One of them is a -- a local
19 interest. And the state not wanting its stores
20 and markets to be complicit in selling a product
21 that a substantial majority of the voters view
22 as immoral, and many consumers and retailers as
23 well, as evidenced by the shift to crate-free
24 pork.

25 JUSTICE THOMAS: How far would you

1 carry that? Could you -- other than beyond the
2 health and safety concerns that you might have
3 here, you'd say moral concerns.

4 Could it extend to a state that has,
5 for example, different political views on
6 certain issues that are important to your
7 voters?

8 MR. MONGAN: I don't think so, Your
9 Honor, if I'm understanding the hypothetical
10 correctly.

11 So, for example, if a state were to
12 bar the importation of goods from another state
13 because that state has a particular policy, that
14 would be a facially discriminatory law. It
15 would be equivalent to an embargo. And that's a
16 paradigmatic Dormant Commerce Clause problem.

17 It's quite different from a neutral
18 in-state sales restriction of the type which is
19 quite common across the country that allows all
20 producers to freely compete so long as they
21 produce goods that satisfy the --

22 JUSTICE KAGAN: But, Mr. Mongan --

23 MR. MONGAN: -- the relevant
24 standards.

25 JUSTICE KAGAN: -- a lot of policy

1 disputes can be incorporated into laws like
2 yours. So Mr. Kneedler gave examples of a few.

3 You know, one, California can do laws,
4 you have to be pro-labor. And Texas can do laws
5 saying -- pro-labor union. And Texas can do
6 laws that say you have to be anti-labor union,
7 you know, close shop, open shop. You could --
8 you could have states making immigration policy,
9 essentially, through these laws.

10 You could have states doing a wide
11 variety of things through the mechanism of
12 saying, well, unless you comply, you can't sell
13 goods in our market.

14 And, you know, we live in a divided
15 country, and the -- the -- the balkanization
16 that the framers were concerned about is surely
17 present today. And I think that the -- that the
18 real power of Mr. Kneedler's examples were, you
19 know, do we want to live in a world where we're
20 constantly at each others' throats and, you
21 know, Texas is at war with California and
22 California at war with Texas?

23 MR. MONGAN: Right, I -- I certainly
24 understand the concern, Your Honor. I think
25 that there is and should be a constitutional

1 check on that, which is that a state regulation
2 of a product has to be sufficiently tied to the
3 actual process of producing that product.

4 And I think a lot of the hypotheticals
5 that my friend pointed to that you've just
6 recited, in addition to likely having some
7 preemption problems, which I'm happy to speak
8 to, but also deal with an in-state sales
9 condition that is not sufficiently tied to
10 production.

11 JUSTICE BARRETT: But where does that
12 come from? I mean, you -- you're saying that in
13 response to Justice Kagan, you've said a couple
14 times that -- you've emphasized that this
15 restriction on how the pork -- how the pigs are
16 raised is tied to the product itself, but why is
17 that necessary?

18 I mean, you know, your friend on the
19 other side said, well, you know, you could have
20 things that tied -- tied the availability of the
21 market to the production of certain health
22 services.

23 So could you have California pass a
24 law that said we're not going to buy any pork
25 from companies that don't require all their

1 employees to be vaccinated or from corporations
2 that don't fund gender-affirming surgery or that
3 sort of thing?

4 What -- what's the importance and
5 where does it come from of this tie to the
6 product itself?

7 MR. MONGAN: So, Your Honor, as to
8 those hypotheticals, and then if I can get back
9 to the first part of the question, I think those
10 would be problematic because what you have there
11 is a condition on in-state sales that's focused
12 on a general company-wide policy with respect to
13 all of that company's activities wherever it
14 does business, including the production of
15 products for totally different states. It's not
16 focused on production of the goods that are
17 coming into the regulating state.

18 I think that this is a principle that
19 the lower courts have recognized in cases like
20 Legato Vapors, that when you condition the sale
21 of a product coming in on that type of wholly
22 unrelated restriction, then you're not really
23 regulating the product, you are -- it's
24 tantamount to a regulation of a wholly
25 out-of-state activity.

1 And there's some support for this as
2 well in -- in the Brown-Forman decision that was
3 obviously focused on price controls, but the
4 Court made clear you can't condition the
5 privilege of selling liquor into New York on a
6 restriction on how liquor is sold in
7 out-of-state sales to consumers out of state and
8 it'll be consumed out of state.

9 JUSTICE BARRETT: But couldn't
10 Californians have a moral interest in saying
11 they don't want to be complicit and open their
12 supermarket shelves to the wares of a company
13 that mistreats its employees, for example, by
14 not providing certain forms of healthcare?

15 MR. MONGAN: So I -- I -- I certainly
16 could imagine a state articulating that type of
17 moral interest, but I don't think that stating
18 the moral interest is the end of the
19 constitutional analysis.

20 Of course, there can be all sorts of
21 constitutional checks on in-state sales
22 restrictions under the Supremacy Clause or the
23 First or Second or Fourteenth Amendment, and for
24 purposes of the Commerce Clause or -- or -- or a
25 general principle against regulating wholly

1 extraterritorial activity, I think the line I've
2 described is a -- is a sensible one because, on
3 the one hand, states have to be able to regulate
4 the products coming into their borders, but, on
5 the other hand, I think we would all recognize
6 that it would be problematic if states can
7 condition the sales of those products on
8 restrictions of wholly unrelated out-of-state
9 purchasers.

10 JUSTICE ALITO: What about --

11 JUSTICE KAVANAUGH: I mean, wholly
12 unrelated is doing a ton of work in your answers
13 to Justice Barrett. So what about a law that
14 says you can't sell fruit in our state if it's
15 produced -- handled by people who are not in the
16 country legally? Is that state law permissible?
17 And if not, how is it different from this law?

18 MR. MONGAN: So I -- I want to get to
19 the constitutional question. I think there
20 would be an important threshold question there
21 of INA preemption, and that does underscore --

22 JUSTICE KAVANAUGH: Put that aside.

23 MR. MONGAN: Right, Your Honor.

24 JUSTICE KAVANAUGH: Put that aside
25 because I can flip it to any number of other, as

1 Justice Kagan said, social issues if you want me
2 to.

3 MR. MONGAN: I certainly understand
4 that. So, if the question is, you know, could
5 you adopt a regulation that says the particular
6 goods that are coming into this state have to be
7 produced by a -- you know, or -- or -- or have
8 to be worked on by people who are lawfully
9 documented individuals, I -- I don't think I see
10 a Dormant Commerce Clause problem there.

11 I'm not sure that it's different from
12 some other restrictions that have been on the --
13 the books with respect to, for example, the sale
14 of goods produced by child labor.

15 Now I'm sure there's a lot of people
16 in California who might not be happy with that
17 law, but I think --

18 JUSTICE KAVANAUGH: And so minimum
19 wage, same answer?

20 MR. MONGAN: No, I -- I would give a
21 somewhat different answer on -- on the minimum
22 wage question. The hypothetical that my friend
23 raised in -- in his brief I think would be
24 pretty plainly invalid under the rule in Baldwin
25 and Healy because what you really have there is

1 a law seeking to control the -- to limit the
2 price of labor inputs in out-of-state
3 transactions and tie it to the price of labor
4 inputs in in-state transactions, and that's the
5 type of dynamic where --

6 JUSTICE KAVANAUGH: Union membership?

7 MR. MONGAN: Pardon?

8 JUSTICE KAVANAUGH: Union membership?

9 MR. MONGAN: So, again, I think a
10 court would ask there, is there a sufficient
11 nexus between that and the actual production
12 process for a particular good. And I suspect
13 that that would be a hard law for a state to
14 defend because a court would know that this --

15 JUSTICE KAVANAUGH: The word
16 "complicity" can do a ton of work, and that
17 word's been used quite a bit here.

18 MR. MONGAN: So -- so I understand
19 that, but I think that the important analytical
20 point there from my perspective is that -- that
21 that goes to the moral interest that's
22 articulated but that that's not the end of the
23 analysis.

24 And I think, certainly, with respect
25 to Prop 12, I -- I -- I recognize that there are

1 some tough line-drawing exercises with respect
2 to some of these borderline hypotheticals. You
3 don't have them with respect to Prop 12.

4 And I think this is a sensible and
5 necessary line to sort of differentiate between
6 the situations where states are directly setting
7 standards for products coming into their borders
8 and the -- the more -- much more problematic
9 scenarios that my friends are pointing to.

10 JUSTICE ALITO: I -- I don't
11 understand the distinction that you're drawing.
12 Could you try to just -- maybe it's just not
13 getting through to me -- explain it to me?

14 What is the difference?

15 MR. MONGAN: So --

16 JUSTICE ALITO: A state says, we don't
17 want a particular product to come into our
18 borders because we think it was produced in an
19 immoral way.

20 MR. MONGAN: So -- so, Your Honor,
21 perhaps --

22 JUSTICE ALITO: Why doesn't that apply
23 equally to a -- a law that says you can't bring
24 any products into our state if they were
25 produced by employees who did not have the right

1 to work, the right to -- not to join a union?

2 MR. MONGAN: So -- so, Your Honor,
3 perhaps I can answer by pointing to some of the
4 concrete examples that Justice Barrett was
5 asking about because there are a number of -- of
6 these morals-focused laws and they're not just
7 the categorical bans like on horse meat and
8 ivory.

9 JUSTICE ALITO: No, it would help me
10 more if you could state the principle rather
11 than giving me examples.

12 MR. MONGAN: Right. I -- I -- I think
13 that the principle is that it should be
14 uncontroversial that a state may regulate the
15 products sold within their borders --

16 JUSTICE ALITO: Right.

17 MR. MONGAN: -- and that that extends
18 -- and it does in many different examples -- to
19 the packaging, production process, the -- the
20 manufacturing process for those goods.

21 I -- I think that it is sensible to
22 draw a line of the type that the Seventh Circuit
23 drew in Legato Vapors if you're conditioning
24 in-state sales on restrictions that are much
25 more attenuated from the actual production

1 process. And I think the union hypothetical,
2 for example, that goes to a general matter of
3 the relations between labor and employees and --
4 and -- and not to the particulars of how a
5 product is produced.

6 JUSTICE ALITO: More -- more
7 attenuated?

8 MR. MONGANG: -- is produced.

9 JUSTICE ALITO: What does that mean?
10 How do you draw -- how do you know when it's --
11 becomes too -- too attenuated?

12 MR. MONGAN: Well, I think a court
13 would look to whether it is -- the regulation is
14 actually geared to the mechanics of the
15 production process or whether it is addressing,
16 for example, some general corporate policy that
17 applies, you know, much more broadly and is
18 several steps removed from the production
19 process. So --

20 JUSTICE KAGAN: And why is that the
21 relevant inquiry? I mean, even if we could
22 figure out which falls on which side, why is
23 that the relevant inquiry?

24 MR. MONGAN: I -- I think it's a
25 relevant inquiry, Your Honor, because the Court

1 has recognized that there is, whether it's under
2 the Commerce Clause or otherwise, a general
3 principle against states regulating wholly
4 extraterritorial commerce.

5 And I would submit that I think a lot
6 of the troubling hypotheticals are scenarios
7 where, yes, there is a regulation of a -- a good
8 but the actual condition that's placed as a
9 restriction on the in-state sale of that good is
10 going to some activity that is fairly --

11 JUSTICE KAGAN: You're basically
12 saying that the way we should think about this
13 is to use an anti-leveraging principle, that a
14 state can't use its power as a consumer or as --
15 you know, as a market to leverage policy views
16 that are unconnected with the marketing of a
17 product?

18 MR. MORGAN: I -- I -- I think I would
19 describe it as a -- as a principle that focuses
20 on the -- the particular production process for
21 -- for a product. And, yes, that would be the
22 concern motivating that principle. But, Your
23 Honor --

24 CHIEF JUSTICE ROBERTS: I'm sorry, go
25 ahead.

1 MR. MONGAN: Oh. Well, I just wanted
2 to make the point that this is not unique to
3 California. I -- I would point the Court to
4 Professor Snead's amicus brief, where he
5 discusses this type of interest, including with
6 respect to morals-based policies such as the law
7 that Arizona and seven other states have banning
8 the sale of eggs from hens that don't have
9 enough space, or Louisiana's law --

10 CHIEF JUSTICE ROBERTS: Right. You've
11 been talking of -- as -- as if the morals aspect
12 was the significant part of the inquiry. But
13 wouldn't your case be a lot harder if there were
14 a non-de minimis number of pork producers in
15 California?

16 MR. MONGAN: Your Honor, I guess -- is
17 the question going to the -- to potential
18 concerns about discrimination?

19 CHIEF JUSTICE ROBERTS: Well, many of
20 our cases can arguably be distinguished on the
21 ground that they were concerned with
22 protectionism.

23 MR. MONGAN: Right. Right.

24 CHIEF JUSTICE ROBERTS: And if there
25 are pork producers in California who are going

1 to be subject to this law, it's a way for
2 California to make sure those producers aren't
3 undermined by producers who don't have to comply
4 with it.

5 MR. MONGAN: That's -- that's right,
6 Your Honor. And the core focus of this doctrine
7 is on protectionism. And so I think in a
8 situation like that, although the law is
9 facially neutral, a court would look to the
10 particular circumstances to see if there's
11 discriminatory effects of the type the Court
12 found in Hunt. Of course, my friends have
13 disclaimed any protectionism or discrimination
14 claim here, and I don't see how that would be
15 viable under the particular circumstances.

16 And as to extraterritoriality
17 considerations, I think that the Court has made
18 quite clear that in cases like Exxon and Walsh,
19 the fact that a state is regulating, even with
20 respect to an industry that doesn't have a
21 presence in that state, is not a dormant
22 Commerce Clause problem.

23 CHIEF JUSTICE ROBERTS: Well, how do
24 we decide -- you keep emphasizing the number of
25 people in California who voted in favor of the

1 referendum. What if there are a substantial
2 number who voted for moral reasons and a
3 substantial number who voted for economic
4 reasons? How should we analyze that? Or, you
5 know, obviously, what if we can't tell?

6 MR. MONGAN: Well, I -- I certainly
7 understand that. That's a common problem with
8 looking at the purposes of legislation.

9 I -- I think in this case, it is clear
10 on the face of the statute and in the ballot
11 materials, which under California law is
12 powerful evidence of voter intent, that there
13 are these two rationales that -- that we have
14 discussed.

15 CHIEF JUSTICE ROBERTS: So if it's --
16 you analyze a situation where you can't tell the
17 basis for the reason, and as we've been
18 discussing, you think it may be more vulnerable
19 if it's a protectionist reason, rather than a
20 moral reason.

21 How do we parse that -- that statute?

22 MR. MONGAN: Right. So, Your Honor, I
23 think that's one of the challenges the Court has
24 wrestled with in the dormant Commerce Clause
25 arena. And, obviously, focusing on legislative

1 purpose is perhaps more disfavored now than it
2 once was in some of the earlier cases. But if
3 you look at the a case like Hunt, it's looking at
4 objective manifestations of protectionism. You
5 have a situation where there are out-of-state
6 competitors who have established a competitive
7 advantage, and the features of the statute admit
8 to neutralize that advantage. But we don't have
9 anything like that here, Your Honor.

10 JUSTICE JACKSON: But how -- how --
11 how does -- the principle that you articulate
12 relate to the concerns of the dormant Commerce
13 Clause? I mean, I had understood that part of
14 the concern was that when states do the kind of
15 thing that you're talking about, even if they
16 are doing so to protect the products in -- for a
17 moral reason that are being sold into the state,
18 it still has a significant impact on interstate
19 commerce and that that's really what the
20 Constitution cares about.

21 So I'm -- I'm a little worried about
22 the line that you draw between conditions --
23 between the types of conditions, conditions that
24 are related to the product versus conditions
25 that aren't, as it relates to the purposes of

1 the dormant Commerce Clause.

2 MR. MONGAN: So -- so two points, Your
3 Honor. I mean, I think my friend spoke about
4 the history, the framing history, of the -- the
5 Commerce Clause. I think the concern there was
6 very clearly with discriminatory, facially
7 discriminatory statutes like embargoes and
8 customs duties and the like. That's the type of
9 dynamic described by the narrow rule in Baldwin
10 and Healy. And we don't have anything like that
11 here.

12 The line that I have been describing,
13 I think, is a reflection of the general
14 principle against regulating wholly
15 extraterritorial conduct. The plurality in
16 Edgar pointed to that as a Commerce Clause
17 principle, and a number of lower courts,
18 including our own circuit, have applied it as
19 such. And it's a means of differentiating
20 between the large number of valid in-state
21 states restrictions and some of the more
22 problematic hypotheticals that we have -- that
23 we have heard today.

24 JUSTICE JACKSON: So you're suggesting
25 that it's only impermissible if it's wholly

1 extraterritorial as identified by it being a
2 condition that is not related at all to the
3 actual product that's coming into the state? Is
4 that the line that you're --

5 MR. MONGAN: Your Honor, I think
6 that's about right. I mean, I'd point the
7 Court, for example, to the Legato Vapors case
8 that my friend referenced in the Seventh
9 Circuit. So there you have an in-state sale
10 condition on vaping products, but the feature
11 that most concerned the Seventh Circuit was that
12 it was requiring out-of-state manufacturers to
13 enter into a particular security contract with a
14 particular private term for a -- a firm for a
15 five-year term.

16 And the Court had no difficulty saying
17 that's not really regulating the product that's
18 sold in the state. It's tantamount to a -- to a
19 regulate of -- regulation of something that is
20 wholly out of state.

21 JUSTICE JACKSON: And it doesn't
22 matter at all to you whether the state's attempt
23 to advance its interest with respect to this
24 product affects the entire market, reshapes the
25 way -- I mean, I think --

1 MR. MONGAN: Right.

2 JUSTICE JACKSON: -- the problem that
3 I'm having a little bit with -- with your side
4 of this case is that we're only at the motion to
5 dismiss stage. I know that there are likely to
6 be some disputes about the extent to which this
7 ultimately does impact, and how much, the -- the
8 market, but at this stage, it seems to me that
9 the Court has to accept that the regulation at
10 issue here is going to have this substantial
11 impact on the operation of this market, and you
12 seem to be indicating that that's not a viable
13 thing from the standpoint of analyzing whether
14 there is some sort of interstate commerce
15 problem.

16 MR. MONGAN: Your Honor, if I -- if I
17 could spend a moment on that --

18 JUSTICE JACKSON: Yes.

19 MR. MONGAN: -- because I think this
20 is very important and we've heard some rhetoric
21 today. We are at the motion to dismiss stage,
22 and we do have to focus on the specific
23 complaint allegations.

24 Those allegations acknowledge, at
25 paragraph 58, that producers are free to choose

1 whether or not they shift to this production
2 method. They've identified in their
3 declarations eight of their own members who've
4 definitively announced they're not shifting.

5 The allegations, paragraphs 297 to
6 299, and the declaration acknowledge that
7 segregation and tracing is available. And if
8 you can segregate and trace, that means that you
9 can pass along the increased costs of production
10 to the in California --

11 JUSTICE JACKSON: Right. They're
12 available but that's not the way the market is
13 right now, according to the complaint. And so
14 some changes are going to have to be made. And
15 I guess I'm just wondering why it isn't
16 plausible to believe that the changes that are
17 going to be made would be a burden on the
18 industry?

19 MR. MONGAN: Well, Your Honor, I don't
20 even think that that is consistent with the
21 allegation in the declarations. They have
22 acknowledged that this can be done and is being
23 done. I'd point you to Pet. App. 287a. This is
24 a declaration from one of their members talking
25 about how he currently agency segregates: "My

1 hogs are marked with my farm identification
2 number that permits them to be segregated from
3 other product." That's for producing crate-free
4 pork. And he's told in his contract with the
5 end supplier that he's going to be paid a price
6 per --

7 JUSTICE JACKSON: Right, but you're
8 going to the evidence. I thought we were at the
9 motion to dismiss stage.

10 MR. MONGAN: Well, I think --

11 JUSTICE JACKSON: I mean, I understand
12 that there might be declarations that say
13 something different, but we're supposed to be
14 confined to the corners of the complaint with
15 respect to what is happening in this industry.

16 MR. MONGAN: I certainly understand
17 and agree with that, Your Honor, but I think
18 even within the corners of the complaint, the
19 declarations attached to the complaint,
20 paragraphs 297 to 299, acknowledge that this is
21 feasible and available.

22 And it's evident in the market, which
23 is why we have crate-free pork and organic pork
24 available in -- in grocery stores. And they
25 acknowledge the crate-free pork part of the --

1 of the industry.

2 So I don't -- I think the burden
3 ultimately here is one that will fall on
4 California consumers, and that's not a burden
5 that should weigh heavily, if at all, in any
6 Pike balancing.

7 JUSTICE ALITO: Suppose the
8 pork-producing states and pork-consuming states
9 get mad at you because of this and they decide,
10 okay, fine, turnaround is fair play, so we're
11 going to adopt regulations concerning the
12 production of agricultural products that are
13 produced almost exclusively in California.

14 Would that be okay? For example,
15 could a state say, we're really concerned about
16 water shortages, so we're going to prohibit the
17 shipment through our territory or the sale
18 within our borders of any almonds where the
19 trees are irrigated? Could they do that?

20 MR. MONGAN: Your Honor, if it's
21 focused on the sale within their borders, I
22 think that the logical conclusion of our
23 position is that they could do that. And I -- I
24 think that there's likely to be political checks
25 for that type of -- of law if it raises concerns

1 in the marketplace.

2 I mean, one thing is, if you adopt a
3 regulation that is just too burdensome to comply
4 with, then the industry will stop serving a
5 state and the state has to decide do we want our
6 regulation or do we want pork.

7 JUSTICE ALITO: Are you unconcerned
8 about all this? Is California unconcerned about
9 all this because it is such a giant, you can
10 wield this power, Wyoming couldn't do it, most
11 other states couldn't do it, but you can do it?
12 You can bully the other states, and so you're
13 not really that concerned about retaliation? Is
14 that part of your position?

15 MR. MONGAN: No, Your Honor, that's
16 certainly not how I would put it. I think that
17 this is a concern held by California and many
18 other states, including states who are
19 pork-producing, like Michigan and Illinois, who
20 filed an amicus brief on our side, and it goes
21 to core features of state sovereign authority to
22 control the -- the products that are sold within
23 our borders.

24 JUSTICE ALITO: Well, one of the
25 arguments I -- I'd like you to respond to this

1 that's made by Petitioner and some of -- some of
2 their amici, is that big companies can comply
3 with this, no problem, but what this is going to
4 do is shut out of the market all the small
5 companies.

6 MR. MONGAN: So, Your Honor, if I can
7 offer a formal response to that focused on the
8 complaint and -- and then a -- a more practical
9 response.

10 They have alleged that. I think what
11 this Court made clear in the Exxon case is that
12 that type of concern is not the type of burden
13 that the Dormant Commerce Clause is concerned
14 with. It goes to the -- the nature of -- of
15 delivery and the methods of operation in an
16 industry.

17 I think that the practical response is
18 that's actually not what we're seeing and that
19 -- that smaller pork producers can choose
20 whether to get a substantial premium for
21 producing this type of specialty product or
22 crate-free pork or continue producing for other
23 states, 49 other states, exactly as many of
24 their own members as the complaint acknowledges
25 have decided to do.

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas?

3 Justice Alito?

4 Justice Kagan?

5 Justice Gorsuch?

6 JUSTICE KAVANAUGH: Do you accept Pike
7 as a precedent of this Court, or are you asking
8 for it to be overruled?

9 MR. MONGAN: We are not asking it to
10 be overruled, Your Honor. We --

11 JUSTICE KAVANAUGH: That's -- thank
12 you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 Justice Jackson?

16 Thank you, counsel.

17 Mr. Lamken.

18 ORAL ARGUMENT OF JEFFREY A. LAMKEN
19 ON BEHALF OF THE HUMANE SOCIETY OF THE UNITED STATES,
20 ET AL., RESPONDENTS

21 MR. LAMKEN: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 Proposition 12 -- excuse me, the
24 Dormant Commerce Clause's dormant aspect focused
25 on protectionism, discrimination, interferences

1 with the instrumentalities of interstate
2 commerce. Proposition 12 concededly is none of
3 those things.

4 It prohibits the sale within
5 California of pork that Californians find
6 immoral and unsafe regardless of where it
7 originates.

8 Proposition 12 reflects a moral
9 tradition that has been respected for millennia
10 that consuming meat that is a product of animal
11 cruelty is itself immoral. California chose to
12 rid its markets of those -- some of those
13 immoral products, and the framers did not sub
14 silentio prohibit states from banning immoral
15 products by hiding in -- hiding that
16 revolutionary limit in a negative implication in
17 a clause that simply is an affirmative grant of
18 authority to Congress, nor do they impose more
19 demanding health and safety proof requirements.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Counsel, how broadly
22 would you define "immoral"?

23 MR. LAMKEN: So, Your Honor, I think,
24 when it comes to the product, you would look at
25 the closeness of the relationship between the --

1 the regulation and the product itself.

2 In this case, it is very closely
3 bound. You can look at three considerations in
4 particular. First, the market distinguishes
5 between these products. They distinguish -- and
6 regulators as well, between crate-raised pork
7 that's inhumane and humanely raised pork.

8 JUSTICE THOMAS: No, I mean the term,
9 a definition of the term "immoral," of the word
10 "immoral."

11 MR. LAMKEN: Yeah. So I think, in
12 general, that would be my second consideration,
13 is you -- one of the things you might look at is
14 looking at whether this is a traditional basis
15 for regulation, if it's something that
16 distinguishes a product from being moral versus
17 immoral.

18 And, here, it's historically bound.
19 The major religions, humanity has recognized for
20 millennia that products can be immoral because
21 they are a product of animal cruelty, in
22 particular, for -- in particular food.

23 And so that is one of the features we
24 do. But we'd also look at whether the market
25 recognizes things as distinct products based on

1 their morality. And the market here and
2 regulators here distinguish inhumanely raised
3 crated-pork from humanely raised pork.
4 Companies look at it. You have companies like
5 from Burger King to Whole Foods make that
6 distinction, regulators make the distinction.

7 The USDA's FSIS regulates labels.

8 JUSTICE JACKSON: But you're
9 suggesting --

10 MR. LAMKEN: It excludes --

11 JUSTICE JACKSON: -- you're suggesting
12 as though that distinction is universally held,
13 and if it were, I would think the market would
14 have already accounted for it everywhere.

15 The problem as I hear your other
16 friend saying is that Iowa, for example,
17 disagrees. Iowa does not believe that its porks
18 are being held -- and I'm saying this
19 hypothetically, I don't know what Iowa actually
20 believes, but assume we have a state that --
21 that -- that thinks it's not immoral to hold
22 their sows in a particular way.

23 To what extent does California get to
24 control what Iowa does with respect to the
25 housing of its pork?

1 MR. LAMKEN: It does not. But the
2 question in this case is, who decides the pork
3 that appears on California grocery shelves
4 that's purchased and consumed by Californians?
5 To say that when another state has a lesser
6 standard, it decides what appears on California
7 grocery shelves --

8 JUSTICE JACKSON: But why can't -- why
9 can't California solve for its morality issue in
10 a different way, in a less burden -- if we
11 assume that it's really going to create a burden
12 to allow California to ban all Iowa pork on the
13 grounds that California disagrees with how Iowa
14 produces pork, why shouldn't the balance to the
15 extent we're making one be to simply allow
16 California to express its morality interest
17 through a less burdensome means, like
18 segregating Iowa's pork when it comes in,
19 putting a big label over it that says this is
20 immorally produced or whatever, and that won't
21 hurt Iowa as much? Why can't we say that that's
22 the way this should be?

23 MR. LAMKEN: So I should be clear that
24 if it were a distinction between Iowa pork and
25 other pork, that would be discriminatory. You

1 don't get to distinguish based on the origin in
2 a state, but distinguish between crate-free pork
3 and immoral inhumane pork.

4 JUSTICE JACKSON: All right, fine.
5 Whatever -- whatever the distinction is, the
6 question is, why does California get to ban it
7 when it has all of the implications on commerce
8 with respect to the supply chain upstream, why
9 isn't the -- the solution that California just
10 gets to announce?

11 MR. LAMKEN: Yes. So I think
12 there's two -- the answer is in two parts. The
13 first is that California has an interest in
14 banning immoral products from its own markets.
15 And it doesn't serve that interest to say, well,
16 we'll put labels on it because it doesn't ban it
17 from the market. It's still in --

18 JUSTICE JACKSON: But wait, why does
19 it ban it? Isn't that just not trusting
20 California consumers? If they -- if they agree,
21 right, there was a problem earlier about, like,
22 how do we know how many consumers agree or
23 disagree with the morality interest.

24 Wouldn't it best be served and we
25 would know based on labeling it and if it

1 doesn't get sold, then there we are?

2 MR. LAMKEN: Well, it still leaves
3 California's markets available for products that
4 California has deemed immoral. But it also
5 doesn't serve California's other interest, which
6 is ensuring that all Californians have access to
7 morally acceptable pork even if they don't have
8 the resources, they don't have the luxury of
9 studying labels or going to the Whole Foods
10 market on La Cienega. This ensures that all
11 pork in California meets a certain level of
12 moral acceptability --

13 JUSTICE BARRETT: Mr. Lamken, can I
14 ask you about that moral -- I'm sorry to
15 interrupt. I see your time is running out. You
16 told Justice Thomas that the definition of
17 "moral" -- and so you're -- you're saying to
18 Justice Jackson things about, you know,
19 California's moral interest.

20 You told Justice Thomas that your
21 definition of morality would be rooted in
22 cultural traditions and that sort of thing.

23 Is your suggestion that states can
24 only regulate based on morals, that sounds a lot
25 like the substantive Due Process Clause, right?

1 They're supported by the history and traditions
2 of the American people but that other kinds of
3 morals legislation that were maybe more edgy or
4 new would not be a permissible basis?

5 MR. LAMKEN: No, Your Honor. I think
6 what you're asking -- and this is the nexus
7 question that the Court was asking about. When
8 you're asking, is California regulating the
9 product that's being sold in California, or is
10 it so divorced from the nature of the product,
11 its regulation, that what it's doing is reaching
12 across state lines and attempting to control
13 something that's wholly out of state which, mind
14 you, I don't think it's a dormant Commerce
15 Clause issue because it extends beyond commerce.
16 California, for example, couldn't regulate high
17 school curriculum in Texas, even though it has
18 nothing to do with commerce.

19 But when you're making that
20 distinction, you would look at the closeness of
21 the fit between is this product somehow immoral?
22 And things you would look at in deciding whether
23 it affects the morality of the product is, one,
24 you would look at is this a market and
25 regulatory distinction that's regulated? Which

1 is precisely the case here. You would look at
2 is this a distinction that's historically
3 recognized? And this is a deeply rooted
4 historical distinction that we understand that
5 our food can be moral or immoral based on
6 whether it's the product of animal cruelty.

7 And, third, you might look at whether
8 or not this is a common feature through state
9 law generally. And for example here, nine
10 states, from Louisiana to Nevada to Virginia,
11 ban the in-state sale of cosmetics that are
12 tested on animals. Congress --

13 JUSTICE ALITO: And I don't -- I don't
14 understand the distinction you're drawing
15 between regulations that go to the nature of the
16 product and regulations that control the way in
17 which the product is -- is produced.

18 Put aside the -- the health issues,
19 the safety issues. Let's assume for the sake of
20 argument that -- that pork produced in the way
21 it's mostly produced is just as safe as pork
22 produced in accordance with California
23 regulations.

24 If you analyze the pork -- you have
25 two pork chops. One is -- one is, you know,

1 made one -- produced one way. One is produced
2 the other way. The product is exactly the same.

3 MR. LAMKEN: Your Honor, that -- how
4 the product is produced and whether it's done in
5 a humane fashion does distinguish the products.
6 Consumers recognize that as a difference. The
7 United States of America recognizes it as a
8 difference. For example, it bans blood
9 diamonds, conflict diamonds, but not ordinary
10 diamonds. We can -- we ban things that are made
11 by slave --

12 JUSTICE ALITO: No, I --

13 MR. LAMKEN: -- in slave countries but
14 not others.

15 JUSTICE ALITO: -- I understand all of
16 that. I just don't understand how you're going
17 to draw a distinction between --

18 MR. LAMKEN: I --

19 JUSTICE ALITO: -- between the
20 California law and, for example, a law that says
21 you can't sell a product in our state if it was
22 produced by -- by workers who did not have the
23 right to work.

24 MR. LAMKEN: Yeah, and I -- and I
25 think the answer -- you draw the line on this.

1 You'd look at for, example, the right to work
2 example. You'd first ask do consumers, do
3 regulators look at that as a typical distinction
4 that makes one product different from another?
5 They typically don't.

6 The next question is, do you -- is
7 this something with a deep historical tradition
8 that you would recognize that it somehow infects
9 the product and makes the product itself
10 immoral? That's not going to happen with --

11 JUSTICE ALITO: It seems to me --

12 MR. LAMKEN: And the third --

13 JUSTICE ALITO: -- you're asking for a
14 categorization of moral objection so the old
15 ones -- you know, the old ones are okay, but new
16 ones are not really?

17 MR. LAMKEN: You'd also look at how
18 often it happens, whether it's regular in the
19 law that that type of category occurs. And as I
20 pointed out, nine states deal with animal --
21 animal testing. Congress distinguishes. Eight
22 states ban eggs from caged hens. Nine states
23 ban aborted -- aborted fetal tissue but not
24 fetal tissue that's not from abortions.

25 Look at the alternative here. The

1 alternative is that states cannot ban goods
2 based on their morality. The alternative is, if
3 a state thinks it's ethical to eat pork but
4 unethical to eat inhumanely, cruelly raised
5 pork, it can only ban pork entirely?

6 JUSTICE JACKSON: But why that --

7 MR. LAMKEN: That is --

8 JUSTICE JACKSON: -- why is that
9 problematic? I'm just -- I'm just trying to
10 understand how a moral objection gets you all
11 the way to banning. Why wouldn't a state be
12 able to advance its moral interest by
13 identifying those goods and services that don't
14 comport with the state's moral views?

15 I understand health and safety, right,
16 because if you have a health and safety problem,
17 then the state says we can't let people have
18 access to these goods because it's going to hurt
19 them.

20 But I think you have a different set
21 of issues when you're talking about a moral
22 objection and whether or not it's bad to prevent
23 a state from banning a product on that ground
24 when you have this alternative to --

25 MR. LAMKEN: And I -- I think the

1 answer is the states, just like the United
2 States, are allowed to say certain products have
3 a factor to them that renders them immoral and
4 they will deny the access to that product to
5 their markets.

6 JUSTICE KAGAN: So in other words, 60
7 --

8 CHIEF JUSTICE ROBERTS: Thank you.
9 I will get to you in a second.

10 Mr. Lamken, we've heard a lot about
11 morality. I think people in some states, maybe
12 the ones that produce a lot of pork, in Iowa or
13 North Carolina or Indiana, may think there's a
14 moral value in providing a low-cost source of
15 protein to people, maybe particularly at times
16 of rising food prices.

17 But under your analysis, it's
18 California's view of morality that prevails over
19 the views of people in other states because of
20 the market power that they have. So -- I mean,
21 isn't that a consideration we should take into
22 effect in --

23 MR. LAMKEN: So --

24 CHIEF JUSTICE ROBERTS: Analyzing this
25 under the Commerce Clause? If, in fact, moral

1 values are going to be given weight at least as
2 significant as economic ones, why isn't that
3 something that we should be sensitive to under
4 the Commerce Clause?

5 MR. LAMKEN: And each of those states
6 is able to produce pork and consume pork in the
7 fashion they choose. This is a law that
8 addresses only the pork that is consumed in the
9 state of California.

10 CHIEF JUSTICE ROBERTS: Yeah, but the
11 reality is -- the reason they have this law is,
12 one, because they don't have pork producers in
13 California. So nobody is going to be hurt from
14 that point of view.

15 And, two, they want to affect conduct
16 in other states. They want pork producers in
17 Iowa and North Carolina and Indiana to have to
18 produce pork the way they want them to, not
19 necessarily even the way they want their own
20 pork producers to produce, because they don't
21 have any pork producers or a de minimis amount.

22 MR. LAMKEN: Your Honor, the -- first,
23 Exxon makes clear that what the Commerce Clause
24 protects -- protects is interstate commerce, not
25 particular methods of production or organization

1 of industry.

2 And that makes sense. As Lopez makes
3 clear, what matters here and what the core of
4 the Commerce Clause is the instrumentalities and
5 the movement of products in interstate commerce.
6 Once you move to protecting the methods of
7 production and the cost of production, you've
8 now moved to affecting commerce in a sort of
9 Wickard versus Filburn kind of way. But that
10 Wickard versus Filburn kind of way just doesn't
11 have a role when it comes to cutting off state
12 authority.

13 And if we do -- if we do otherwise, we
14 start making those judgments, this Court puts
15 itself back in the role that it once took in
16 Lochner of trying to effect and trying to
17 decide, gee, how good is the state's limit, do
18 we agree with the state limits, or is there
19 another state limit? And what California's law
20 does is it controls solely within California.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 MR. LAMKEN: Almost 13 percent.

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas?

25 Justice Alito?

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: Are you giving up
3 on the health and safety aspects of your claim?

4 MR. LAMKEN: Absolutely not, Your
5 Honor.

6 JUSTICE SOTOMAYOR: You spent all of
7 your argument on the moral issue.

8 MR. LAMKEN: That is a product of
9 having ten minutes, Your Honor. But I think the
10 health and safety, the key point on that, is
11 Petitioners have a burden -- a huge burden under
12 this Court's Maine versus Taylor decision. And
13 that is they have to show that it's not even
14 plausible, that it's not arguable that there is
15 a health and safety interest here.

16 And the complaint doesn't come close
17 do pleading that, because, first, it admits
18 right at the outset, the complaint at the outset
19 admits that there is -- and I'm going to quote
20 if I find it -- that --- this is Pet. App. 228,
21 paragraph 440. It admits that higher stocking
22 density, this is the intense confinement,
23 correlates with higher salmonella rates for
24 growing pigs.

25 There's no reason to think that's

1 irrational when you move from growing pigs to
2 sows. And the American Health Association and
3 the Physicians' Committee explained the -- the
4 mechanism by which this is a huge health impact,
5 which is intense confinement causes stress which
6 has immunosuppressive effects, not just for sows
7 but for the piglets.

8 And is it irrational for California to
9 believe, is it beyond debate, have the facts in
10 the complaint satisfied and shown that they're
11 entitled to relief and shown that California
12 just simply has no rational basis here for
13 thinking that this has an effect? It does not
14 come close.

15 There's a burden, a price, under Rule
16 8 to get past the complaint stage. And that is
17 that you have to show you're plausibly entitled
18 to relief. To be entitled to relief here,
19 Petitioners need to show that it's not even
20 arguable that there's a health effect. They do
21 not even come close, Your Honor.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Mr. Lamken, I -- I
24 guess what troubles me is that this is a
25 pleading stage case. So let's assume that moral

1 interests count in the analysis. Let's just --
2 I'm not saying I'm -- I necessarily think that,
3 but let's assume it.

4 And let's assume that moral interests
5 can extend beyond labeling, that people can say
6 labeling is not enough. We actually want to
7 prevent those mis- -- you know, those benighted
8 people from eating this product regardless,
9 whether they know what it is.

10 So moral interests count. Moral
11 interests extend beyond labeling. Still, you
12 have this complaint which alleges -- and then
13 whatever you want to say about the health
14 interests.

15 On the other hand, you have a
16 complaint that alleges great costs to the pork
17 farmers outside of California, almost all of
18 whom are outside of California, and the entire
19 industry. And I take Mr. Mongan's point that
20 the complaint is considerably more nuanced than
21 the briefs in this case, but you could imagine a
22 complaint that basically made the points in the
23 briefs, you could imagine the pork producers
24 amending their complaints to sound more like
25 Mr. Bishop's brief than the complaint that they

1 actually wrote.

2 And in that case, wouldn't we have to
3 say, okay, this is the pleading stage, it goes
4 back, somebody can do Pike balancing, it's very
5 hard, you know, what exactly are we balancing,
6 these incommensurable things? But that's what
7 our doctrine indicates should happen. So
8 somebody should do that balancing.

9 MR. LAMKEN: Right. Your Honor, I
10 think there's two points. The first is that I
11 don't think they could -- well, second point
12 is -- I'm going to come to, which is that's not
13 this complaint, which is what the Court has
14 before it. But before I get to that's not this
15 complaint --

16 JUSTICE KAGAN: Assume it's not this
17 complaint. Let's assume a better complaint or
18 a -- not a better complaint necessarily. Let's
19 assume a stronger complaint.

20 MR. LAMKEN: Right. So Exxon makes
21 clear the particular structure or methods of
22 operation are not what the Commerce Clause
23 protects. The fact that costs might go up for
24 production is divorced from the essence of the
25 Commerce Clause itself, which is about the

1 interstate movement of goods. Can you have that
2 trade?

3 When you step further away from that
4 and you say I'm worried about how much it costs
5 to make the pork in other states, you have now
6 stepped away from the core of the Commerce
7 Clause, the interstate movement of goods, the
8 channels of commerce, the instrumentalities of
9 commerce that Lopez makes clear, and you are now
10 in the land of, well, this is something that
11 affects commerce, affects commerce in a
12 Wickard/Filburn kind of way.

13 That's just too far to read an
14 implicit negative implication from
15 constitutional text as a limit on what state
16 authority can do. That goes too far. And I
17 think Exxon makes that quite clear.

18 But even apart from that, under
19 Twombly the -- the allegations of --

20 JUSTICE KAGAN: I guess what strikes
21 me about this case, Mr. Lamken, is that both
22 sides want to exclude things from the Pike
23 analysis. Right? Mr. Bishop wants to exclude
24 all moral interests, as does Mr. Kneedler. And
25 you want to exclude a world of economic harms

1 because you think that that's not really what
2 the Commerce Clause is all about.

3 And isn't Pike just saying you get to
4 throw them all in the mix and it's really hard
5 but somebody has to make the judgment and it
6 hasn't been made yet in this case?

7 MR. LAMKEN: No, Your Honor, I think
8 Exxon made that judgment, that you don't say,
9 well, gee, it's going to be very expensive to
10 force everybody who is out of -- in Exxon, all
11 the burdens fell on out of state refiners. Oh,
12 gee, this is restructuring the operation. No,
13 Maryland gets to make the determination that it
14 does not want refiners to be operating gas
15 stations.

16 Likewise here, California gets to make
17 the judgment as to what's sold within the state.

18 It may drive up costs for
19 Californians. It may mean that pork farmers
20 serving Californians pay more or costs -- it
21 costs more for them. But that's simply an
22 effecting commerce type of thing. That's not an
23 interstate commerce problem. It's an effecting
24 commerce problem and I don't think courts should
25 be in the middle of making that sort of

1 determination from a negative implication from
2 an affirmative grant of authority to Congress.

3 But here under Twombly, even if you
4 just look at Twombly, Twombly says your
5 rationale needs to make -- your theory needs to
6 make economic sense. It has to comport with
7 common economic understanding.

8 And with California being 13 percent
9 of the market, it does not comport with common
10 economic understanding that somehow the whole
11 market is going to be shifted as opposed to some
12 producers serving California and some producers
13 choosing to serve the other 87 --

14 JUSTICE KAGAN: Thank you.

15 MR. LAMKEN: -- percent of the market.

16

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 Justice Kavanaugh?

20 Justice Barrett?

21 Justice Jackson?

22 JUSTICE JACKSON: Can I just get a
23 quick clarification of the burdens at this
24 stage, sort of piggybacking on what Justice
25 Kagan said.

1 I understood you to say that the
2 complaint has to show that it is not plausible
3 that California has a health and safety concern
4 under these circumstances. I -- I didn't think
5 that that's what was going on. I thought the
6 complaint had to show that it is plausible that
7 the burden outweighs any possible health
8 interest that California has.

9 MR. LAMKEN: Well, certainly when
10 you're looking at -- I think the government's
11 argument here was that there is simply no health
12 and safety interest, that the complaint is
13 sufficient to show that. And I don't think
14 that's true.

15 The standard under --

16 JUSTICE JACKSON: Assuming -- isn't
17 the -- isn't the only thing that they have to
18 show is under Pike balancing, whatever the
19 burdens are that they allege, plausibly outweigh
20 whatever benefits or interests that California
21 might have?

22 MR. LAMKEN: Okay, but once you have a
23 health and safety interest, they must show facts
24 that plausibly show that California does not
25 have a legitimate health and safety interest,

1 that it's not even arguable.

2 California is not required to wait for
3 people to get sick, die, or end up in the
4 hospital before it regulates. Maine versus
5 Taylor is very clear about that.

6 JUSTICE JACKSON: All right. Thank
7 you.

8 MR. LAMKEN: And that was just as
9 discriminatory.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. LAMKEN: Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Mr. Bishop,
14 rebuttal.

15 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP
16 ON BEHALF OF THE PETITIONERS

17 MR. BISHOP: Just very, very short,
18 Your Honor. I have heard a lot about Exxon but
19 Exxon is solely about in-state restrictions. It
20 had absolutely nothing to do with this case.

21 Now, I don't think that General
22 Mongan's attempt to distinguish Prop 12 from
23 other policy director conditions on sale works
24 at all. I heard nothing that distinguishes Prop
25 12 from a law that says you cannot sell any food

1 in this state unless it's produced by workers
2 paid at a minimum wage, offered certain medical
3 care, who can belong to unions.

4 Those are all conditions directly
5 related to the production of the product, which
6 occurs out of state. And I heard no definition
7 of attenuated conditions that is workable.

8 And what I ask the Court to focus on
9 is what our nation's interstate market looks
10 like if California can condition sales on its
11 moral or policy views, and every other state can
12 do the same.

13 We'll be back to the preconvention
14 picture where you have vulcanized markets, and
15 discord among the states. Probably a lot worse
16 now than in pre-convention times, given the
17 political differences among us.

18 And that destroys the twin purposes of
19 the Commerce Clause, which this Court said in
20 Healy are to maintain the national economic
21 union and preserve the territorial sovereignty
22 of the states. We will not have a national
23 economic union if California can impose its
24 moral views this way.

25 And just one -- one final point. I

1 heard a lot of fighting the complaint. We have
2 a 450-paragraph complaint, supported by
3 declarations that says that there are immense
4 costs involved for the industry, immense harm to
5 pigs that will result from complying with --
6 with -- with Prop 12 and no safety benefit.

7 I have a dozen pork farmers in the
8 court today who would testify at trial that they
9 are being forced by distributors and packers and
10 retailers to comply with Prop 12 in a way that
11 they think kills pigs, that harms their workers,
12 that makes it extremely difficult for them to --
13 to -- to operate their farms in the way that
14 they think is efficient and safe for workers and
15 pigs. And we believe we're entitled to a trial
16 to show that.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:15 p.m., the case
21 was submitted.)

22

23

24

25

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