No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, *et al.*,

Respondents.

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

BRIEF OF HISTORIANS THOMAS AIELLO AND JOSHUA SPECHT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Commerce Clause implicitly forbids a state from regulating in-state sales of food originating in conditions the state deems unhealthy, unsafe, or immoral.

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STATEMENT OF INTEREST

Amicus curiae Thomas Aiello is Professor of History at Valdosta State University in Valdosta, Georgia. His 2015 book *Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana* was cited in *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1417–1418 (2020) (Kavanaugh, J., concurring).

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Amici are academic historians with professional expertise in how states have regulated food, farming, consumption, and commerce from the Founding Era until today. Marshaling amici's professional research, this brief aims to provide an accurate and thorough historical perspective to inform this Court's analysis of the Commerce Clause's meaning and context.[1]

SUMMARY OF ARGUMENT

Since the time of the Commerce Clause's ratification, states have regulated the sale of food and other products within their borders in order to protect the health, safety, and morals of their citizens. These regulations included bans on local sales of unsafe or unhealthy agricultural products and ingredients, along with detailed inspection standards concerning the production and processing of meat sold inside a state's borders, no matter where the meat originated. Indeed,

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[1] No counsel for a party authored this brief in whole or in part, or made a contribution to fund the preparation or submission of this brief. The Open Philanthropy Project is the only person or entity that made a contribution to fund the preparation of this brief. This brief is filed with the written consent of the parties.

during the Founding Era and for the Nation's first century, the power to regulate food in these ways was exercised almost entirely by the states. And even during the industrial era, as Congress began to legislate in this field, states still led the way in channeling local concerns into local regulatory standards. Laws like this have always meant that food producers who pursue business in multiple states must choose whether to adapt their production, processing, and sourcing methods to those states' standards. Like those numerous and longstanding state laws, Proposition 12 simply regulates which products may be sold within California's borders. The Court should not construe the Commerce Clause to cast doubt on such a well-established form of state marketplace regulation.

ARGUMENT

I. Since the Founding Era, states have regulated local food sales to ensure safe and healthy food for their citizens.

Local standards safeguarding sales of foods are as old as the Republic. Throughout the Founding Era, the states that debated and ratified the Commerce Clause frequently enacted regulations governing the sale of food and other goods based on concerns about a product's production, quality, and morality. This Court has frequently looked to this type of "history and precedent" to determine the Constitution's meaning. *Eldred* v. *Ashcroft*, 537 U.S. 186, 187 (2003). This is because "a page of history is worth a volume of logic." *New York Tr. Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). In this case, Founding Era legislative practice confirms that the Commerce Clause does not bar states from regulating local food sales in a manner that evenhandedly impacts all who pursue commerce in the state.

Throughout the Founding Era, states both imported food to feed their citizens and exported it to sustain their industries. See Curtis P. Nettels, The Emergence of a National Economy, 1775–1815 (1962). And during this period, states enacted detailed regulations governing local sales of food, regardless of whether the food was imported or locally produced. This included inspection and production standards for cured meat and fish, as well as laws restricting sales of "unwholesome" or harmful provisions, particularly fresh meat and dairy products.

A. Inspection and Packing

In the Founding Era, states enacted detailed inspection requirements governing the packing and processing of foods, especially for salted meat and fish that traveled interstate in barrels. These laws prevented "spoilage and contamination" in "barrels used to store and ship foods domestically" and ensured that barrels, which were typically purchased intact, contained precisely what was promised. Wallace F. Janssen, America's First Food and Drug Laws, 30 Food, Drug, Cosmetic L.J. 665, 666–67 (1975). These regulations governed a large share of American meat consumption, since "salt beef and pork dominated the meat diet in most families" throughout "the late eighteenth and early nineteenth centuries." Sarah F. McMahon, A Comfortable Subsistence: The Changing Composition of Diet in Rural New England, 1620–1840, 42 Wm. & Mary Q. 26, 36 (1987). And laws establishing packing, weight, and quality standards for these barrels necessarily required producers to conform their production methods accordingly, as the cost of selling food to a state's citizens.

For example, in 1791, less than three years after Virginia ratified the Commerce Clause, it began to

require that each barrel of salted pork sold in the Commonwealth contain 204 pounds of pork. 3 The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619, p. 261 (1823). The same law also mandated that each barrel have at least "twelve hoops thereon." *Ibid.* The next year, a new enactment made the standards even more detailed and also specified that the law applied to "[a]ll beef and pork exposed to sale or barter within this commonwealth in barrels, *whether the same be packed here or imported from Carolina*, *or any other place*." 1 The Statutes at Large of Virginia, From October Session 1792 to December Session 1806, p. 173 (1835) (emphasis added).

Other states followed suit. In 1793, Maryland amended a prior inspection statute to require that beef and pork imported to Georgetown be inspected. 645 The Laws of Maryland, ch. 21, p. 13 (1793). Recognizing that the prior statute "impose[d] no penalty on persons offering salted provisions for sale in said town, except for exportation," the legislature required inspection of all beef or pork regardless of origin before the meat could be sold in Georgetown. *Ibid.* Likewise, in 1798, Rhode Island enacted comprehensive inspection standards for meat sold in the state. Beef and pork were required to be of "a good quality" and packed in either full barrels (which had to contain 200 pounds) or half barrels (100 pounds). The Public Laws of the State of Rhode Island and Providence Plantations, p. 509 (1798). The act also required that barrels of beef and pork be classified and labeled either "prime" or "mess" according to the cuts of meat packed inside. *Id.* at 510. In 1802, New Jersey also specified weight requirements for barrels of beef and pork "exposed to sale within [the] state" and mandated that the barrels "be[] of the materials and

dimensions" described and labeled "prime," "mess," or "cargo" based on the cut of meat inside. A Digest of the Laws of New Jersey, § 5, pp. 41–42 (1838). The state also required that barrels conform to other requirements such as having 12 hoops and completely coopered heads. *Ibid.*

States also established inspection standards that affected processing methods for fish, an industry chiefly sustained by fisheries in New England. See Nettels, *supra,* at 216–217. In Virginia, for example, a 1795 law required detailed inspection of "[e]very barrel of fish" regardless of whether it was "packed in this Commonwealth for sale, in any town established in this state . . . or imported here." "An Act for Inspection of Fish," 2 The Statutes at Large of Virginia, ch. 225, § 2, p. 191 (1819). Electric refrigeration was well over a century away, so the law provided that "all barrels so packed shall be full, well nailed, and pegged, and the fish therein shall be well salted, sound, and well seasoned." *Id.* § 3.

Seven years later, New York enacted a law with a similar name but different requirements. "An Act for the Inspection of Fish," 5 The Laws of the State of New York, ch. 59, p. 282 (1809). This 1802 law established a system of appointing "not more than four inspectors of fish in the city and county of New York" who would enforce distinct packing and volume standards for distinct species of fish (for example, "every barrel of salmon inspected[] shall contain two hundred pounds" and "nothing herein contained shall prevent the putting up of dry salted herring, in barrels made of red oak or black oak, with heads made of pine"), alongside a mandate that "every barrel . . . in which fish shall be packed . . . shall be made of well seasoned white oak, rock oak or white ash staves and heading," shall

"have twelve good hoops," and shall "be perfectly tight." *Id.* §§ 3, 13, pp. 282–284.

These inspection laws – specifying complex state standards for how barrels of pork, beef, salmon, herring, and other fish should be packed, nailed, pegged, weighted, and seasoned – necessarily impacted production and processing for whoever wished to supply these products for a state's consumers. This means these laws necessarily had some effect on business decisions outside the regulating state.

B. "Unwholesome" or Harmful Foods

The earliest state laws regulating food also banned the sale of foods based on their quality or conditions of origin, especially "unwholesome" provisions. In 1785, two years before the Constitutional Convention, Massachusetts became the first state to enact a general food law. Titled "An Act Against Selling Unwholesome Provisions," the law regulated all local sales of food, regardless of origin. The law's purpose was to protect citizens from the sale of "diseased, corrupted, contagious, or unwholesome provisions," which were a "great nuisance of public health and peace." 1 The Laws of the Commonwealth of Massachusetts, p. 224 (1807). The law restricted the sale of all such provisions "whether for meat or drink," punishable by fine or imprisonment. *Ibid.*

Virginia and South Carolina enacted similar laws both before and after ratifying the Commerce Clause. "An Act Prescribing the Punishment of Those Who Sell Unwholesome Meat or Drink," 1 The Revised Code of the Laws of Virginia, ch. 187, p. 551 (1819) (enacting in 1786 escalating criminal penalties for any person "that selleth the flesh of any animal dying otherwise than by slaughter or slaughtered when diseased, or a

baker, brewer, distiller, or other person, who selleth unwholesome bread or drink"); *id.* at ch. 1, p. 4 (reenacting this law verbatim in 1819); 5 The Statutes at Large of South Carolina, p. 22 (1839) (banning the sale of "any poor carrion, blown, puffed up, or unwholesome meats"); *cf. Missroon* v. *Waldo*, 11 S.C.L. 76, 78 (S.C. Const. App. 1819) (reversing a South Carolina jury's verdict that was in favor of a vendor who had sold four barrels of "unwholesome" bread, described as "loaves of English stamp which . . . in the centre [of] was a musty collection which was equal to, and perhaps worse, than a mixture of base metals"). These laws continued to spread over the next decades. *E.g.*, A Digest of the Laws of the State of Georgia, pp. 366–367 (1822); Public Laws of the State of Rhode Island and Providence Plantation, p. 411 (1844).

These "unwholesome" food laws were enforced both through civil actions and through inspections of local sales of fresh food, especially meat and dairy products. While milk and fresh meat did not travel long distances in this era before refrigeration, both products still crossed state borders and supplied regional markets. A share of New York City's meat and milk was, for example, supplied from cattle herds across the river in neighboring New Jersey. See Gergely Baics, Is Access to Food a Public Good? Meat Provisioning in Early New York City, 1790–1820, 39 J. Urb. Hist. 645, 650 (2021). Because "citizens expected their local governments to ensure the availability of adequate quantities and quality," vendors and customers gathered in public spaces "to conduct trade in fresh food under the watchful eye of the municipal government." *Ibid.* These government inspectors were tasked with safeguarding "public health standards in the sale of fresh provisions." *Id.* at 655.

The expansion of "unwholesome" meat laws – as well as the concerns underlying them – tracked the expansion of American meat consumption, which grew steadily in the decades following Independence. See, *e.g.*, McMahon, *supra*, at 36–39 (explaining that combined average household allowances of beef and pork in New England rose from 165 pounds in the middle of the 18th century to "200 pounds by the early 19th century"). And as meat eating continued to increase into the middle of the 19th century, so did fears of the unsafe origins of animal products, including urgent concerns about the conditions in which animals were raised.

For example, a health treatise from 1852 summarized concerns about cattle fed "rotten" and "decompos[ing]" produce, inhaling "poisonous vapors," and housed in inhumane conditions. M.L. Byrn, Detection of Fraud and Protection of Health: A Treatise on the Adulteration of Food and Drink, p. 37 (1852), http://www.loc.gov/item/07026067. These conditions were understood to create hazardous meat, supplied to consumers who had no knowledge of the alarming origins:

> [A]fter the animals are fed and housed in this way . . . they become, as a natural consequence, worn down by disease and ill-treatment—bloated up like the drunkard—they then being of no further use as milch cows, are killed, and the meat sent into market to be consumed by an unconscious and unthinking people.

Id. at 38. The treatise directly linked the way animals were being "housed and fed" across the nation to the "impur[ity]" of food products:

> When we reflect on the many benefits these useful animals were created to confer on mankind, the more we become disgusted with the way they are housed and fed, to supply the large cities with milk; and persons must not think that it is confined to New York, Philadelphia, and Boston, but all cities of any size are cursed with impure milk.

Id. at 30.

Another volume from the same period, written by a physician and focused on threats to healthy eating, also warned about the cramped quarters that livestock suffered in, breathing filth and unable to move around:

> The suffering animals stand in low unventilated buildings so closely, that it is impossible for them to lie down without lying upon one another. They breathe over and over again the same air, tainted with the exhalations of their own fevered bodies, and of the unutterable slimy filth voided from their diseased and ulcerated intestines.

Thomas Hoskins, What We Eat: An Account of the Most Common Adulterations of Food and Drink, p. 170 (1861), http://resource.nlm.nih.gov/62420660R. The book observed that Americans had long been drawn to reforming these inhumane conditions:

> The distillery stables of New York, where cows stand in hundreds and even thousands, as closely as they can be packed, surrounded by liquid filth, in low unventilated buildings, fed almost entirely on the hot slop from the whiskey stills, and in every stage of disease and rottenness, have attracted the attention of persons interested in sanitary reform and

> the prevention of disease, ever since they were first begun.

Id. at 165.

In addition to the health dangers of impure farm products and unwholesome meat, another critical concern for the early states was disease spreading among both humans and livestock. These afflictions were thought to spread most rampantly in hot weather and especially in crowded cities, so New York in 1801 banned importation of cotton, hides, coffee, or peltry into New York City from June to October. "An Act to provide against infectious and pestilential Diseases," 1 The Laws of the State of New York, ch. 92, § 16, p. 368 (1906). State officials suspected that these goods contributed to disease, so despite what importers might consider an unworkable restriction on the interstate trade of staple goods, the state took precautions to protect its citizens. After all, "[t]he same bale of goods, . . . the same cask of provisions, or the same ship, that may be the subject of commercial regulations, may also be the vehicle of disease." *Missouri, K. & T. Ry. Co.* v. *Haber*, 169 U.S. 613, 627 (1898) (quotation omitted). But laws restricting those goods were "no more intended as regulations on commerce than the laws which permit their importation [we]re intended to inoculate the community with disease." *Ibid.*

C. Moral Reform

Finally, in addition to regulation of foods, Founding Era states also enacted local restrictions on other products they deemed harmful. And because "[t]he postrevolutionary era witnessed the origins of one of the most concerted and energetic moral reform movements in American history," a major focus here was moral perils. William J. Novak, The People's Welfare:

Law and Regulation in Nineteenth-Century America, p. 152 (1996). For example, states banned private lottery tickets, declaring them a nuisance, *e.g.*, 1 The Laws of the State of New York, ch. 12, p. 35 (1802), as well as tickets from state-run lotteries, *e.g.*, Public Statute Laws of the State of Connecticut, tit. 22, § 75, p. 166 (1821) (banning any effort "within this state" to "sell or otherwise dispose of any lottery tickets" including those "issued from or under the authority of any other state whatever").

Pennsylvania's efforts to ban lottery tickets are especially relevant. In 1762, Pennsylvania's colonial legislature had enacted penalties for any person "who shall set up or establish any lottery, or sell or expose to sale any ticket or device in such lottery." 6 The Statutes at Large of Pennsylvania, p. 184 (1902). After Independence, interstate flow of lottery tickets undermined the ban. So legislators revisited the matter in 1792, observing that the colonial ban "hath not in latter years been considered to extend to lotteries set up and established without this state." 14 The Statutes at Large of Pennsylvania, pp. 198–199 (1902). Four years after their state convention voted in Independence Hall to ratify the Constitution, the state thus expanded the act to ban sale of any lottery tickets, irrespective of origin, unless "authorized by the laws of this commonwealth." *Id.* at 199.

This range of early state laws protecting consumers from harmful food and other goods – both locally produced and imported alike – shows that the people who drafted, debated, and ratified the Commerce Clause did not believe they were surrendering this power. Despite this proliferation of state laws regulating food products, Congress left regulation of domestic food production to the states for at least the Republic's

first century.[2] This of course did not mean Congress lacked power to regulate interstate commerce related to food. Rather, regulating local food sales has always been a quintessential state power, no matter that these "numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 594 (1995) (Thomas, J., concurring).

II. States continued to lead the way on food regulation through the industrial era.

Industrialization brought both new benefits and new threats to consumer health and safety. But far from showing that early understandings of the Commerce Clause became outmoded with industrial transformation, the history of food regulation into this period confirms the Founding Era's wisdom of allowing states to lead on this front. This proved especially important in a highly networked and integrated national economy, which exposed Americans to a growing range of new health and safety concerns.

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[2] The "first federal food protection law was enacted by Congress in 1883 to prevent the importation of adulterated tea." Neal D. Fortin, Food Regulation: Law, Science, Policy, and Practice, p. 4 (4th ed. 2022). The law solely governed foreign imports. "This was followed in 1896 by the oleo-margarine statute, which was passed because dairy farmers and the dairy industry objected to the sale of adulterated butter and fats colored to look like butter." *Ibid.* But due to "doubts about the constitutional power of Congress to regulate" domestic food production, "the legislation imposed its regulatory control under the guise of a complex system of taxation" enacted through Article I's taxing power. Peter Barton Hutt, A History of Government Regulation of Adulteration and Misbranding of Food, 39 Food, Drug, & Cosmetic L.J. 2, 45 (1984).

States continued to take the lead in safeguarding food consumption to meet these threats, helping ensure that "the facets of governing that touch on citizens' daily lives [were] administered by smaller governments closer to the governed." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 536 (2012). Because states tend to be more responsive to local consumers, these laws meant that "innovation and competition in government" was based on "local tastes and local conditions." Michael McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1493 (1987). And because industrialization meant both more centralized and specialized industries and more mass-produced goods, these state laws necessarily impacted national producers and supply chains.

States enacted the first laws dealing with the hazards of certain industrially produced foods, usually called "pure food" legislation. These laws prohibited the mislabeling and adulteration of both natural and processed food products. In Massachusetts – which a century earlier had enacted the country's first general food law in 1795, see *supra,* at 6 – starting around 1879, "coalitions of consumers, health providers, and public health officials were able to secure fairly comprehensive pure food laws, update and supplement them as needs arose, and claim, with some justification, that Massachusetts led the nation in enforcing the food laws on its books." Lorine Swainston Goodwin, The Pure Food, Drink, and Drug Crusaders, 1879–1914, pp. 62–63 (1999). Illinois had passed a similar law in 1874, and a dozen other states followed in the next decade. See Carl L. Alsberg, "Progress In Federal Food Control," in Mazyck P. Ravenel (ed.), A Half Century of Public Health, p. 214 (1921).

Even as laws governing food purity and labeling spread, they were by no means uniform. This meant it "was often illegal to sell a product in one state that was manufactured under strict laws in another." Ruth Clifford Engs, The Progressive Era's Health Reform Movement, p. 271 (2003); see also Alsberg, *supra*, at 215. In turn, "large national firms involved in interstate trade . . . resisted state regulation because compliance with widely varying state regulations was potentially costly." Marc Law, The Origins of State Pure Food Regulation, 63 J. Econ. Hist. 1103, 1120 (2003). But state legislators nonetheless acted to protect their consumers, and "[b]y 1900 nearly every state had passed some kind of pure food or pure dairy legislation that made it illegal to sell 'adulterated' food products." *Id.* at 1103; see also James Young, Pure Food: Securing the Federal Food and Drugs Act of 1906 (1989).

This Court rejected Commerce Clause challenges to these laws, for example upholding a Massachusetts criminal conviction for sale of butter "made partly of fats, oils and oleaginous substances and compounds thereof, not produced from unadulterated milk or cream." *Plumley* v. *Massachusetts*, 155 U.S. 461, 462 (1894). The challenged law no doubt impacted out-of-state production of butter. But the Court explained that this regulation of a food's ingredients and production was within "plenary" state power, despite the impact on interstate commerce:

> If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud

> and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state.

Id. at 473.

States continued passing pure food laws similar to the one *Plumley* upheld as a response to local reports of unsanitary, misleading, and unsafe food production practices. For example, Indiana enacted such a law in 1898 after John Hurty, a Purdue University chemistry professor and the state's chief public health officer, estimated that four hundred children in the state had died from adulterated milk. Deborah Blum, The Poison Squad: One Chemist's Single-Minded Crusade for Food Safety at the Turn of the Twentieth Century, p. 63 (2019). Hurty even reported that milk producers were faking the look of cream using pureed calf brains: "It had been hard to get rid of the brains of immature animals slaughtered. People could not be induced to eat brain sandwiches in sufficient amount to use all the brains, and so a new market was devised." Thurman B. Rice, The Hoosier Health Officer: A Biography of Dr. John N. Hurty and the History of the Indiana State Board of Health to 1925, p. 255 (1941).

Meanwhile in New York, a study of milk "produced just across the Hudson River in New Jersey . . . found 'so numerous a proportion of liquefying colonies [of bacteria] that further counting was discontinued.'" Blum, *supra*, at 23 (citation omitted). In a later case out of New York, this Court observed that there was no question that "milk may be excluded [from the state] if necessary safeguards have been omitted" and "[a]ppropriate certificates may be exacted from farmers in Vermont and elsewhere." *Baldwin* v. *G.A.F. Seeling, Inc.*, 294 U.S. 511, 524 (1935).

The success of state laws that protected consumers from unwholesome, impure, or otherwise objectionable goods – as well as growing outrage about conditions in the nation's food manufacturing plants – eventually led to louder calls for the federal government to follow the states' lead. See Fortin, *supra*, at 4. Theodore Roosevelt answered that call, urging federal standards in his annual message to Congress in 1905. Within the next year, "Upton Sinclair's muckraking novel *The Jungle* sparked an uproar over conditions in the meatpacking industry" in ways no politician could, *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452, 455 (2012), and Congress passed the Pure Food and Drug Act of 1906, which prohibited "the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs or medicines, and liquors," Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed 1938).

While the 1906 law established federal standards, it did not supersede state law. And sure enough, just "within two years after the passage of the federal law at least thirty states amended or enacted food laws." Alsberg, *supra*, at 271. Even across these new laws "many differences remained." *Ibid.* Across the nation, states insisted on more stringent standards than the federal law, reaching deeper into the details of industrial production. For example, Indiana in 1907 banned sales of concentrated animal feed – which the federal Pure Food and Drug Act regulated in the same manner as human food, see 21 U.S.C.A. § 7 (West) (repealed 1938) – unless manufacturers used methods specifically approved by the U.S. Association of Official Agricultural Chemists to ascertain "the minimum percentage of crude fat or crude protein, allowing 1 per cent of nitrogen to equal 6.25 per cent of protein," as well as "the maximum percentage of

crude fiber," Laws Ind. 1907, ch. 206 (Burns' Ann. St. § 16-1001 *et seq.*).

Indiana's content labeling requirements went far beyond the Pure Food and Drug Act's misbranding restrictions. Nonetheless, this Court upheld the Indiana law against both Commerce Clause and preemption challenges filed by a Minnesota producer who had placed products violating the law's standards on a train to Indiana. See *Savage* v. *Jones*, 225 U.S. 501, 521, 532 (1912). The Court reiterated the same rule it had applied to reject numerous industry challenges to food-related state regulations over the years: "when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce." *Id.* at 525 (listing cases beginning with *Plumley*, 55 U.S. 461). The Court also cast aside the producer's claim that Indiana had "set up arbitrary standards governing conditions of manufacture." *Id.* at 528.

States also led the way in enacting consumer protections that evolved largely without congressional culmination or even support. The clearest example here is cigarettes. Leadership on regulation of smoking came from the states, with Congress rarely weighing in. The first state consumer restrictions were enacted in New Jersey and Washington in 1883, outlawing underage sales. U.S. Dep't of Health and Human Services, Reducing Tobacco Use: A Report of the Surgeon General, p. 30 (2000) (hereinafter Surgeon General Report). By the decade's end over half the states in the union had such laws, and by World War II every state besides Texas did too (Texas joined in 1964). *Id.* at 31.

Some states went much further. In 1895, North Dakota banned all cigarettes. By 1901, three more states enacted similar bans and eleven others "had some general anticigarette legislation." Surgeon General Report, *supra*, at 32. Eight more states joined over the next decade. *Ibid.* Upholding Tennessee's total ban, this Court ruled that the law was fully "within the police power of the States." *Austin* v. *Tennessee*, 179 U.S. 343, 345 (1900). Addressing the impact on interstate commerce, the Court rejected the notion that a supplier "may, under the commerce clause of the Constitution of the United States, bring into [Tennessee] from other states cigarettes in unlimited quantities, and sell them despite the will of Tennessee as expressed in its legislation." *Id.* at 362. As it happens, these bans eventually fell. But that was not because courts declared them invalid under the Commerce Clause. Rather, state residents had enough of the crusade and got their political representatives to agree. See Surgeon General Report, *supra*, at 32.

In the light of this history, the ultimate question in this case is whether states can keep contributing to the development of regulatory standards in the way they always have, versus whether the Commerce Clause should be interpreted to "force all of the states to accept the lowest standard for conducting the business permitted by one of them." *Robertson* v. *California*, 328 U.S. 440, 460 (1946). It may well be prudent for Congress to enact federal uniformity in meat production and processing. Or it might be better to permit more state innovation and let markets respond. These are – and long have been – questions for state legislatures and Congress, not for courts applying the dormant Commerce Clause.

CONCLUSION

The Commerce Clause does not prohibit states from enacting local safeguards on food originating outside the state. If it did, many state laws pioneered by the same Americans who drafted, debated, and ratified the Constitution would be on questionable constitutional footing and the country's ongoing history of food regulation would be undermined. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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