No. 20-1215

In the Supreme Court of the United States

NORTH AMERICAN MEAT INSTITUTE,

Petitioner,

v.

ROB BONTA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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June 1, 2021

QUESTION PRESENTED

In Proposition 12, California's voters imposed a restriction on the in-state sale of certain animal products, regardless of whether the products originate in-state or out-of-state. The district court refused to preliminarily enjoin that restriction, concluding that petitioner is unlikely to succeed in showing that the restriction violates the dormant Commerce Clause. The court of appeals affirmed in an unpublished memorandum disposition. The question presented is:

Whether the court of appeals correctly held that the district court did not abuse its discretion in denying preliminary injunctive relief.

PARTIES TO THE PROCEEDING

As the petition notes, "parties to the proceedings below" included Xavier Becerra as California's Attorney General, and Sonia Angell as the Director of the California Department of Public Health. Pet. ii. Today, the Attorney General is Rob Bonta (as the docket in this case already reflects). The Director of the California Department of Public Health is now Tomás J. Aragón, M.D., DrPH. Under Rule 35.3, those individuals are automatically substituted as parties.

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STATEMENT

1. Section 25990(a) of California's Health and Safety Code, adopted by the State's voters as Proposition 12 in November 2018, directs that farm owners and operators in California must not "knowingly cause [certain] animal[s] to be confined in a cruel manner." Specifically, in-state farmers must provide at least "43 square feet of usable floorspace" to "a calf raised for veal" and at least "24 square feet of usable floorspace" to "a breeding pig." Cal. Health & Safety Code § 25991(e). The veal confinement standard took effect in January 2020; the breeding pig standard will take effect in January 2022. *Id.*

Proposition 12 also prohibits "the sale within the state" of meat products from animals that were confined with less floorspace. Cal. Health & Safety Code § 25990(b). This sales restriction applies to all covered products sold to California consumers, no matter the products' origin. *Id.* Like the confinement standards, the sales restriction for veal took effect in January 2020, and the sales restriction for covered pork products will take effect in January 2022. *See id.* § 25991(e). The purpose of Proposition 12 is "to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." Pet. App. 43a.

2. In October 2019, nearly a year after the voters enacted Proposition 12, petitioner North American Meat Institute sued the California Attorney General and other state officials, challenging the constitutionality of the restriction on veal and pork products sold in California. Pet. App. 4a-5a. Petitioner sought a

preliminary injunction on the ground that it was likely to succeed on the merits of its dormant Commerce Clause claims. *Id.* at 13a. Specifically, it argued that Proposition 12's limitation on in-state sales violates the dormant Commerce Clause by "(1) discriminating against out-of-state producers, distributors, and sellers of pork and veal, (2) impermissibly regulating extraterritorial activities beyond California's borders; and (3) substantially burdening interstate commerce in a manner that clearly exceeds any legitimate local benefits." *Id.* at 5a.

The district court (Snyder, J.) denied preliminary injunctive relief in November 2019, concluding that petitioner had "fail[ed] to raise any serious questions on the merits" of its three claims. Pet. App. 14a. As to the discrimination claim, the court reasoned that "Proposition 12 is facially neutral" and has no "discriminatory purpose" or "effect." *Id.* at 18a. The "in-state sales prohibition," the court emphasized, "applies equally to animals raised and slaughtered in California as [it does] to animals raised and slaughtered in any other state." *Id.* at 21a. And petitioner "adduce[d] no evidence—not even the threshold amount necessary to support a preliminary injunction—to justify an inference" that the measure was motivated by protectionism concerns. *Id.* at 20a (internal citation omitted).

As to the extraterritoriality claim, the court held that Proposition 12 lacks any impermissible extraterritorial reach because its "in-state sales prohibition only applies to 'in-state conduct'—sales of meat products in California—not conduct that takes place 'wholly outside' California." Pet. App. 33a. "It is accordingly a perfectly lawful exercise of California's 'state sovereignty protected by the Constitution.'" *Id.*

Finally, the court concluded that petitioner made no showing that Proposition 12's in-state sales restriction imposes a "burden . . . on interstate commerce [that] is clearly excessive in relation to the putative local benefits." Pet. App. 35a (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)) (internal quotation marks and brackets omitted). Petitioner's concern about increased compliance costs, the court observed, merely reflects "disappointment that Proposition 12 precludes" producers who wish to sell in California from using a particular "more profitable method of operating in a retail market." *Id.* at 37a (internal quotation marks omitted).

Petitioner appealed, but did not move for an injunction pending appeal.[1] On October 15, 2020, the court of appeals affirmed in an unpublished memorandum. Pet. App. 2a-3a (Callahan & Ikuta, Circuit Judges, and Bencivengo, District Judge). Emphasizing that Proposition 12 "treats in-state meat producers the same as out-of-state meat producers," the court concluded that "[t]he district court did not abuse its discretion in holding that [petitioner] was unlikely to succeed on the merits of its dormant Commerce Clause claim." *Id.* at 2a.

Petitioner sought rehearing en banc, but the court denied the petition after "no judge requested a vote for en banc consideration." Pet. App. 42a.

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[1] After petitioner appealed the denial of its motion for a preliminary injunction, proceedings continued in the district court. The court granted in part and denied in part respondents' motion to dismiss the complaint. *See N. Am. Meat Inst. v. Becerra*, 2020 WL 919153 (C.D. Cal. Feb. 24, 2020). Shortly thereafter, petitioner filed an amended complaint. *See* D. Ct. Dkt. 73. The court then stayed further proceedings pending resolution of petitioner's appeal from the denial of preliminary injunctive relief. *Id.* 74.

ARGUMENT

The court of appeals properly affirmed the district court's denial of preliminary injunctive relief. Its unpublished decision adheres to this Court's dormant Commerce Clause precedents and does not conflict with any other court of appeals decision. Petitioner principally argues that Ninth Circuit precedent "conflict[s] with the law in every other circuit," Pet. 19, by limiting "the Constitution's prohibition on extraterritorial regulation . . . to 'price control' and 'price affirmation' statutes," *id.* at 12; *see id.* at 14-22. But that argument is premised on a distorted presentation of Ninth Circuit precedent. In multiple decisions that petitioner fails to cite—including an en banc decision—the Ninth Circuit has struck down state laws on extraterritoriality grounds even though they were not price control or price affirmation regulations. This Court, moreover, has recently denied petitions seeking review of the same or similar extraterritoriality issues. For those reasons, and because the other two circuit conflicts alleged by petitioner are illusory as well, there is no basis for the Court's intervention.

1. The court of appeals correctly concluded that the "district court did not abuse its discretion in holding that [petitioner] was unlikely to succeed on the merits of its dormant Commerce Clause claim." Pet. App. 2a.

a. The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce," this Court has "interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid*

Waste Mgmt. Auth., 550 U.S. 330, 338 (2007). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008).

As a general matter, "two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). First, "state regulations may not discriminate against interstate commerce." *Id.* Second, "[s]tate laws that 'regulate even-handedly to effectuate a legitimate local public interest will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)) (alterations omitted). "State laws frequently survive this *Pike* scrutiny." *Davis*, 553 U.S. at 339. Indeed, the Court has observed that only "a small number of our cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997).

A third principle this Court has occasionally articulated is that the dormant Commerce Clause does not permit a State to "directly control[] commerce occurring wholly outside [its] boundaries." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The Court has "used [this] extraterritoriality principle to strike down state laws only three times." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). In each of those cases, the Court invalidated price control or price affirmation statutes that

regulated sales in other States. *See id.* at 1173. In *Brown–Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), for example, "New York law required liquor merchants to list their prices once a month and affirm that the prices they charged in New York were no higher than those they charged in other states." *Epel*, 793 F.3d at 1172. That scheme had an impermissible extraterritorial reach because "a seller couldn't lower price[s] elsewhere without first doing so in New York." *Id.*; *see also Healy*, 491 U.S. at 339 (similar); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935) (invalidating State's attempt to establish a "scale of [milk] prices for use in other states"). The Court has recognized, however, that a regulation of in-state conduct—such as a regulation of in-state sales—does not become "impermissibl[y] extraterritorial" merely because it produces "effects" beyond a State's borders. *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).

b. In this case, petitioner moved in the district court to preliminarily enjoin Proposition 12 on the ground that the in-state sales restriction likely violates the dormant Commerce Clause. Pet. App. 5a. After the district court denied that motion, the court of appeals affirmed in an unpublished memorandum. *Id.* at 2a-3a. The court of appeals reasoned that the district court did not "abuse its discretion" because petitioner is "unlikely to succeed" in showing that Proposition 12 is discriminatory, impermissibly extraterritorial, or invalid under the *Pike* balancing standard. *Id.*

That analysis is correct in every respect. Proposition 12's in-state sales restriction is not discriminatory because it "treats in-state meat producers the same as out-of-state meat producers." Pet. App. 2a (citing, *e.g.*,

Wayfair, 138 S. Ct. at 2100 (Gorsuch, J., concurring)). It is not impermissibly "extraterritorial" because it restricts sales within California alone. *Id.* at 2a-3a (citing, *e.g.*, *Walsh*, 538 U.S. at 669). And there is no basis for holding the restriction invalid under *Pike* because petitioner failed to demonstrate that it "substantially burden[s] interstate commerce," *id.* at 3a, or that any burden "is clearly excessive in relation to the putative local benefits," *Pike*, 397 U.S. at 142; *see also infra* pp. 16-18.

2. Petitioner disagrees with the panel's unanimous assessment of the merits and urges this Court to grant review in an interlocutory posture on the ground that the court of appeals' decision "implicates conflicts" with "multiple circuit courts" on three dormant Commerce Clause issues. Pet. 2; *see id.* at 14-31. But petitioner fails to identify any genuine conflict.

a. First, petitioner argues that the Ninth Circuit has imposed an "arbitrary limitation" on the dormant Commerce Clause extraterritoriality doctrine. Pet. 15. According to petitioner, the Ninth Circuit has limited the doctrine "to 'price control' and 'price affirmation' statutes," *id.* at 12, in a way that "conflict[s] with the law in every other circuit," *id.* at 19. That is incorrect.

i. The Ninth Circuit has repeatedly made clear—in a series of published decisions that petitioner fails to cite—that it does not view the extraterritoriality doctrine as limited to pricing regulations. In *Sam Francis Foundation v. Christie's, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015), for example, the en banc court struck down a California statute requiring a "seller of fine art to pay the artist a five percent royalty if 'the seller resides in California.'" The court "easily conclude[d] that the royalty requirement, as applied to out-of-state sales by California residents, violate[d]

the dormant Commerce Clause" to the extent it governed "sales [with] no necessary connection with the state other than the residency of the seller." *Id.* at 1323. "For example," the court explained, "if a California resident has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York, the Act requires the payment of a royalty to the North Dakota artist—even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California." *Id.* The court concluded that application of the statute to such out-of-state sales would impermissibly regulate "wholly out-of-state conduct." *Id.* at 1324.

Other Ninth Circuit decisions have likewise invalidated laws that were not pricing regulations on extraterritoriality grounds. In *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615-616 (9th Cir. 2018), the court affirmed an injunction blocking California's application of waste disposal standards to medical waste disposed of in other States. And in *NCAA v. Miller*, 10 F.3d 633, 638-639 (9th Cir. 1993), the court held that Nevada could not validly require the NCAA to apply certain procedural requirements to disciplinary proceedings lacking a sufficient nexus to Nevada. If the Ninth Circuit had limited "the Constitution's prohibition on extraterritorial regulation . . . to 'price control' and 'price affirmation' statutes," Pet. 12, each of those decisions would have turned out differently.

Petitioner seizes on the observation by the panel below that Proposition 12 "is not a price control or price affirmation statute." Pet. App. 2a; *see* Pet. 15. That observation was an accurate and sensible one—each of this Court's handful of precedents striking down laws on extraterritoriality grounds involved

"price-control or price-affirmation statutes." *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015); *see supra* pp. 5-6. This Court made a similar observation when refusing to apply the extraterritoriality doctrine in *Walsh*, 538 U.S. at 669 (noting that Maine statute is "unlike price control or price affirmation statutes").[2] But the panel below did not hold that extraterritoriality challenges are *limited* to pricing regulations. Nor could it have done so, in light of the en banc decision in *Sam Francis* and the other circuit precedents discussed above.[3]

Petitioner also notes that the Tenth Circuit "has suggested the extraterritoriality doctrine is limited to price regulations." Pet. 18. But as petitioner explains, Tenth Circuit precedent is not entirely consistent on this score. *See id.* at 18-19; *see also* Br. of Indiana *et*

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[2] The Court in *Walsh* rejected an extraterritoriality challenge to a Maine law regulating in-state pharmaceutical sales. 538 U.S. at 669; *see id.* at 654-657. In doing so, the Court emphasized that the law merely pressured manufacturers to enter into certain "rebate agreements" within the State—it did not regulate "the terms of transactions that occur elsewhere." *Id.* at 669. Moreover, "unlike [the] price control or price affirmation statutes" invalidated in the Court's prior extraterritoriality decisions, "'the Maine Act [did] not regulate the price of any out-of-state transaction'"; did "'not insist that manufacturers sell their [products] . . . for a certain price'"; and did not tie "'the price of . . . in-state products to out-of-state prices.'" *Id.*

[3] As petitioner notes, *see* Pet. 15, other Ninth Circuit panels have made observations similar to the panel's here in assessing dormant Commerce Clause challenges to different laws. *See Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1240 (9th Cir. 2021); *Chinatown Neighborhood Ass'n*, 794 F.3d at 1146; *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 949-951 (9th Cir. 2013). Again, however, none of those decisions held that the sole or dispositive consideration is whether a law is a price control or price affirmation statute.

al. 7 (citing, *e.g.*, *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999)). This Court "usually allow[s] the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflict with other courts of appeals." *Joseph v. United States*, 574 U.S. 1038, 1038 (2014) (Kagan, J., respecting the denial of certiorari); *see* Shapiro et al., *Supreme Court Practice* § 4.6, p. 4-24 (11th ed. 2019).

Indeed, this Court has repeatedly denied certiorari in recent years when asked to consider whether "the extraterritoriality doctrine is limited to price regulations." Pet. 18; *see Frosh v. Ass'n for Accessible Medicines*, No. 18-546 (2019); *Energy & Env't Legal Inst. v. Epel*, No. 15-471 (2015); *Snyder v. Am. Beverage Ass'n*, No. 12-1221 (2013). The Court has also repeatedly denied petitions presenting similar questions involving the extraterritoriality doctrine. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, No. 18-881 (2019); *Sam Francis Found. v. Christie's, Inc.*, No. 15-280 (2016); *Rocky Mountain Farmers Union v. Corey*, No. 13-1148 (2014); *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 13-1313 (2014); *cf. Missouri v. California*, No. 148, Original (2019); *Indiana v. Massachusetts*, No. 149, Original (2019).

ii. Even if the Court were inclined to consider the proper scope of the extraterritoriality doctrine, this case would be an exceptionally poor vehicle for addressing that issue. As an initial matter, given that this is an appeal of the denial of a preliminary injunction on a limited record, the panel constrained its analysis to a brief assessment of whether the district court "abuse[d] its discretion in concluding that Proposition 12 does not directly regulate extraterritorial conduct[.]" Pet. App. 2a. That short discussion does not amount

to the kind of thorough consideration of a question that makes for a suitable vehicle for plenary review. *Cf. Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017) (this Court is "'a court of review, not of first view'").

More fundamentally, petitioner cannot show that Proposition 12's sales restriction has an impermissible extraterritorial reach in any event: it bars the sale of certain animal products "within the state" of California—and nowhere else. Cal. Health & Safety Code § 25990(b); *see* Pet. App. 2a-3a, 29a-35a. And as petitioner acknowledges, *see* Pet. 14, Proposition 12's confinement standards apply only to California farmers, *supra* p. 1. Under California law, then, out-of-state farmers may confine animals however they see fit; Proposition 12 merely limits which of their products may be sold within the State.

Petitioner nonetheless argues that Proposition 12 represents an impermissible "effort to control out-of-state farming conditions," Pet. 20, because, in petitioner's view, its "practical effect" will be to lead out-of-state meat producers to adopt new "confinement conditions for breeding sows and veal calves," *id.* at 14. But this Court has already rejected the argument that a state law or policy has impermissible extraterritorial reach merely because businesses may respond by opting to modify their practices in other States. *See Walsh*, 538 U.S. at 669. And for good reason. As then-Judge Gorsuch explained, if such out-of-state effects sufficed to render a state law invalid under the dormant Commerce Clause, that would "risk serious problems of overinclusion." *Epel*, 793 F.3d at 1175. The "reality is that the States frequently regulate activities that occur entirely within one State but that have effects in many." *Am. Beverage Ass'n v. Snyder*,

735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring). For example, States routinely adopt "standards for products sold in-state (standards concerning, for example, quality, labeling, health, or safety)" that have "ripple effects . . . both in-state and elsewhere"—including the practical effect of sometimes leading out-of-state producers to modify their production and distribution systems if they wish to sell their products in the enacting State. *Epel*, 793 F.3d at 1173. As courts throughout the Nation have recognized, that kind of indirect "effect" does not render a state law invalid under the dormant Commerce Clause extraterritoriality doctrine.[4]

Petitioner's contrary understanding of the doctrine is not supported by the cases it invokes. *See* Pet. 16-19. In *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833 (7th Cir. 2017), for example, the court struck down a statute authorizing Indiana to bring civil-penalty

[4] *See, e.g.*, *Epel*, 793 F.3d at 1170 (in-state sales restriction "requir[ing] electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources"); *Chinatown Neighborhood Ass'n*, 794 F.3d at 1139, 1146 (in-state restriction on sale of shark fins); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 632, 647 (6th Cir. 2010) ("regulation prohibit[ing] dairy processors from making claims about the absence of artificial hormones in their milk products" on labels of products sold in-state); *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 41 (1st Cir. 2005) (Maine statute barring manufacturers from imposing certain surcharges on sale of automobiles in the State); *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 819 (8th Cir. 2001) (statute that "only regulates the sale of livestock sold in Missouri"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) (in-state sales restriction requiring lightbulbs sold in-state to bear certain labels); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 791, 794 (8th Cir. 1995) ("Minnesota law prohibiting the sale of petroleum-based sweeping compounds" within the State).

actions against out-of-state vaping-product manufacturers for violating a host of "astoundingly specific" operational requirements—including rules "go[ing] so far as to require the manufacturer to contract with an independent security firm rather than provide the security services in-house," *id.* at 828. Far from being "exactly like Proposition 12," Pet. 17, the Indiana statute was likely motivated by "protectionist purposes," 847 F.3d at 833. And unlike Proposition 12, it was directly enforceable against any out-of-state producer "whose product, either intentionally or unintentionally, reaches Indiana." *Id.* at 836. By contrast, Proposition 12's confinement standards do not apply to out-of-state producers. *Supra* p. 1. If an out-of-state producer does not provide the amount of space specified in the statute to a particular calf or breeding pig, the only consequence under California law is that the meat from that animal may not be sold "within the state." Cal. Health & Safety Code § 25990(b).[5]

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[5] The other lower-court decisions cited by petitioner are also inapposite. None invalidated an in-state sales restriction merely because out-of-state producers would respond by opting to modify their production practices in other States. *See, e.g.*, *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 666 (4th Cir. 2018) (invalidating Maryland statute that "directly regulates the price of transactions that occur outside Maryland"); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 66 (1st Cir. 1999) (applying the Foreign Commerce Clause to invalidate a Massachusetts law limiting state procurement with companies "doing business in Burma" because the law threatened "excessive interference in foreign affairs"), *aff'd on other grounds by Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 653, 661 (7th Cir. 1995) (striking down Wisconsin statute requiring governments in other States to adopt specified recycling standards before firms in those jurisdictions could enter Wisconsin's waste-disposal market).

Nor do the decisions of this Court discussed in the petition (Pet. 19-22) support petitioner's understanding of the extraterritoriality doctrine. The Court struck down the law in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994), "on the grounds that it had a *discriminatory purpose and effect*, not that it violated the extraterritoriality doctrine." Pet. App. 34a, n.11; *see C & A Carbone*, 511 U.S. at 391-393. And petitioner is not correct that *Baldwin* "struck down a New York law that was structured identically to Proposition 12." Pet. 19. That case involved a measure designed to protect New York's dairy industry from out-of-state price competition. *See Baldwin*, 294 U.S. at 519. The Court viewed the measure as the economic equivalent of a "customs dut[y]"—the kind of "impost[] or dut[y] upon commerce with other countries . . . placed, by an express prohibition of the Constitution, beyond the power of a state." *Id.* at 521-522 (citing U.S. Const. art. I, § 10, cl. 2). While *Baldwin* discussed dormant Commerce Clause limits on extraterritorial state legislation, *see id.* at 521, the Court has long since made clear that a state law or policy is not invalid under *Baldwin* merely because its effect may be that out-of-state businesses will decide to alter their practices in other States. *See Walsh*, 538 U.S. at 669 (refusing to extend "the rule that was applied in *Baldwin*").

b. Second, petitioner argues that courts of appeals have divided on what qualifies as "discrimination" under the dormant Commerce Clause. Pet. 22. In particular, petitioner alleges a conflict on the question whether States may constitutionally apply the same "regulatory treatment" to all products sold within the State, whether produced in- or out-of-state. Pet. 26; *see id.* at 24-27. In petitioner's view, producers derive

a "competitive advantage" from more permissive regulations in the State of production, and the dormant Commerce Clause entitles them to retain that advantage anywhere they wish to sell their products—even in a State that imposes higher standards on products sold within its borders. *Id.* at 24. That theory would appear to prevent a State from prohibiting the sale of *any* product within its borders (such as lead paint or products made with asbestos) so long as the product was lawfully produced out-of-state.

Petitioner does not identify any precedent supporting that expansive theory. Contrary to petitioner's suggestion, Pet. 25, the Third Circuit did not adopt any such theory in *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board*, 298 F.3d 201 (3d Cir. 2002). It instead struck down a classic protectionist measure: a Pennsylvania milk-pricing regulation designed to "protect the milk industry of the Commonwealth" by guaranteeing local milk producers a "minimum price[]" and barring out-of-state competitors from beating that price. *Id.* at 206-207 (internal quotation marks omitted). The Third Circuit relied on *Baldwin*, 294 U.S. at 521-525, and *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), in which this Court invalidated similar milk-industry measures on the grounds that they were tantamount to "tariff[s] or customs dut[ies]," *West Lynn Creamery*, 512 U.S. at 194; *see Cloverland-Green*, 298 F.3d at 211-212, 214. Petitioner points to nothing similar in Proposition 12.[6]

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[6] Petitioner also invokes *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 335 (1977). But the regulation invalidated in *Hunt* "shield[ed] the local [North Carolina] apple industry" from competition, *id.* at 351, by "prohibit[ing] the display of Washington State grades on closed containers of apples

c. Finally, petitioner argues that the court of appeals departed from this Court's precedents and created a circuit conflict by "effectively confin[ing] *Pike* balancing to contexts in which states regulate 'inherently national' industries or ones in need of a 'uniform system of regulation.'" *Id.* at 30. Again, petitioner is mistaken.

As petitioner acknowledges, the need for a "national," "uniform" regulatory regime can be an important factor in the *Pike* balancing analysis. *See* Pet. 31-32 & n.7; *see also Gen. Motors Corp.*, 519 U.S. at 299 n.12. The court of appeals pointed to this factor in its preliminary assessment of petitioner's *Pike* claim, *see* Pet. App. 3a; but it never suggested that this factor is the *exclusive* consideration under *Pike*. Nor could it have, in light of Ninth Circuit precedent treating the factor as significant but not dispositive. *See, e.g.*, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 952-953 (9th Cir. 2013); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148, 1154-1155 (9th Cir. 2012). So there is no basis for concluding that Ninth Circuit precedent "conflicts with" *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 572 (4th Cir. 2005), which "rejected the argument that '*Pike* balancing applies only when a generally nondiscriminatory state law undermines a compelling need for national uniformity in regulation.'" Pet. 31 (internal quotation marks and alteration omitted). Nor, for the same reason, is there any conflict

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shipped into the State," *id.* at 348. North Carolina thereby prevented apple purchasers from distinguishing "superior" Washington apples from "inferior" locally grown apples. *Id.* at 352. Proposition 12 does not "strip[] away" any analogous competitive advantage of out-of-state meat producers. Pet. App. 24a; *see id.* at 23a-26a (addressing *Hunt*).

between the non-precedential decision in this case and the other out-of-circuit authority that petitioner references. *See id.* (citing *VIZIO, Inc. v. Klee*, 886 F.3d 249, 259 (2d Cir. 2018); *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997)).

On the merits of the *Pike* claim, petitioner asserts that Proposition 12 "is a prototypical violation of . . . *Pike* because it imposes massive burdens" on the veal and pork industries. Pet. 28. But petitioner has not substantiated that claim—let alone established that the burdens are "clearly excessive in relation to the putative local benefits," as *Pike* requires. 397 U.S. at 142. Indeed, petitioner has not yet pointed to any concrete evidence of burdens on the veal industry arising since the sales restriction on veal took effect nearly 18 months ago. As to the pork sales restriction, which will take effect next year, one of petitioner's members recently reported that it "faces no risk of material losses" from the restriction. Hormel Foods, *Hormel Foods Company Information About California Proposition 12* (Oct. 6, 2020), https://tinyurl.com/2x4cb68x (last visited May 26, 2021). To the contrary, that company has pledged to "continue to meet the needs of [its] consumers and customers throughout the state [of California]." *Id.*[7]

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[7] Petitioner also suggests that California lacks "*any* legitimate local interest" in support of Proposition 12's in-state sales restriction. Pet. 29. When applying *Pike*, however, this Court has refused "to second-guess" judgments "concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987). And there is nothing illegitimate or insubstantial about restricting the sale of a product in order to "discourage [its] consumption" and "prevent complicity in a practice that [the State has] deemed cruel." *Éleveurs*, 729 F.3d at 952; *cf. Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326,

In any event, the relevant question at this stage of the proceedings is whether the district court abused its discretion in denying provisional relief based on the limited record that was before it when it considered the preliminary injunction motion. In support of that motion, petitioner attached unsubstantiated "affidavits to the effect that Proposition 12 will substantially burden interstate commerce." Pet. App. 37a; *see, e.g.*, Pet. 26 n.6, 28-29. The district court reviewed those submissions and determined that, at most, they showed that "complying with Proposition 12 *could* impose *potentially* significant costs upon at least *some* . . . members" of petitioner's organization. Pet. App. 39a (emphasis added). That is not enough to demonstrate a likelihood of success under *Pike*. *See id.* at 35a-39a.

Petitioner may, of course, attempt to introduce further evidence to substantiate its *Pike* claim in the ongoing district court proceedings. But that possibility just underscores why review in this Court would be inappropriate at this juncture. This Court is generally reluctant to grant certiorari "where the case in which review is sought is at an interlocutory rather than a final stage." Shapiro, *Supreme Court Practice*, *supra*, § 4.4(h), p. 4-19; *see, e.g.*, *DTD Enterprises, Inc. v. Wells*, 558 U.S. 964 (2009) (Kennedy, J., respecting the denial of certiorari). That reluctance is especially appropriate where, as here, there are significant gaps in the evidentiary record; the decision of the court of

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330 (5th Cir. 2007) (discussing Texas statute barring "sale [of] horsemeat as food for human consumption," regardless of where the meat was produced); *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 553 (7th Cir. 2007) (discussing similar statute in Illinois); Ga. Code Ann. § 26-2-160 (barring "sale for human consumption [of] any dog meat," whether produced in- or out-of-state).

appeals is limited, preliminary, and non-precedential; and the petition fails to make any credible showing of a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1, 2021