

No. 21-468

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In The  
**Supreme Court of the United States**

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NATIONAL PORK PRODUCERS COUNCIL, et al.,  
*Petitioners,*

v.

KAREN ROSS, in Her Official Capacity as Secretary of the  
California Department of Food & Agriculture, et al.,  
*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

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**BRIEF FOR *AMICI CURIAE* ANIMAL  
PROTECTION ORGANIZATIONS AND LAW  
PROFESSORS IN SUPPORT OF RESPONDENTS  
AND RESPONDENTS-INTERVENORS**

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**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*Amici Curiae* are a coalition of non-profit organizations and law school academics with longstanding interests in preventing animal cruelty and promoting humane treatment of farmed animals.

The San Francisco Society for the Prevention of Cruelty to Animals (“SF SPCA”) is a non-profit animal shelter offering protection to animals in need. SF SPCA is the first cageless animal shelter in the U.S., with programs reaching 250,000 Californians each year.

The San Diego Humane Society is a non-profit animal shelter dedicated to creating a more humane world by advancing animal welfare. With five campuses in San Diego County, California, they care for more than 40,000 animals each year.

Marin Humane is a non-profit animal shelter dedicated to transforming lives through animal care, humane education, and advocacy. Located primarily in Marin County, with a foster-based program in Oakland, California, Marin Humane provides a variety of services to over 10,000 animals a year, including adoptions, fostering, and humane education. They strive to prevent animal abuse, increase awareness about

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<sup>1</sup> All parties have provided written consent to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici* or counsel has made a monetary contribution to the preparation or submission of this brief.

animal welfare, and empower community members to make humane choices.

Mercy For Animals (“MFA”) is a non-profit organization dedicated to constructing a just and sustainable food system. MFA works to eliminate the worst farming practices and animal suffering including through corporate welfare reform, legislation and policy work, undercover investigations, education, and advocacy. MFA has over 3.5 million U.S. supporters, including in California, who seek to promote a world free of farmed animal cruelty and end the exploitation of farmed animals for food.

Rise for Animals is a non-profit organization focused on promoting humane treatment of animals in captivity.

The Justice for Animals Program at the University of San Francisco’s School of Law instructs students on how the legal system handles the mistreatment and neglect of billions of animals in research labs, puppy mills, roadside zoos, and factory farms.

Professor Taimie Bryant is a Professor of Law and Faculty Director of the UCLA Animal Law and Policy Small Grants Program. Professor Bryant has published extensively on animal law, and has worked on several legislative reform projects involving animals in California.

Professor Douglas A. Kysar is a Professor of Law and co-director of the Law, Ethics and Animals Program at Yale Law School. Professor Kysar has published

extensively on various animal law topics, including animal imprisonment.

Professor Rajesh Reddy is the Director of the Animal Law Program at Lewis & Clark Law School and has worked on U.S. and international animal protection efforts. Lewis & Clark Law School's Center for Animal Law Studies aims to advance animal protection through the law, including by challenging inhumane practices through its Farmed Animal Protection Project.



### SUMMARY OF ARGUMENT

A state statute that “regulates even-handedly” must be upheld “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Proposition 12, the California Initiative at issue, easily meets this balancing test. The Initiative regulates even-handedly—it bans the sale *in California* of all pork products, *regardless of where they were manufactured*, if the animals used to make the product were “confined in a cruel manner.” Cal. Health & Safety Code § 25990(b)(2).

The Court of Appeals correctly held that Proposition 12 does not burden interstate commerce, thus obviating the need for examining the local benefits. Moreover, Petitioners Pork Producers failed to adequately state a claim regarding the economic burden actually imposed by the Initiative. Petitioners’ argument is

premised on the erroneous assertion that the Initiative “effectively” requires group housing. Complaint ¶ 24. However, although Pork Producers can *opt* to use group housing as a means of satisfying the Initiative, they can also satisfy the conditions of the Initiative by using larger stalls. Yet, their Complaint fails to allege that this option would cause them undue economic harm that is “excessive” in relation to the local benefits conferred by the Initiative. This failure to adequately address the *actual* requirements of the Initiative renders Pork Producers’ Complaint implausible under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Proposition 12 also confers important local benefits, long recognized as falling within the purview of state regulation—the protection of the public health and morals by prohibiting the in-State sale of products produced via cruel confinement practices. The Initiative ensures that California residents, who overwhelmingly voted for this legislation, are not complicit in the production of meat products by cruel means, and that those Californians who wish to consume pork can do so without contributing to such cruelty.

Contrary to the allegations made in Petitioners’ Complaint, the confinement practices prohibited by Proposition 12 are demonstrably cruel and inhumane, with highly detrimental impacts on the physical and psychological welfare of female pigs. Pork Producers’ assertions that Proposition 12 will *decrease* sow welfare are unsubstantiated, factually implausible, and in contravention of current scientific evidence, including

conclusions from the U.S. Department of Agriculture. Accordingly, the Court of Appeals’ decision should be affirmed.

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## ARGUMENT

### I. INTRODUCTION.

In 2018, 63% of California voters enacted Proposition 12, the Farm Animal Confinement Initiative (“the Initiative”). Secretary of State Alex Padilla, *Statement of Vote* 16 (Nov. 6, 2018). The law prohibits the sale *in California* of whole pork meat which is “the meat of a covered animal who was confined in a cruel manner.” Cal. Health & Safety Code § 25990(b)(2). “Confined in a cruel manner” means “a manner that prevents the animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely,” (the “stand-up-turn-around” requirement”). *Id.* § 25991(e)(1). Furthermore, the law imposes square footage requirements—e.g., breeding pigs must have at least “24 square feet of usable floorspace per pig.” *Id.* § 25991(e)(3).

Pork Producers erroneously contend that Proposition 12 violates the Dormant Commerce Clause “under this Court’s extraterritoriality and *Pike* . . . doctrines.” Petitioners’ Brief (“Pet. Br.”) 19. However, Proposition 12 does *not* govern *out of state practices*. Instead, it prohibits the *in-state* sale of pork products resulting from cruel confinement, regardless of where the product was produced.

Moreover, Proposition 12 easily satisfies the balancing test of *Pike*:

[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

*Pike*, 397 U.S. at 142. Indeed, even *if* Proposition 12 burdens interstate commerce in a cognizable way, those burdens are not “*clearly excessive*” in relation to the *significant* local benefits at issue here. The Initiative prevents Californians from being complicit in promoting, encouraging, and condoning cruel confinement practices they find abhorrent, and allows California residents who wish to consume pork products to do so without contributing to such practices.

## **II. THE PORK PRODUCERS HAVE FAILED TO STATE A PLAUSIBLE COMMERCE CLAUSE CLAIM.**

The Pork Producers have not “plausibly” alleged sufficient facts to support their Commerce Clause claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). As the Court noted in *Iqbal*, in reviewing whether a Complaint plausibly states a claim for relief, the Court must start by examining the actual elements of the claim. 556 U.S. at 675. Here, those elements require the Pork Producers to allege (1) that the

Initiative, as written, will impose substantial economic burdens on out-of-state pork producers, and (2) that those burdens are “clearly excessive” in relation to the local benefit to Californians. *Pike*, 397 U.S. at 142; *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (even a state law that governs commerce extraterritorially will be upheld if it bears a “reasonable relation” to the legitimate exercise of the state’s police power).

Pork Producers’ Dormant Commerce Clause claims are premised on the erroneous assertion that Proposition 12 “effectively” requires the use of group housing, Complaint ¶ 24, and that switching to group housing will impose substantial economic burdens, Complaint ¶¶ 279–350, and result in less humane treatment of the animals, Complaint ¶¶ 153, 164, 203, 323, 391. Petitioners make the same argument in their brief on the merits. *See* Pet. Br. at 47 (asserting that “[s]ows in group housing experience more injuries and fatalities than sows housed in breeding stalls because they are exposed to aggression”).

However, nothing in Proposition 12 requires a sow to be housed in group housing. Rather, the Initiative simply bans the sale of products from a sow “confined in a cruel manner,” i.e., a manner that does not allow the animal to meet the stand-up-turn-around requirement, Cal. Health & Safety Code § 25991(e)(1), and there are other ways to meet the *actual* requirements of the Initiative—the most obvious being to house the sows in *larger* individual stalls.

Because the Pork Producers’ principal arguments are based on this incorrect statement of the Initiative’s requirements, the vast majority of their allegations about economic burden center on the cost of switching to group housing, rather than the cost of housing sows in larger pens.<sup>2</sup> Hence, their Complaint fails to plausibly allege that the Initiative—as actually written—violates the Commerce Clause.

In fact, the Complaint also fails to explain *why* the Initiative “effectively” requires the use of group housing, rather than larger stalls. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a complaint that tenders “‘naked assertion[s]’ devoid of ‘further factual enhancement’” does not pass the plausibility test) (quoting *Twombly*, 550 U.S. at 557). As this Court explained in *Iqbal*, such “conclusory” factual allegations are not to be accepted by the reviewing court as a basis for stating a claim. *Id.*; *see also id.* at 681 (“bare assertions” of facts that amount to a “formulaic recitation of the elements” of the claim are not sufficient) (quoting *Twombly*, 550 U.S. at 555).

This is particularly true here, where the main fact relied on by the industry—that the Initiative requires

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<sup>2</sup> The sole exception is a single allegation in the Complaint that “[f]or farmers who do not employ group housing, going from 14-square-foot gestation stalls to 24 square feet of pen space per sow would drive an estimated 42% reduction in sow inventory and the same percentage increase of average fixed costs,” Complaint ¶ 70, and the related statement that “[m]embers would face additional penalties by taking this route,” because they could not deliver as many pigs to their suppliers. *Id.* ¶ 71.

the use of group housing—is contradicted by the Initiative’s plain language. Therefore, because Pork Producers have based the bulk of their claims on a false premise, they have failed to meet the requisite plausibility standard. *See Twombly*, 550 U.S. at 554 (courts should not engage in “false inferences” to find claims plausible). Moreover, while the Complaint contains several self-serving allegations that it is more humane to house sows in stalls that prevent the animals from even turning around, rather than in group housing, Complaint ¶¶ 153, 164, 203, 323, 391—allegations that are also implausible, *see infra* at III.B—the Complaint does not contain a single allegation that housing sows in larger stalls is somehow less humane.

Nor could Petitioners plausibly make such an allegation. As this Court explained in *Iqbal*, in determining whether allegations are plausible, the reviewing court must “draw on its *judicial experience and common sense*.” 556 U.S. at 679 (emphasis added). Applying that standard here, there simply is no validity to the proposition that keeping a sentient animal for most of her life in a stall that prohibits her from even turning around is humane. Indeed, applying the Court’s “experience and common sense,” surely the members of this Court would not accept such an allegation about a dog, cat, or guinea pig—even though arguably it might be easier to feed those animals and administer veterinary treatment if they were so confined. This same “common sense” requires rejection of the notion that these animals—who are also sentient, highly intelligent, naturally inquisitive, curious, and active—are somehow

treated more humanely by being confined in a way that *prevents them from even turning around in their crates for their entire reproductive lives.*

Because the Pork Producers have based their arguments on a demonstrably incorrect, and highly self-serving, reading of the Initiative, their claim for relief is simply not “plausible” under *Twombly* and *Iqbal*.

### **III. PROPOSITION 12 FURTHERS IMPORTANT PUBLIC BENEFITS FOR CALIFORNIA RESIDENTS.**

The local benefits furthered by the Initiative are substantial. By voting for the Initiative, Californians proclaimed that they do not condone cruel confinement practices, and do not want to be complicit in promoting or encouraging such practices with respect to pork products sold in their state. Further, without Proposition 12, Californian consumers who wish to eat pork products have no way of ensuring that such products have been produced without the use of extreme confinement. *See infra* IV. Therefore, these consumers must either entirely forego eating such products—including, e.g., bacon for breakfast—or consume food produced through the inhumane treatment of animals, an option they find morally repugnant. Therefore, it is readily apparent that Proposition 12 serves the important local purposes of protecting the public health, ensuring that Californians are not complicit in the inhumane treatment of animals, and allowing consumers to consume more humanely produced pork.

**A. Pigs Are Complex, Social Animals Who Display a Range of Behaviors and Emotions.**

To demonstrate the significant local benefits at issue here, it is important to recognize the physical and behavioral characteristics of pigs. Although scientists are only beginning to understand the full extent of pig cognition and emotional perception, behavioral studies document that pigs are highly intelligent and emotionally sensitive. *See generally* Lori Marino & Christina M. Colvin, *Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in Sus domesticus*, 28 *Int'l J. Compar. Psych.* 1 (2015). When piglets are born, mothers can identify their offspring by voice. *See* Gudrun Illmann et al., *Acoustical Mother-Offspring Recognition in Pigs (Sus scrofa domesticus)*, 139 *Behaviour* 487, 496 (2002). As they grow older, piglets develop a full repertoire of vocalizations, which scientists have isolated and paired with different needs and fears, such as requests for food, alarm calls, or distress. *See* Elodie F. Briefer et al., *Classification of Pig Calls Produced From Birth to Slaughter According to Their Emotional Valence and Context of Product*, 12 *Sci. Reps.* 3409, 3410, 3413 (2022).



A pig, with her piglets, at a farm sanctuary. Photo: Jo-Anne McArthur / We Animals Media

After learning to communicate with each other, pigs develop an interest in play—they carry balls and sticks, play fight with each other, and scamper and roll in open fields. Kristina Horback, *Nosing Around: Play in Pigs*, 2 *Animal Behav. & Cognition* 186, 187–192 (2014). These behaviors are strikingly like those exhibited by dogs, and studies of pig behavior repeatedly note the overlap in cognitive and emotive capacities between these two species. *See, e.g.*, Marino & Colvin, *supra*, at 7, 9–12, 14–15, 18.

Pigs search for food by rooting in soil with their snouts. Richard Lutwyche, *The Pig: A Natural History* 76–77 (2019). This behavior is instinctive and a crucial means by which pigs stimulate their senses and satisfy their curiosity. *Id.*; *see also* A. Stolba & D. Wood-Gush, *The Behaviour of Pigs in a Semi-Natural Environment*,

48 *Animal Sci.* 419, 419 (1989). Rooting also allows pigs to create wallows where they can play and bathe. Lutwyche, *supra*, at 77.



A pig rooting at a farm sanctuary. Photo: Jo-Anne McArthur / We Animals Media

In farms where they have room to roam, pigs will frolic and move in energetic bounds, much like a dog at play. See Lutwyche, *supra*, at 110; see also Creek Valley Critters, *Pigs Playing*, YouTube 0:00–0:56 (Oct. 17, 2016), <https://www.youtube.com/watch?v=2lTZt1xaErQ>.



Visitors play with rescued pigs at a farm sanctuary.  
Photo: Jo-Anne McArthur / We Animals Media

Pigs also have advanced analytic and empathetic capacities, with a highly developed cognitive and emotional understanding of their world. *See* Marino & Colvin, *supra*, at 16; *see also* Inonge Reimert et al., *Emotions on the Loose: Emotional Contagion and the Role of Oxytocin in Pigs*, 18 *Animal Cognition* 517, 526 (2015). Adult pigs express what is known in psychology as emotional contagion—the ability to notice and respond to the emotional state of others. Reimert et al., *supra*, at 517, 526. Pigs are thus acutely aware of their emotional environment and respond to the pleasure or distress of their companions. *Id.*



Pigs in fields of chamomile at a farm sanctuary. Photo: Jo-Anne McArthur / We Animals Media

Contrary to how they are treated by large industrial pork producers, pigs are not inanimate widgets in a manufacturing process. *See, e.g.,* Matthew Prescott, *Your Pig Almost Certainly Came from a Factory Farm, No Matter What Anyone Tells You*, Wash. Post (July 15, 2014) (quoting the National Hog Farmer: “The breeding sow should be thought of, and treated as, a valuable piece of machinery whose function is to pump out baby pigs like a sausage machine.”). Rather, pigs are highly intelligent, curious, empathetic, social beings. As such, they deserve to at least be allowed to turn around in their enclosures. That is all that is required by the Initiative at issue here.

**B. The Confinement Practices Prohibited by Proposition 12 Are Cruel, Inhumane, and Abusive.**

Contrary to the Pork Producers’ assertions that its local impacts are “flimsy,” Pet. Br. 47, Proposition 12 ensures that pork sold in California does not result from intensive confinement systems that harm pigs both physically and psychologically. Conventional “gestation stalls” or “crates”—which violate Proposition 12’s requirements and are the individual stalls currently lauded by Pork Producers—“immobiliz[e] breeding pigs in barren metal crates barely wider than their bodies.” *Iowa Investigation: Hawkeye Sow Centers (Hormel Supplier)*, Animal Outlook, <https://animaloutlook.org/investigations/iowa-pigs/> (last visited Aug. 4, 2022).



A breeding pig in a gestation crate in Hawkeye Sow Center, Iowa. Photo: Animal Outlook

These crates are so small and restrictive that they prevent the pigs from being able to turn around or express natural behavior. *Id.*; Humane Soc’y Veterinary Med. Ass’n, *HSVMA Veterinary Report: Welfare Concerns Associated with Intensive Farm Animal Confinement Methods 2* (n.d.) (hereinafter HSVMA) (noting that gestation crates “are too small for the pigs to turn around or take more than a step forward or backwards”).



A breeding pig in a gestation crate in Nebraska. Photo: Animal Legal Defense Fund

The United States Department of Agriculture (“USDA”) has further found that “simple movements such as standing up or lying down may be difficult if the sow is large, because the dynamic space requirements needed to carry out these posture changes are greater than the static space requirements.” Jeremy N. Marchant-Forde, *USDA Sow Welfare Fact Sheet 1* (2010) (hereinafter USDA). Breeding sows spend most of their reproductive lives in crates, starting from when they are first bred at around seven-months-old, see

Complaint ¶ 58(a), until they are culled or slaughtered which happens, on average, between one and three years of age. Yuzo Koketzu & Ryosuke Iida, *Farm Data Analysis for Lifetime Performance Components of Sows and Their Predictors in Breeding Herds*, 6 *Porcine Health Mgmt.* 1, 4 (2020).



These sows have grown too big for the crates they are kept in. Photo: Jo-Anne McArthur / Animal Equality / We Animals Media



A bruised and bloody pregnant pig cannot comfortably lie down in her gestation crate. Photo: Animal Legal Defense Fund

Most gestation crates have no bedding materials, meaning sows have no thermal protection, which, in turn, can cause systemic stress due to the cold, and may cause, or exacerbate, injuries. John Webster, *Animal Welfare: A Cool Eye Towards Eden* 148 (1995).



Pigs in gestation crates on a filthy floor. Photo: Mercy for Animals



Pigs in gestation crates without any bedding materials. Photo: Mercy for Animals

The tiny size of gestation crates forces the animals to urinate and defecate where they stand and the floors of crates are often partially or fully slatted, with waste falling into a pit below. USDA, *supra*, at 1. This means that sows are housed directly above their own excrement, which exposes them to high levels of ammonia and increases the prevalence of respiratory diseases. See J.H. Smith et al., *The Preference of Pigs for Fresh Air Over Ammoniated Air*, 49 *Applied Animal Behav. Sci.* 417, 418 (1996); J.P. Tillon & F. Madec, *Diseases Affecting Confined Sows: Data from Epidemiological Observations*, 15 *Annales de Recherches Vétérinaires* 195, 198 (1984).



This sow's cage has accumulated urine and feces, which she is forced to lie in. Photo: Jo-Anne McArthur / Essere Animali / We Animals Media

Experts in animal welfare science have consistently identified gestation crates as one of the most

inhumane forms of animal confinement. Donald Broom, a Professor in University of Cambridge's Department of Veterinary Medicine has identified "the close confinement of sows in [crates] or tethers" as "one of the most extreme examples of cruelty to an animal." The Humane Soc'y of the U.S., *Scientists and Experts on Gestation Crates and Sow Welfare* 3 (2012) (hereinafter HSUS 2012).



A sow in a gestation crate awaits insemination. Photo: Andrew Skowron / We Animals Media

The Pew Commission on Industrial Farm Animal Protection concluded that, "the most intensive confinement systems, such as . . . hog gestation pens . . . prevent the animal from a normal range of movement and constitute inhumane treatment." Pew Comm'n on Indus. Farm Animal Prot., *Putting Meat on the Table: Industrial Farm Animal Production in America* 38 (2008). A video of pigs confined to crates in a pig farm

graphically illustrates the cruelty of these conditions. See [www.dropbox.com/s/fckwxut7qodic0p/WAM5532.mp4?dl=0](http://www.dropbox.com/s/fckwxut7qodic0p/WAM5532.mp4?dl=0).



Pigs scream in gestation crates in a newly built industrial farm. Photo: Jo-Anne McArthur / We Animals Media

As explained by Ian Duncan, the Emeritus Chair in Animal Welfare at University of Guelph:

In my opinion, the practice of keeping sows in gestation crates for most of their pregnancy is one of the cruelest forms of confinement devised by humankind. Sows are intelligent, inquisitive animals who naturally spend their time rooting, foraging and exploring their environment. . . . All of this is completely denied them by gestation crates and leads to enormous frustration.

HSUS 2012, *supra*, at 4.



A sow looks through the bars of a gestation crate. Photo: Andrew Skowron / We Animals Media



A sow lies on the floor of a gestation crate. Photo: Andrew Skowron / We Animals Media

Breeding pigs physically and mentally suffer from such intensive confinement. See Animal Outlook, *supra*, <https://animaloutlook.org/investigations/iowa-pigs/> (video evidence at seconds 0:42 through 1:12 showing the intensive confinement of Iowan pigs in gestation crates). The USDA's own report found that "the balance of data shows sows in [conventional gestation] stalls to have more problems" than sows in group housing. USDA, *supra*, at 2. Studies have further shown that a "high incidence of health problems [including death] require[s] stall-housed sows to be removed" from production, compared with a very low incidence of health problems in group housing. D.M. Broom et al., *A Comparison of the Welfare of Sows in Different Housing Conditions*, 61 *Animal Sci.* 369, 382 (1995). Gestation crates "reduce cardiac function, alter body conformation, reduce bone strength and make[] posture changes more difficult." USDA, *supra*, at 2. Intensive confinement causes overgrown hooves in sows, making walking more difficult. The Humane Soc'y of the U.S., *An HSUS Report: Welfare Issues with Gestation Crates for Pregnant Sows* 3 (2013) (hereinafter HSUS 2013); see also Animal Outlook, *supra*, <https://animaloutlook.org/investigations/iowa-pigs/> (video evidence at minutes 1:13 through 1:22 showing a sow having difficulty walking with overgrown hooves).



A breeding sow with overgrown hooves from intensive confinement. Photo: Jo-Anne McArthur / Animal Equality / We Animals Media

“Immobilization, a byproduct of the cage’s small size, atrophies sows’ muscles and bones, making the most basic movements difficult.” HSVMA, *supra*, at 2. As the size of the sow increases during pregnancy, sows in gestation crates experience increasingly severe discomfort. Leena Anil et al., *Evaluation of The Relationship Between Injuries and Size of Gestation Stalls Relative to Size of Sows*, 221 J. Am. Veterinary Med. Ass’n 834, 834 (2002).

Gestation crates are typically placed side by side within facilities to maximize production (and profits), which means sows must extend their limbs into adjacent crates while lying down, thus risking getting stepped upon. *Id.* at 836.



A sow's feet and ears stick into her neighbors' crate when she tries to lie down. Photo: Jo-Anne McArthur / Animal Equality / We Animals Media



Another sow's feet and ears sticking into her neighbors' crates as she tries to lie down. Photo: Andrew Skowron / We Animals Media

Sows in gestation crates often experience injuries and soreness from rubbing against the bars of the crates, or even from standing or lying down on the barren floors. Anil et al., *supra*, at 836.



A pig with a pressure sore from being housed in intensive confinement. Photo: People for the Ethical Treatment of Animals

“Skin lesions attributed to pressure, such as decubital ulcers, are more common in stalls.” USDA, *supra*, at 2; see also Animal Legal Defense Fund, *Investigation Reveals Cruelty and Neglect at Hormel Foods’ Pig Supplier*, YouTube (May 25, 2016) <https://www.youtube.com/watch?v=z5VitkAhM7Y> (video showing pigs at a factory farm in Nebraska suffering from sores and other physical ailments due to intensive confinement at seconds 0:06 through 0:30).



A close-up of a pressure sore on a crated pig. Photo: Direct Action Everywhere



A severely irritated and inflamed pig backside from intensive confinement. Photo: Direct Action Everywhere

The slatted floors of gestation crates often have sharp corners that can injure pigs' exposed limbs, or other body parts when they slip in the crates. Anil et

al., *supra*, at 836. Per the USDA, “[l]ameness appears to be higher for sows in stalls.” USDA, *supra*, at 2.

Pigs in conventional gestation crates have “lower immune function and higher disease incidence than [pigs in] group housing.” USDA, *supra*, at 2. “Lack of exercise and decreased water consumption [in crates] greatly increases the risk of urinary tract infections.” HSVMA, *supra*, at 2.

Sows also experience detrimental psychological impacts from confinement in gestation crates. “[C]onfinement [in gestation crates] result[s] in alteration or prevention of many of the sow’s normal behaviours, increases in abnormal behaviour and in various other indicators of poor welfare.” Jeremy N. Marchant & Donald M. Broom, *Effect of Dry Sow Housing Conditions on Muscle Weight and Bone Strength*, 62 *Animal Sci.* 105, 105 (1996). Sows housed in gestation crates are more likely to exhibit stereotypic behavior—a well-recognized indication of psychological distress—including biting the bars on crates and engaging in repetitive vacuum chewing (chewing without anything in their mouths).



Some sows spend significant periods of time biting the bars of their crates, a symptom of psychological distress. Photo: Mercy for Animals

A 2021 study found that, “[d]uring the whole pregnancy period, the frequency of empty chewing behavior in gestating sows housed in [gestation crates] was significantly higher than that of sows in [group housing].” Liu et al., *A Comparison of the Behavior, Physiology, and Offspring Resilience of Gestating Sows When Raised in a Group Housing System and Individual Stalls*, 11 *Animals* 2076, 2079 (2021); see also John J. McGlone, *Review: Updated Scientific Evidence on the Welfare of Gestating Sows Kept in Different Housing Systems*, 29 *Proc. Animal Sci.* 189, 195 (2013) (“[T]he stereotypies directed to objects such as bars and feeders [was] greater among stalled sows compared with group-penned sows.”); HSVMA, *supra*, at 2 (“Sows often resort to stereotypic behaviors, such as repetitively

chewing the bars of the cage. This is indicative of psychological distress.”).



A distressed sow biting the bars of her gestation crate.  
Photo: Direct Action Everywhere



A pig bites her crate. Photo: Jo-Anne McArthur / We Animals Media for The Guardian

In fact, many pigs “gnaw on the bars of their crates until their mouths bleed.” Press Release, The Humane Soc’y of the U.S., *The Humane Society of the United States Sues World’s Largest Pork Producer for Misleading Consumers* (Oct. 18, 2021).



Blood and bloody bars on gestation crates at a Virginia factory farm. Photo: The Humane Society of the United States

Unresponsiveness in breeding pigs is another behavioral indication of poor welfare. Studies show that, over time, crated sows become less responsive to external stimuli, including water poured on their backs, and even squeals from piglets. D.M. Broom, *Stereotypies and Responsiveness as Welfare Indicators in Stall-Housed Sows 2* (Brit. Soc’y Animal Prod., Paper No. 19, 1986). The European Scientific Veterinary Committee found that such inactivity and unresponsiveness is abnormal, and likely an indication of clinical depression. Sci. Veterinary Comm., *The Welfare of Intensively Kept Pigs* 93 (Sept. 30, 1997); see also Liu et al., *supra*, at 4 (“[T]he stress hormone (ACTH, A, COR) level of gestating sows housed in [gestation crates] was higher than

that of gestating sows housed in [group housing] throughout the whole gestation period.”); <https://www.dropbox.com/s/3t0bi16zo6wzo3e/WAM15859.mp4?dl=0> (a video of a sow snorting in a gestation crate). The USDA has also concluded that “[p]roductivity, using measures of sow reproductive output, *shows no advantages for stalls.*” USDA, *supra*, at 2 (emphasis added). Nevertheless, pork producers persist in using these extreme, abusive, confinement systems to fit as many pigs as possible into small spaces and maximize their potential profit.<sup>3</sup>

For all these reasons, other industrialized countries, including England, Scotland, and Switzerland, have banned the use of gestation crates. Farmed Animals Regulations 2007, SI 2007/2078, sch. 8, ¶ 5 (Eng.) (requiring that a “pig must be free to turn round without difficulty at all times” and accommodations

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<sup>3</sup> Proposition 12 further prevents the cruel confinement of veal calves and egg-laying hens for veal and eggs destined for California. Cal. Health & Safety Code § 25990(b)(1), (3)–(4). “Veal crates are small, individual cages used to confine newborn calves prior to their slaughter. Both the size of the crates and a tether at the calves’ necks prevent them from turning around.” HSVMA, *supra*, at 3. “Calves can be so crippled from confinement that they have to be helped into the truck or trailer on the way to the slaughter plant.” *Facts on Veal Calves*, Humane Soc’y Veterinary Med. Ass’n, [https://www.hsvma.org/facts\\_veal\\_calves#.YunKiS1h1n5](https://www.hsvma.org/facts_veal_calves#.YunKiS1h1n5) (last visited Aug. 2, 2022). Battery cages are “small wire enclosures crowding up to ten hens in single units that are frequently stacked in egg production” and are “widely regarded as inhumane for many reasons.” HSVMA, *supra*, at 1. “The small size of the cage affords each hen, on average, only 67 square inches of space—less space than the area of a single sheet of letter-sized paper—on which to live her entire life.” *Id.*

must be constructed to allow the pig to “stand up, lie down and rest without difficulty” except during farrowing and in the week prior to farrowing); The Welfare of Farmed Animals Regulations 2010, SI 2010/388, sch. 6 pt. 2, ¶ 5 (Scot.) (same); Ordonnance sur la Protection des Animaux [Animal Protection Ordinance], Apr. 23, 2008, SR 455, RS 455, art. 48 (Switz.) (requiring that sows must be housed in groups except during the period of lactating or mating). The European Union has also greatly restricted the use of gestation crates. See 2008 O.J. L 47, art. 3, ¶ 4.<sup>4</sup>

**C. Proposition 12 Requires More Humane Alternatives to These Cruel Confinement Systems for Pork Products Sold in California.**

More humane alternatives to gestation crates are available and economically viable. HSVMA, *supra*, at 3. To begin with, farmers can choose to house their pigs in larger stalls. Larger individual stalls, referred to as “turnaround stalls,” are larger than customary gestation crates and have swinging wall dividers that allow the sow to turn around. Dale Miller, *Turnaround Stall Worth a Second Look*, National Hog Farmer (Mar. 15, 2009).

Another option—group housing—allows “groups of up to several dozen sows [to be] housed together in

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<sup>4</sup> In sharp contrast to what is allowed in the U.S., the E.U. only allows the use of gestation crates for a period of four weeks during sow pregnancies. See 2008 O.J. L 47, art. 3, ¶ 4.

indoor pens, sometimes with deep litter allowing for access to bedding materials, and [the] freedom to move and the opportunity to socialize.” HSUS 2013, *supra*, at 6. According to the World Organisation for Animal Health, “[s]ows and gilts . . . are social animals and prefer living in groups, therefore pregnant sows and gilts should preferably be housed in groups.” World Organisation for Animal Health, *Terrestrial Animal Health Code*, ch.7.13.12 (2021).



An example of group housing that complies with Proposition 12. Photo: JYGA Technologies

While the pork industry alleges that Proposition 12’s square footage requirement lacks a scientific basis, Complaint ¶¶ 376–388, and will *decrease* sow welfare, Complaint ¶¶ 389–410, studies show that increased space is directly correlated with *increased sow welfare*

*and behavior.* See Jeremy N. Marchant-Forde, *The Welfare of Pigs* 117 (2009); D.M. Broom et al., *supra*, at 384; see generally D.M. Broom, *supra*. Although Pork Producers also allege that Proposition 12 harms sows by increasing sow aggression, Complaint ¶¶ 393, 396–397, these concerns are based, by the Producers’ own admission, on experience with group housing offering *only sixteen to eighteen square feet of space per sow*, Complaint ¶ 162. By contrast, Proposition 12’s increased square footage requirement of twenty-four square feet per sow would greatly minimize aggressive interactions.

In fact, USDA research shows that, “[i]n group housing, low levels of aggression are facilitated by . . . housing the sows with greater than minimum recommended space allowances.” USDA, *supra*, at 2 (emphasis added). USDA scientist Dr. Jeremy Marchant-Forde found that increased space is crucial, because “[a]s space allowance decrease[s], the total number of aggressive interactions increase[s].” Marchant-Forde, *supra*, at 118 (emphasis added). As John Webster, Emeritus Professor at the University of Bristol, explains:

The case that sow stalls are good for welfare is that they protect sows from injuries incurred through fighting . . . [r]est[ing] on the premise that it is acceptable to prevent an undesirable pattern of behaviour *by restricting all forms of behaviour*. It would be as valid to claim that prisons would be so much more

manageable if all the inmates were kept permanently in solitary confinement.

John Webster, *Animal Welfare: Limping Towards Eden* 112 (2008) (emphasis added).

#### **IV. THE LOCAL BENEFITS TO CALIFORNIANS ARE SUBSTANTIAL.**

Contrary to the Pork Producers’ and Solicitor General’s repeated characterization of the local benefit as merely a “philosophical” disagreement, e.g., Pet. Br. 5; Solicitor General Amicus Br. 11, Californians who voted for this Initiative have three valid interests at stake—each of which is substantial and well within the State’s power to regulate.

First, as others explain, there is a substantial interest in protecting consumers from unsafe and unhealthy pork produced from intensively confined animals. *See* Brief for Intervenor Respondents 36–41; *see generally* Amicus Br. of Am. Public Health Ass’n et al.

Second, Californians have a moral objection to being complicit in the cruel, inhumane treatment of these sentient animals—protection of which is well within the purview of the State’s police powers. Indeed, if questions of “profound moral and social importance” are “unequivocally” left to the people to decide, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022), Californians should be able to decide not to be complicit in such blatant cruelty to animals with respect to food products sold in their state. In fact, many

Courts, including this one, have found that a moral value interest is a legitimate local benefit, particularly in the animal cruelty context. “The traditional police power of the States is defined as the authority to provide for the public health, safety, *and morals*” and this Court has “upheld such a basis for legislation.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (emphasis added). Indeed, even in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), upon which Petitioners heavily rely, the Court noted that a state statute would survive a Commerce Clause challenge when it does no more than “*apply its domestic policy, rooted in its conceptions of morality and order. . .*” 294 U.S. at 528 (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court discussed the “legitimate governmental interests in protecting the public health and *preventing cruelty to animals.*” *Id.* at 538 (emphasis added). Even earlier, in *Baldwin*, the Court indicated that preventing the “evils springing from uncared for cattle” would be a legitimate local benefit. 294 U.S. at 524. Indeed, this Court has also found that “the States’ interests in conservation and protection of wild animals [are] legitimate local purposes similar to the States’ interests in protecting the health and safety of their citizens,” *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *see also Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551, 557 (7th Cir. 2007) (“States have a legitimate interest in prolonging the lives of animals that their population happens to like.”). As Justice Thomas explained in *United States v. Lopez*, 514

U.S. 549 (1995), “it seems to me that the power to regulate ‘commerce’ can by no means encompass authority over . . . cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, *notwithstanding these activities’ effects on interstate commerce.*” *Id.* at 585 (Thomas, J., concurring) (emphasis added).<sup>5</sup>

In *Pike*, this Court observed that the outcome of that case might have been different had the Court been dealing with state legislation “where the propriety of local regulation has long been recognized.” 397 U.S. at 143 (internal quotation omitted). Here, the state’s authority to regulate cruelty to animals with respect to products sold in California—to safeguard the *public morals*—is well established. As this Court recognized in *United States v. Stevens*, 559 U.S. 460, 469 (2010), “the prohibition of animal cruelty itself has a long

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<sup>5</sup> See also *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Bonta*, 33 F.4th 1107, 1119 n.6 (9th Cir. 2022) (“A state’s interest in preventing animal cruelty is a legitimate matter of local concern, even when that cruelty takes place outside the state.”) (internal quotations omitted); *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013) (noting that “the State believed that the sales ban in California may discourage the consumption of products produced by force feeding birds and prevent complicity in a practice that it deemed cruel to animals”); *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015) (“The purpose of the Shark Fin Law is to conserve state resources, prevent animal cruelty, and protect wildlife and public health. . . . These are legitimate matters of local concern.”); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 952 (9th Cir. 2019) (“[S]tates may regulate to minimize the in-state harm caused by products sold in-state, a central aspect of the state sovereignty protected by the Constitution.”).

history in American law, starting with the early settlement of the Colonies.” *See also, e.g., Pa. Soc’y for the Prevention of Cruelty to Animals v. Bravo Enters.*, 237 A.2d 342, 348 (Pa. 1968) (“A legislative proscription, such as that found in the cruelty to animals statute, is declarative of the public policy and is *tantamount to calling the proscribed matter prejudicial to the interests of the public.*”) (emphasis added); *Waters v. People*, 46 P. 112, 113 (Colo. 1896) (explaining that one “aim” of that state’s anti-cruelty statute is “to *conserve the public morals*”) (emphasis added); *State v. Porter*, 16 S.E. 915, 916 (N.C. 1893) (observing that the state’s anti-cruelty code was, in part, “enacted to *protect the public morals*”) (emphasis added); Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 Law & Soc. Inquiry 136, 164 (2019) (noting that “cruelty occurring on private property, or otherwise removed from direct observation . . . *was equally offensive to decency and public morals as cruelty occurring on the streets*”) (emphasis added).

Thus, the state of California has a substantial interest in ensuring that its citizens do not contribute to the cruelty of animals that end up in its markets—a subject that has long been the province of state legislation—*regardless of where those products originate*. The citizens of California do not want to be complicit in patronizing or condoning the abuse and cruel treatment of these intelligent, social animals.

Third, Californians who wish to eat pork do not want to eat products that were produced through such cruel and inhumane practices. In fact, according to a

2020 survey, gestation crates were deemed an unacceptable practice by two-thirds of Americans (66%), and nearly three-quarters of Americans (73%) “would be more likely to buy pork products from a company that is committed to ending the confinement of pregnant pigs than from one that is not.” The Harris Poll, *Majority of Pork Buyers Show Concern for Pig Welfare, Survey Shows* 5 (2020). Yet, without the protection conferred by the Initiative, Californians have no way to avoid pork products resulting from such intensive confinement.<sup>6</sup>

Proposition 12 provides Californian consumers who wish to purchase pork in the state with an assurance that it has not been produced by cruel confinement practices. Without Proposition 12, these Californians have no guarantee that they can identify in-state pork products that were not produced via cruel, morally offensive means. Even though the uncontested portion of Proposition 12 ensures that pork produced in California meets the law’s confinement standards, Cal. Health & Safety Code § 25990(a), federal law does not require disclosure of the manufacturer’s location on the label of a meat product. *See* 9 C.F.R. § 317.2(c)(3)

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<sup>6</sup> Although some products are voluntarily certified by third parties as “humane,” most independent certifications “deceive consumers by branding as humane products from animals raised in intensive confinement.” Farm Forward, *The Dirt on Humane Washing* 3 (2020). In fact, the “Animal Welfare Approved” certification is the only certification that avoids certifying products from “animals raised in intensive confinement,” *id.* at 18, something that the average consumer would not know without doing extensive independent research.

(2021) (regulations under the Federal Meat Inspection Act require only that the label specify a “manufacturer, packer, or distributor”) (emphasis added). Thus, as long as the product is *distributed* in California, the label need not identify its state of origin. *Id.*

Furthermore, absent Proposition 12, consumers eating in restaurants, schools, and hospitals in California have no opportunity to ensure that the pork they are eating was not produced by cruel methods.

Restaurant suppliers in California source meat from all over the country. *See, e.g., Our Supply Partners*, West Coast Prime Meats, <https://westcoastprime.meats.com/wholesale-partners/> (last visited Aug. 2, 2022) (a major Californian meat supplier which sources pork from numerous suppliers across the country); *see also* Br. Retail Litigation Center et al. Amici Curiae Supp. Pet’rs 12 (discussing how U.S. restaurants use 15,000 distribution centers located across the country). Absent Proposition 12, California consumers who dine in these establishments have no way of ensuring their meat was produced without the use of cruel confinement methods.

A 2021 study found that California school meals, with only four percent of plant-based menu entrees, rely largely on meat. Friends of the Earth, *The State of School Lunch in California* 8 (Mar. 2021). Moreover, from 2018–2019, California schools purchased 2.5 million pounds of pork through the USDA Foods program, *id.* at 9, which obtains pork products from many states other than California. *See id.* In fact, in 2015, barely

half of California's schools purchased locally sourced food products. *See Purchase of Locally Produced Foods*, Cal. Dep't of Educ. (June 16, 2021), <https://www.cde.ca.gov/ls/nu/sn/mbcnp062018.asp>; *Fingertip Facts on Education in California*, Cal. Dep't of Educ. (Mar. 30, 2022), <https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp>. Thus, children who are served pork products in school cannot avoid eating pork that was produced through cruel and inhumane confinement practices.

Similarly, without Proposition 12, Californians who are served pork products in hospitals also cannot avoid eating products produced by such cruel practices. Pork purchases by the Nutrition and Food Services department at the University of California at San Francisco Medical Center alone were 11,925 pounds (9.6% of purchases) in 2010 and 45,839 pounds (17.4% of purchases) in 2013. UCSF Med. Ctr. Nutrition & Food Servs., *UCSF Sustainable Foodservice: Annual Report* 5–6 (2013).

Thus, Proposition 12 has an enormous impact on California by ensuring that the pork Californians consume in-state is both healthy and free of at least some of the taint of animal cruelty. Proposition 12 presents more than just a philosophical determination regarding animal cruelty—it is a state's effort to protect the personal eating habits of its residents. Indeed, even more so than for other practices to which people may object on moral grounds, *see, e.g., Trs. of Indiana Univ. v. Curry*, 918 F.3d 537, 542–43 (7th Cir. 2019) (upholding a ban on the sale of fetal tissue where the State law was grounded in ethical concerns), the morally

offensive practices at issue here *directly* affect those Californians who wish to eat pork products. In any event, because Pork Producers failed to address these substantial local benefits in their Complaint, let alone allege that the economic burdens about which they complain are “*clearly excessive*” in relation to those local benefits, *Pike*, 397 U.S. at 142 (emphasis added), their Complaint fails to state a claim for relief under the Commerce Clause.

## **V. THE STATES SHOULD BE PERMITTED TO REGULATE IN THIS AREA.**

Finally, *amici* emphasize the importance of allowing states to decide these questions of great moral significance, with due regard for federal legislative supremacy and individual constitutional safeguards. Proposition 12, and laws like it, allow states to protect their populaces from products that are cruelly produced and harmful to public health. *See, e.g.*, Colo. Rev. Stat. § 35-21-203 (2020) (Colorado statute forbidding use of battery cages by 2025 and banning in-state sale of products from battery cage systems by 2025); Colo. Rev. Stat. § 35-50.5-102 (2008) (Colorado statute forbidding use of gestation crates in-state by 2018); Mich. Comp. Laws § 287.746 (2009) (Michigan statute phasing out use of gestation crates by 2020 and prohibiting use of, or in-state sale of, products produced from battery cages by 2025); Or. Rev. Stat. § 600.150 (2007) (Oregon statute banning use of gestation crates by 2012); Or. Rev. Stat. § 632.835–850 (2019) (Oregon statute banning use of battery cages in-state and banning

in-state sale of products from battery cage systems by 2024); Mass. Gen. Laws ch. 129 App., §§ 1-2-1-3 (2016) (Massachusetts statute prohibiting in-state use of gestation crates, battery cages, and veal crates, and in-state sale of products from such systems, by 2022); R.I. Gen. Laws § 4-1.1-3 (2012) (Rhode Island statute forbidding use of gestation crates in-state by 2013); Ariz. Rev. Stat. Ann. § 13-2910.07 (2006) (2006 Arizona statute phasing out in-state use of gestation crates by 2012); Ariz. Admin. Code R3-2-907 (2022) (Arizona regulations forbidding use of battery cages and banning in-state sale of products from battery cage systems by 2025); Me. Rev. Stat. Ann. tit. 7, § 4020 (2009) (Maine statute banning in-state use of gestation crates by 2011); Fla. Const. art. X, § 21 (a 2002 ballot measure amended the Florida constitution to phase out in-state use of gestation crates by 2008).

Failure to recognize the important local benefits conferred by these laws would be antithetical to this Court's long-standing history of accepting the traditional police powers of states to legislate for the public health and welfare, as well as to protect the public morals by reducing cruelty to animals.



## CONCLUSION

For the foregoing reasons, the Court should affirm the holding of the Court of Appeals. Should the Court nevertheless find that Petitioners have stated a claim upon which relief might be granted, this case should be

remanded to the trial court for further proceedings on the merits of that claim.

Respectfully submitted,

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