No. 20-1215

IN THE
Supreme Court of the United States

NORTH AMERICAN MEAT INSTITUTE,
Petitioner,
v.
ROB BONTA, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, *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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QUESTION PRESENTED

California voters passed Proposition 12 to proscribe the sale of animal products where the source animals were confined in cruel and extreme conditions. Those conditions are "crue[l]" and "threaten the health and safety of California consumers." Prop. 12 §2 (Pet. App. 43a). The district court denied a preliminary injunction, holding that the challenger was unlikely to demonstrate that the law was unduly extraterritorial, discriminated against interstate commerce, or substantially burdened interstate commerce. The court of appeals affirmed. The question presented is:

Whether the court of appeals erred in finding that the district court's decision to deny a preliminary injunction was not an abuse of discretion in light of the arguments and factual development before it.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner North American Meat Institute was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Rob Bonta, in his official capacity as Attorney General of California; Karen Ross, in her official capacity as Secretary of the California Department of Food and Agriculture; and Sonia Angell, in her official capacity as Director of the California Department of Public Health, or their predecessors, were the defendants in the district court and the appellees in the court of appeals.

Non-Government Respondents/Intervenors The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook were intervenors in the district court and intervenor-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, each of the Intervenors The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook states that no company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings, within the meaning of Rule 14.1(b)(iii), beyond those identified in the petition.

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

California's Proposition 12 prohibits sales "within the state" of specified products from animals subjected to "extreme methods of farm animal confinement." Prop. 12, §§2, 3 (codified Cal. Health & Safety Code §§25990-25994) (Dec. 19, 2018) (Pet. App. 43a-44a). Those confinement methods, Proposition 12 explains, are not merely "animal cruelty," but "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." Prop. 12, §2 (Pet. App. 43a). Proposition 12 addresses only in-state sales and nowhere distinguishes among products by origin. Petitioner North American Meat Institute nonetheless challenged it under the dormant Commerce Clause and sought a preliminary injunc-

tion. The district court denied that motion, Pet. App. 40a, and the Ninth Circuit affirmed in a two-page, unpublished memorandum order finding no abuse of discretion, Pet. App. 1a-2a.

Review of that interlocutory and non-precedential decision is unwarranted. Preliminary-injunction proceedings like these are conducted expeditiously on a reduced record and limited range of arguments. This case lacks a full factual record, and the courts below have yet to explore the full range of state interests that Proposition 12 protects, critical in a dormant Commerce Clause challenge. The petition would not even permit this Court to resolve the issue the petition purports to raise for review—the constitutionality of California's Proposition 12. Petitioner asks the Court to address that issue now by ignoring local interests the defendants are entitled to assert in merits proceedings, such as consumer-protection and health-and-safety. But doing so would result in a hypothetical ruling.

The circuit conflicts that petitioner asserts are, in any event, illusory. The Ninth Circuit's ruling is consistent with the law of other circuits and this Court's precedent.

STATEMENT

I. Statutory Framework

A. Proposition 12's Amendments to the California Health and Safety Code

In November 2018, California residents voted overwhelmingly to enact Proposition 12, a ballot initiative that prohibits in-state sales of certain products from farm animals confined under some of the most extreme and cruel conditions. The initiative was advanced by a coalition of over 500 public-health, consumer-protection, animal-welfare, and food-safety organizations. Official Voter Infor-

mation Guide, California General Election (Nov. 6, 2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf.

Section 2 of Proposition 12 sets forth its purpose: "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." Prop. 12, § 2 (Pet. App. 43a). The ballot-measure voters' pamphlet provided to California voters—which the California Supreme Court views as the best evidence of an initiative's purpose—explained that "[v]oting YES" on Proposition 12 "reduces the risk of people being sickened by food poisoning and factory farm pollution"; that "[s]cientific studies repeatedly find that packing animals in tiny, filthy cages increases the risk of food poisoning"; and that "[t]he American Public Health Association called for a moratorium on new animal confinement operations because they pollute the air and ground water, and diminish the quality of life for nearby homeowners." Official Voter Information Guide, *supra*, at 70.

Section 3 of Proposition 12 amends the California Health and Safety Code. It provides that "farm owner[s] or operator[s] *within the state*" shall not knowingly confine covered animals "in a cruel manner." Prop. 12, § 3 (codified Cal. Health & Safety Code § 25990(a)) (Pet. App. 43a-44a) (emphasis added). "Confined in a cruel manner" is defined in relevant part as confinement that "prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely." *Id.* § 4 (codified Cal. Health & Safety Code § 25991(e)(1)) (Pet. App. 45a-46a). Providing specificity, Proposition 12 identifies minimum space allotments for identified animals. *Id.* § 4 (codified Cal. Health & Safety Code § 25991(e)(2)-(5))

(Pet. App. 46a). Those standards apply only to operations *within* California.

Proposition 12 also prohibits businesses from knowingly *selling* "within the state" certain veal meat, pork meat, or eggs from animals confined contrary to Proposition 12's standards. Prop. 12, § 3 (codified Cal. Health & Safety Code § 25990(b)) (Pet. App. 44a). That prohibition does not distinguish among products based on origin. Nor does it apply to sales outside the State. Producers wishing to sell products outside California from farm animals confined contrary to Proposition 12's standards remain free to do so.

B. Prior Regulation

Proposition 12 was preceded by other regulatory efforts. In November 2008, California voters passed Proposition 2 to "prohibit the cruel confinement of farm animals" within California. See Prop. 2, § 2 (codified Cal. Health & Safety Code §§ 25990-25994) (Jan. 1, 2015).

In 2010, the California legislature passed Assembly Bill 1437 (AB 1437), which prohibited the sale, within California, of certain eggs produced by hens confined in contravention of Proposition 2's standards. Cal. Health & Safety Code §§ 25995-25996.3 (Jan. 1, 2011). Comments to AB 1437 detailed studies showing that hens so confined had "a greater chance of carrying bacteria or viruses, thus having a greater chance of exposing consumers to food borne bacteria and viruses." Bill Analysis of AB 1437, Cal. Assembly Comm. on Agric. 1 (Apr. 29, 2009). The final legislative findings declare the legislature's intent in passing AB 1437—"to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in

increased exposure to disease pathogens including salmonella." Cal. Health & Safety Code § 25995(e).[1]

Both Proposition 2 and AB 1437 faced state and federal constitutional challenges, but were upheld. See, *e.g.*, *Cramer* v. *Brown*, No. CV 12-3130-JFW, 2012 WL 13059699 (C.D. Cal. Sept. 12, 2012), aff'd *Cramer* v. *Harris*, 591 F. App'x 634 (9th Cir. 2015); *JS West Milling Co., Inc.* v. *California*, No. 10-04225 (Cal. Super. Ct. Fresno Cnty. 2010); *Ass'n of Cal. Egg Farms* v. *State*, No. 12-CECG-03695 (Cal. Super. Ct. Fresno Cnty. Aug. 22, 2013). This Court refused original jurisdiction over one such challenge, brought by a coalition of States. *Missouri ex rel.* v. *Becerra*, 137 S. Ct. 2188 (2017).

II. Proceedings Below

A. Petitioner Challenges Proposition 12

Approximately one year after Proposition 12's enactment, petitioner North American Meat Institute—which represents meat packers and processors—filed suit in the Central District of California seeking declaratory and injunctive relief. See *N. Am. Meat Inst.* v. *Becerra*, No. 2:19-CV-08569-CAS, ECF Nos. 1, 15. Petitioner alleged that Proposition 12's in-state sales ban violated the dormant Commerce Clause and discriminated against its pork- and veal-producing members. ECF No. 1 (Compl.) ¶¶ 44-90. Respondents The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook (collectively Interve-

[1] Multiple States have passed similar legislation. See, *e.g.*, Colo. Rev. Stat. Ann. § 35-21-203; Mass. Gen. Laws, Ch. 129 App., § 1-1 *et seq.*; Mich. Comp. Laws Ann. § 287.746; Or. Rev. Stat. § 632.850 (2012); Wash. Laws, ch. 276 (HB 2049).

nors), intervened to defend Proposition 12. ECF No. 43 (Pet. App. 12a-13a).

B. The District Court Denies Petitioner's Motion for a Preliminary Injunction

Petitioner moved for a preliminary injunction, arguing that Proposition 12 violates the Commerce Clause for three related reasons. ECF No. 15 (Pet. PI Br.). In denying the motion, the district court addressed each theory. Pet. App. 4a-40a.

1. The district court explained that it was "not convinced" that Proposition 12 discriminates against out-of-state producers in purpose or effect. Pet. App. 19a-20a. Petitioner's discriminatory-purpose argument rested on a handful of statements made in connection with a *different* California law, AB 1437 (the 2010 statute that proscribed in-state sales of eggs from cruelly confined hens). The court did not believe AB 1437 was so motivated, and saw no evidence that any bad intent behind AB 1437 somehow carried over to Proposition 12 regardless. *Id.* at 20a. The ballot explained that Proposition 12 "is intended '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 * * * .'" *Id.* at 9a (quoting Prop. 12, § 2).

Petitioner likewise did not show that Proposition 12 was discriminatory on its face or in effect. Pet. App. 21a. Proposition 12 did not impose "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Ibid.* (quoting *Oregon Waste Sys., Inc.* v. *Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994)). The court rejected petitioner's argument that Proposition 12 strips away supposed competitive advantages enjoyed by out-of-state producers. The court

distinguished *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), which struck down a North Carolina law that sought to deny the Washington apple industry the competitive advantage it had earned for itself through a rigorous grading system. In contrast, petitioner's putative competitive advantage was a "standard production method, available to any meat processor in any state that allows it." Pet. App. 24a.

2. The district court also was not persuaded, for purposes of a preliminary injunction, by petitioner's argument that Proposition 12 impermissibly seeks to regulate "'commerce that takes place wholly outside of the State's borders.'" Pet. PI Br. 15 (quoting *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989)). The court explained that the extraterritoriality doctrine arises from three Supreme Court cases that invalidated state statutes that attempted to fix *prices* for *sales outside the State*: *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Brown–Forman Distillers Corp.* v. *N.Y. State Liquor Authority*, 476 U.S. 573 (1986); and *Healy*, *supra*. While hesitant to expand the extraterritoriality doctrine beyond that context, the district court recognized that petitioner had "raised an argument that the doctrine *could* apply to Proposition 12." Pet. App. 33a. Under that broader reading of the extraterritoriality doctrine, however, petitioner's argument still failed. "Proposition 12's in-state sales prohibition only applies to 'in-state conduct'—sales of meat products in California—not conduct that takes place 'wholly outside' California." *Ibid.*

3. Finally, the district court held that petitioner's arguments under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), also did not merit a preliminary injunction. State regulations that "'regulate evenhandedly to effectuate a legitimate local public interest,'" the district court

explained, will be upheld under *Pike* "'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" Pet. App. 17a (quoting *S. Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018)).

The district court was unpersuaded by petitioner's preliminary effort to show that Proposition 12 will drive farmers and processors from the California market and increase costs for those that remain. Petitioner's arguments were primarily directed to how a subset of market participants prefer to operate and were, as a result, insufficient to establish the excessive burden on interstate *commerce* that *Pike* requires. Pet. App. 38a-39a. Petitioner raised "no serious argument that Proposition 12 imposes any substantial burden on interstate commerce." *Id.* at 39a.

4. Following denial of the preliminary injunction, the district court denied motions to dismiss in part and granted them in part, allowing discovery to proceed on some claims. See *N. Am. Meat Inst.* v. *Becerra*, No. 2:19-CV-08569, 2020 WL919153 (C.D. Cal. Feb. 24, 2020), ECF No. 64 (MTD Opinion). In its opinion, the district court explained that petitioner will be permitted to explore, through discovery and further merits litigation, its allegations that Proposition 12 has the purpose or effect of differentially burdening out-of-state producers and its allegations that California has no "legitimate local interest justifying the burden" that Proposition 12 allegedly imposes on interstate commerce. *Id.* at 9-10, 14; *id.* at 13 ("[T]he Court finds that NAMI has also adequately pled facts that plausibly suggest the absence of any benefits that would justify Proposition 12's alleged burden on interstate commerce."). The court also authorized petitioner to file an amended complaint alleging facts supporting its contention that Proposition 12 "regulates conduct that takes place 'wholly outside' California." *Id.* at 12. Shortly

thereafter, petitioner filed an amended complaint. ECF No. 73. The case was then stayed pending appellate review of the district court's decision denying a preliminary injunction. ECF No. 74.

C. The Court of Appeals Affirms Denial of the Preliminary Injunction in an Unpublished, Non-Precedential, Two-Page Decision

The court of appeals affirmed denial of the preliminary injunction in a two-page, unpublished memorandum order holding 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. First, it was not "an abuse of discretion" for the district court to hold "that Proposition 12 does not have a discriminatory purpose given the lack of evidence that the state had a protectionist intent." *Ibid.* Second, there was no abuse of discretion in concluding that "Proposition 12 does not have a discriminatory effect because it treats in-state meat producers the same as out-of-state meat producers." *Ibid.* Nor did the district court "abuse its discretion in concluding that Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute." *Ibid.* Finally, the district court "did not abuse its discretion in holding that Proposition 12 does not substantially burden interstate commerce," as Proposition 12 merely "precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographic origin." *Id.* at 3a. The court of appeals did not purport to conclusively resolve the merits or the constitutionality of Proposition 12.

Rehearing and rehearing *en banc* were denied on December 23, 2020. Pet. App. 41a-42a. This petition followed.

REASONS FOR DENYING THE PETITION

Petitioner seeks review of a two-page, unpublished memorandum disposition that affirms denial of preliminary injunction—holding there was no abuse of discretion—based on the limited arguments and record before it. That decision creates no precedent. It does not finally resolve petitioner's challenge to Proposition 12 in whole or in part. Petitioner nonetheless asks this Court to review each of the three dormant Commerce Clause theories it raised below, asserting a circuit conflict on each. But petitioner ignores circuit precedent—and what the interlocutory order below actually says. Both are fully consistent with this Court's precedents and the decisions of other circuits.

The petition is, in any event, a singularly inadequate vehicle for addressing petitioner's challenge to Proposition 12. Petitioner's arguments largely rest on the erroneous premise that California has no local interests (such as health-and-safety or consumer-protection) to support a (wholly in-state) sales regulation. But preliminary-injunction proceedings are necessarily conducted expeditiously on a reduced record and limited arguments. The district court has made clear that it anticipates further factual proceedings concerning petitioner's claim that California has no local interests justifying Proposition 12, as well as its allegations of discrimination against out-of-state producers. And California and Intervenors remain free to defend Proposition 12 on the merits based on the full range of state interests it protects, including the express health-and-safety interest set forth in Proposition 12 itself. By asking for review now without considering those interests, petitioner asks the Court to decide academic questions that cannot resolve Proposition 12's constitutionality.

I. THE UNPUBLISHED DECISION BELOW ON DENIAL OF A PRELIMINARY INJUNCTION DOES NOT ADEQUATELY PRESENT THE QUESTION FOR REVIEW

Petitioner asks this Court to review an unpublished, two-page memorandum disposition that does not resolve the case on the merits. The interlocutory posture "alone furnishe[s] sufficient ground for the denial of" certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The issue raised by petitioner cannot even be properly resolved on the limited arguments in these preliminary-injunction proceedings.

A. The Preliminary Injunction Ruling Below Does Not Resolve or Properly Present Proposition 12's Constitutionality

Absent extraordinary circumstances, this Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where (unlike here) the issues otherwise warrant review. *Va. Mil. Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari); see *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring in denial of certiorari); Stephen M. Shapiro, Supreme Court Practice §2.3, at 2-15 (11th ed. 2019). Petitioner barely acknowledges that it is seeking review of an interlocutory decision denying a preliminary injunction—on a necessarily reduced set of arguments and incomplete record—much less offers any reason the Court should depart from its usual practice of awaiting final judgment.

Here, moreover, the absence of the fully developed legal arguments and factual record—a consequence of the case's posture—weighs dispositively against review. Petitioner contends that Proposition 12 violates the dormant Commerce Clause under three theories: (1) that it substantially burdens interstate commerce in a manner that

exceeds any legitimate local benefits; (2) that it discriminates against out-of-state producers; and (3) that it is impermissibly extraterritorial because it regulates activities wholly outside California's borders. Pet. 8, 22, 27. None of those theories, or Proposition 12's ultimate constitutionality, can be decided based on necessarily truncated preliminary-injunction proceedings. Indeed, this litigation is in its nascent stages. Defendants have yet to file an answer, and there has been no discovery. For the Court to adjudicate the posited constitutional question without the benefit of proper development would put the cart far beyond the horse.

B. Petitioner's *Pike* Argument Exemplifies the Petition's Inadequacy as a Vehicle for Review

Petitioner's argument under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)—that the burdens on interstate commerce grossly outweigh in-state benefits—exemplifies this case's inadequacy as a vehicle for review. Petitioner urges that Proposition 12 "imposes massive burdens on interstate commerce," requiring "out-of-state veal and pork farmers" to "spend hundreds of millions of dollars," with "*no* countervailing legitimate local interest." Pet. 28; see Pet. App. 37a. However, as the United States has previously advised this Court in connection with previous *Pike* challenges to similar state laws:

> Assessing the economic impact [of the legislation] would require an analysis of competitive constraints on the ability of out-of-state producers to pass on to [out-of-state] consumers any increased costs they incur in complying with [California law] for the portion of their production to be shipped to [California]. Those questions of market forces and indirect effects *would be best resolved by a district court that can conduct discovery and weigh expert testimony*.

U.S. Br. in *Indiana* v. *Massachusetts*, No. 149, Original, at 7-8 (Nov. 2018) (emphasis added); see U.S. Br. in *Missouri* v. *California*, No. 148, Original, at 21-22 (Nov. 2018) (similar).

Here, that process has barely begun. After resolving the motion to dismiss, the district court allowed discovery to proceed. Petitioner filed an amended complaint, but the case (and discovery) was then stayed pending petitioner's interlocutory appeal. See p. 9, *supra*. The process of identifying the facts necessary to resolution of this case has not even begun. And there is reason to believe that petitioner's hyperbolic exposition regarding out-of-state impacts will founder. Some of petitioner's members (including out-of-state pork producers) are already in compliance with Proposition 12's standards. Pet. App. 28a n.9. One of petitioner's largest members—one of petitioner's declarants in proceedings below—has publicly announced that it will fully comply with Proposition 12 standards—thereby "continu[ing] to meet the needs of our consumers and customers throughout" the State—and "faces *no risk of material losses*" in doing so. *Hormel Foods Company Information About California Proposition 12*, Hormel (Oct. 6, 2020) (emphasis added), https://www.hormelfoods.com/newsroom/in-the-news/hornews/hormel-foods-company-information-about-california-proposition-12/.

Petitioner's insistence that California cannot identify a valid local interest, Pet. 28-29, underscores the inadequacy of this case's procedural posture. For one thing, the district court explained that petitioner would be given an opportunity to develop and prove that contention on the merits. See MTD Opinion 13-14. For another, petitioner asks this Court to decide this case on the premise that California "did not argue below" that Proposition 12's sales

prohibition serves any interest other than preventing animal cruelty. Pet. 2 n.1; see Pet. 29. California, petitioner argues, has no legitimate interest in applying that prohibition to animal products produced outside California, because the objectionable cruel animal confinement for those products occurs out-of-state. Pet. 29. Petitioner's effort to ignore health and safety is difficult to reconcile with the text of Proposition 12 itself, which sets forth a health-and-safety purpose: Such extreme confinement conditions, it states, "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." Prop. 12, §2 (Pet. App. 43a). This Court "assume[s] that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981).

The petition suggests (at 2 n.1) that California waived Proposition 12's health-and-safety purposes. But the briefing below repeatedly invokes that purpose. See Defendant's Opp. to Plaintiff's Motion for Preliminary Injunction at 1, 3, 8-9, No. 2:19-CV-08569 (C.D. Cal. Oct. 28, 2019), ECF No. 24. Far from waiving local health-and-safety concerns, California's counsel stated only that it was "unnecessary" to address them in connection with the preliminary injunction because "the prevention of animal cruelty is unquestionably a recognized benefit." *Id.* at 18 n.6.

Preliminary-injunction proceedings are necessarily rapid and address only a reduced set of arguments on a truncated record. Petitioner's assertion that health-and-safety and consumer-protection issues were not debated

during these preliminary-injunction proceedings underscores why the Court cannot conclusively resolve Proposition 12's constitutionality here. Whatever arguments were presented in preliminary-injunction proceedings, California and Intervenors are entitled to fully defend Proposition 12's ultimate constitutionality on all available grounds, asserting all local state interests. See *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). And there is ample evidence supporting local health-and-safety interests.[2]

Proposition 12 serves multiple other local interests that have yet to be adjudicated. For example, Proposition 12 assures California consumers that they can purchase meat

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[2] For instance, it is "well-established that close confinement leads to the increased risk of the spread of disease between hogs" and that "humans are not far behind." *McKiver* v. *Murphy-Brown, LLC*, 980 F.3d 937, 980 (4th Cir. 2020) (internal quotation marks omitted) (Wilkinson, J., concurring); see Health Care Without Harm Amicus Br. 10-15, *Nat'l Pork Producers Council* v. *Ross*, No. 20-55631 (Dec. 7, 2020), ECF No. 48 (detailing myriad infectious diseases caused or exacerbated by closely confined animals). Indeed, foodborne bacterial pathogens "can be facilitated by intensified livestock systems," which "generally have high density populations." Bryony A. Jones et al., *Zoonosis Emergence Linked to Agricultural Intensification and Environmental Change*, 110 Proc. Nat'l Acad. Sci. U.S., No. 21, at 8399 (2013), https://www.pnas.org/content/110/21/8399. The California Department of Food and Agriculture has recently issued a notice of proposed rulemaking for Proposition 12 that addresses inhumane treatment. Notice of Proposed Rulemaking, Cal. Dep't of Food & Agric., Title 3 §§ 1320-1327.2 (May 28, 2021). The proposed regulations remain subject to notice and comment. Proposition 12 requires "[t]he Department of Food and Agriculture and the State Department of Public Health [to] jointly promulgate" implementing "rules and regulations." Cal. Health & Safety Code § 25993(a). The latter agency has not yet proposed regulations. It thus remains to be seen whether California's Department of Food and Agriculture's articulation of California's interest will be adopted.

anywhere in the State knowing that the source animals were not subjected to the cruel confinement Proposition 12 addresses. It spares consumers who care about such issues from the difficult task of researching the origin of meat products and how the animals were treated, or deciphering and auditing often misleading producer representations. California customers thus can purchase foods knowing they are safe and morally acceptable. Indeed, consistent with that consumer-protection goal, Proposition 12 provides a private cause of action that allows consumers to bring suit for violations under a provision of California law banning "unlawful, unfair or fraudulent business act[s]." Cal. Bus. & Prof. Code § 17200. And California has a local interest in ensuring that its local marketplace is not used to endorse or incentivize cruelty.

Proposition 12 also advances California's legitimate interest in the humane treatment of animals *in California* by ensuring that California's standards regarding *California-raised* animals can be effectively enforced. Petitioner would demand a two-track system for meat sales, one that applies to California-raised meat (which must comply with Proposition 12 standards) and another for out-of-state meat (which would not). But petitioner itself urges (at 28-29) that tracing meat can be daunting. Allowing compliant and non-compliant meats to commingle within the State would create an enforcement nightmare in which determining legality of any animal product requires a potentially uncertain forensic investigation. For that sort of reason, this Court has upheld in-state bans that apply across-the-board without regard to whether items originate unlawfully within the State or lawfully outside it. See, *e.g.*, *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 40-41 (1908); *Andrus* v. *Allard*, 444 U.S. 51, 58 (1979).

In all events, the point is that neither the district court nor the Ninth Circuit passed on any of those local health-and-safety, effective enforcement, or consumer-protection rationales in connection with the preliminary injunction. Nor have the lower courts had an opportunity to consider petitioner's attack on the *bona fides* of Proposition 12's standards. See Compl. ¶7. Factual determinations underlying the exercise of the State's police power are afforded considerable deference. *Adams* v. *City of Milwaukee*, 228 U.S. 572, 583 (1913). The people of California are entitled to a full adjudication of these issues. This Court—"a court of review, not of first view"—ought not attempt that evaluation first. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

C. Petitioner's Extraterritoriality and Discrimination Arguments Likewise Are Not Properly Presented

For similar reasons, petitioner's other dormant Commerce Clause arguments—extraterritoriality and discrimination—are not properly presented.

1. Petitioner's extraterritoriality argument suffers from the same fatal vehicle problems as its *Pike* argument. Proposition 12 addresses sales *within California*. Petitioner nowhere disputes that States have broad authority to regulate products sold within their boundaries for consumer-protection and related purposes. *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980). Because Proposition 12 regulates only in-state sales, it says nothing about animal products sold outside California or the treatment of source animals for those products.

Petitioner's extraterritoriality argument rests on the notion that Proposition 12's in-state sales prohibition serves no in-state interests. Proposition 12's "express purpose and practical effect," petitioner argues, is to

control out-of-state conduct. Pet. 14. That argument, like petitioner's *Pike* argument, simply assumes away myriad (and yet-to-be-fully-adjudicated) local interests that California and Intervenors are entitled to assert on the merits wholly apart from animal cruelty. See pp. 14-16, *supra*. By asking the Court to assume away those interests in light of what was supposedly argued (or not) at the preliminary injunction phase, petitioner asks the Court to issue a hypothetical decision about Proposition 12's constitutionality.

Petitioner's argument, moreover, incorrectly equates Proposition's 12's out-of-state *effects* with extraterritorial *control*. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn* v. *Ozlin*, 310 U.S. 53, 62 (1940). Upstream effects on petitioner's members are properly considered under *Pike*. See 397 U.S. at 142. But petitioner's *Pike* arguments—which examine out-of-state impacts and in-state, local interests—remain pending below and await full development.

2. Petitioner asserts that Proposition 12 somehow discriminates against interstate commerce. Pet. 22. Petitioner does not contend that Proposition 12 discriminates on its face; it nowhere distinguishes between in-state and out-of-state products. Petitioner instead invokes comments made about AB 1437—a different law, from 2010, that addressed the sale of eggs from egg-laying hens. From that, petitioner argues that Proposition 12's in-state sales prohibition should be presumed to have the impermissible intent of protecting California producers—who must comply with California confinement standards—from out-of-state animal products that otherwise would not. Pet. 24, 27. The district court found those claims factually unpersuasive at

the preliminary injunction stage, but also made clear that petitioner will be given an opportunity to *prove them* on the merits. See MTD Opinion 9-10.

Petitioner has also argued that California producers had more "lead time" to comply with Proposition 12 (having been subjected to similar standards earlier). See Compl. ¶¶ 51-52 (alleging Proposition 12 "tilts the playing field" because California farmers had "lead time" to comply). But the petition deliberately disavows that theory, declaring that it is "not at issue here," because that fact-dependent inquiry remains pending before the district court. Pet. 10 n.4. Petitioner does not explain why this Court would grant review to address one discrimination theory now when discrimination is still being litigated below.

* * * * *

The absence of a detailed court-of-appeals opinion—unsurprising at this case's stage—also renders this case a particularly poor vehicle. This Court does not have before it extensive appellate analysis of Proposition 12 and relevant precedent—the sort of thorough vetting of facts and refinement of issues that lays the groundwork for further review. The absence of any such development at this stage weighs dispositively against review. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Cutter*, 544 U.S. at 718 n.7.

II. The Petition Identifies No Conflict Of Authority Warranting This Court's Review

This Court's "modern Commerce Clause precedents" disavow "arbitrary, formalistic distinction[s]" and "'esche[w] formalism'" in favor of "'a sensitive, case-by-case analysis of purposes and effects.'" *S. Dakota* v. *Wayfair,*

Inc., 138 S. Ct. 2080, 2092, 2094 (2018). The precedents petitioner invokes reflect those careful distinctions. They establish no conflict warranting this Court's review.

A. The Petition Fails To Show a Circuit Conflict on Extraterritoriality

Petitioner first urges a conflict on the scope of cases invalidating purportedly extraterritorial legislation. According to petitioner, the Ninth Circuit limits "the extraterritoriality doctrine * * * to price regulation," while "at least six other circuits" do not. Pet. 16.

1. The Ninth Circuit's en banc decision in *Sam Francis Foundation* v. *Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), makes clear that it imposes no such limit. *Christies* did not involve a price-control or price-affirmation statute. It concerned a California statute requiring any "seller of fine art to pay the artist a five percent royalty if 'the seller resides in California or the sale takes place in California.'" *Id.* at 1322. The Ninth Circuit held that the statute violated the dormant Commerce Clause as applied to out-of-state sales (by in-state residents) because it purported to "regulat[e] a commercial transaction that 'takes place wholly outside of the State's borders.'" *Id.* at 1323 (quoting *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989)). The court distinguished prior cases that, like this one, involve "state laws that regulated in-state conduct with allegedly significant out-of-state practical effects." *Id.* at 1324.

Consistent with that, the district court acknowledged that the extraterritoriality doctrine "*could* apply to Proposition 12"—citing *Christies*. Pet. App. 33a. The court simply held that Proposition 12 did not meet the standard from *Christies*. Far from being an effort to "regulat[e] conduct that takes place 'wholly outside' a state's jurisdiction," the court held, Proposition 12 "regulates 'in-

state conduct'"—"sales of meat products in California"—"'with allegedly significant out-of-state practical effects.'" *Ibid.* The petition ignores that. Indeed, it never acknowledges *Christies*—even though that case was a focus of petitioner's arguments below. See *id.* at 32a.

The petition focuses on the one sentence the unpublished decision below devotes to the issue: "The district court did not abuse its discretion in concluding that Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute." Pet. App. 2a. But the only holding in that sentence is that there was no abuse of discretion. The court of appeals' incomplete shorthand description of the district court's more extensive reasoning cannot be read to announce a new standard, much less overrule en banc precedent or create an inter- or intra-circuit conflict—things a non-precedential, unpublished memorandum disposition cannot do regardless. See *United States* v. *Camper*, 66 F.3d 229, 232 (9th Cir. 1995); *Reynolds Metals Co.* v. *Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000).[3]

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[3] Petitioner also invokes *Ward* v. *United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021), and *Association des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013). Although *Ward* suggests that the extraterritoriality doctrine *could* be limited to price-control or price-affirmation statutes, it declined to limit its analysis to that interpretation. 986 F.3d at 1240. And *Eleveurs* predates *Christies*. Other cases do not so limit the extraterritoriality doctrine. See *Pharm. Rsch. & Mfrs. of Am.* v. *Cnty. of Alameda*, 768 F.3d 1037, 1043 n.2 (9th Cir. 2014); see also *Chinatown Neighborhood Ass'n* v. *Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015). *Christies* explains that cases like *Eleveurs* "concerned state laws that regulated in-state conduct with allegedly significant out-of-state practical effects" rather than "regulation of wholly out of state conduct." 784 F.3d at 1324. Regardless, any intra-circuit split would be an issue for the Ninth Circuit, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

The petition's treatment of Tenth Circuit precedent shows why petitioner's reading of the decision below is unpersuasive. The petition describes the Tenth Circuit's decision in *Energy & Environment Legal Institute* v. *Epel*, 793 F.3d 1169 (10th Cir. 2015) (Gorsuch, J.), as having "suggested the extraterritoriality doctrine is limited to price regulations." Pet. 18. *Epel* correctly observed that the *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), "line of cases" "concerns only 'price control or price affirmation statutes' that involve 'tying the price of * * * in-state products to out-of-state prices.'" 793 F.3d at 1174. But the petition insists that the Tenth Circuit imposes no such limit because it has applied the extraterritoriality doctrine in cases outside of the price-affirmation context. Pet. 18-19 (citing *Hardage* v. *Atkins*, 619 F.2d 871, 872 (10th Cir. 1980)). For the same reason, the Ninth Circuit imposes no such limit either: As explained above, it, too, has applied the extraterritoriality doctrine outside the price-affirmation context.

Petitioner, moreover, never distinguishes *Epel* or suggests that decision is incorrect. *Epel* upheld Colorado's requirement that 20% of electricity sold in-state come from renewable sources, whether generation occurs inside or outside Colorado. 793 F.3d at 1170. If Colorado can insist that electricity sold in the State be generated from renewable sources, whether generated in Colorado or not, California can evenhandedly regulate in-state sales of animal products, whether the products originate inside or outside the State. If the Tenth Circuit's published *Epel* decision upholding such in-state sales regulation creates no conflict, the single sentence from the Ninth Circuit's unpublished, non-precedential order upholding denial of a preliminary injunction does not either.

2. Petitioner's contention that other circuits have invalidated state laws in "contexts that are materially indistinguishable from this case," Pet. 16, fares worse still. Petitioner begins with *National Solid Wastes Management Association* v. *Meyer*, 63 F.3d 652, 661 (7th Cir. 1995), which invalidated a Wisconsin statute that precluded use of Wisconsin landfills by out-of-state waste generators unless "their home communitie[s] adopt[ed] and enforce[ed] * * * Wisconsin recycling standards." *Id.* at 658. It thus required the adoption of *legislation in other States*, concerning recycling activities *taking place in those States*, and imposed Wisconsin standards on *members* of an out-of-state community that do not even dispose of waste in Wisconsin. *Ibid.* Petitioner attempts to describe an amended version of that statute differently (at 16-17), but it had the same defects: It likewise declared "that *no* solid waste may be imported from *any* other state, unless the municipality in which the waste is created enacts an ordinance meeting Wisconsin's specifications." *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam). Wisconsin sought to legislate extraterritorially to control the out-of-state handling of waste that never enters Wisconsin. See *ibid.* Because those statutes "facially regulate[d]" conduct taking "'place wholly outside of the State's borders,'" they would have been invalid under Ninth Circuit law as well. See *Christies*, 784 F.3d at 1323. Indeed, far from disagreeing with Ninth Circuit precedent, *Meyer* describes and relies on it at length. 63 F.3d at 660. And California's Proposition 12 could not be more different from the prohibition in *Meyer*. Like the law upheld in *Epel*, it says nothing about out-of-

state legislation and is limited to products sold within the regulating State.[4]

The statute in *Legato Vapors, LLC* v. *Cook*, 847 F.3d 825 (7th Cir. 2017), is further afield. The e-cigarette law there imposed "remarkably specific security requirements," required out-of-state manufacturing facilities to outsource security to "a security firm," regulated the duration of the contracts, and set "stringent certification standards" for security firms. *Id.* at 828, 834. Out-of-state manufacturers apparently were required to comply with those requirements in *all* of their operations—not just with regard to products destined for Indiana. And while the law had apparent "protectionist purposes"—its requirements granted a "legislative * * * monopoly" to "one favored" Indiana company—they also "operate[d] as extraterritorial legislation, governing the services and commercial relationships between out-of-state manufacturers and their employees." *Id.* at 833; see *id.* at 835 (controlling cleanser and sinks similarly invalid). They were invalid, the Seventh Circuit held, because they "directly regulate * * * wholly out-of-state commercial transactions." *Id.* at 837. Ninth Circuit law would lead to the identical result. *Christies*, 784 F.3d at 1323 (law invalid where it "regulates a commercial transaction that 'takes place wholly outside of the State's borders'").

The law in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 69-70 (1st Cir. 1999), bears no resemblance to Proposition 12 either. It banned any company that did business with Burma (now Myanmar) from contracting with Massachusetts. That law was invalidated under the

[4] The statute in *Hardage*, 619 F.2d at 873, was invalid for the same reasons as the statute in *Meyer*—it is virtually indistinguishable—and it differs from Proposition 12 for the same reasons. See *Meyer*, 63 F.3d at 660-661.

foreign Commerce Clause because it "impedes the federal government's ability to speak with one voice in foreign affairs." *Id.* at 67. The law, moreover, was focused on the identity of the actor and had nothing to do with the products sold in the State. It imposed a Massachusetts penalty on *businesses*—a disability in bidding for state contracts—based on *foreign business conduct* (commerce with Burma) totally disconnected from any in-state activity or product. *Id.* at 69-70. Petitioner's other cases likewise do nothing to support a conflict.[5]

3. Petitioner similarly errs in urging (at 19-22) that Ninth Circuit precedent conflicts with this Court's decisions. The leading Ninth Circuit case, *Christies*, quotes *Healy*, 491 U.S. at 336, for its central holding that "'the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Christies*, 784 F.3d at 1323. It is that central tenet of *Healy* that the Ninth Circuit's order below

[5] They all would be resolved identically in the Ninth Circuit, as each involved a statute that regulated wholly out-of-state commercial transactions. For example, in *Association for Accessible Medicines* v. *Frosh*, 887 F.3d 664 (4th Cir. 2018), the Maryland statute imposed a civil penalty for price gouging *outside* the State, even against "parties to a transaction that did not result in a single pill being shipped to Maryland." *Id.* at 671. It thus "facially regulate[d] a commercial transaction that '[took] place wholly outside of the State's borders.'" *Christies*, 784 F.3d at 1323; see also *Am. Beverage Ass'n* v. *Snyder*, 735 F.3d 362, 376 (6th Cir. 2013) (statute unconstitutional because it outlawed out-of-state sale of products bearing a certain stamp); *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (statute unconstitutional because it outlawed commerce on Internet even out-of-state). Proposition 12, by contrast, reaches only products sold in California.

cited in holding that the district court did not abuse its discretion. Pet. App. 2a.

The claimed conflict with *Baldwin*, see Pet. 19-20, is likewise illusory. In *Baldwin*, the Court invalidated a New York statute that required milk sold in the State to have been purchased from suppliers at a minimum price, even if the transaction occurred out-of-state. That protectionist legislation sought "to promote the economic welfare" of New York farmers by "guard[ing] them against competition with the cheaper prices of Vermont." *Baldwin*, 294 U.S. at 522. Petitioner nowhere suggests the Ninth Circuit would sustain such legislation, which seeks to regulate commerce—setting transaction prices—"'that takes place wholly outside of the State's borders.'" *Christies*, 784 F.3d at 1323. This Court has also explained that "[t]he rule that was applied in *Baldwin* * * * is not applicable" to laws that do not regulate the terms "'of any out-of-state transaction, either by its express terms or by its inevitable effect.'" *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 669 (2003). Proposition 12 does not expressly or inevitably regulate "any out-of-state transaction." Petitioner's members can confine animals as they wish and sell their animal products wherever they want; they need meet California's standards only for California sales. Their choice to have highly integrated distribution systems does not truncate the State of California's authority over in-state sales of products to its citizens. See *Online Merch. Guild* v. *Cameron*, 995 F.3d 540 (6th Cir. 2021) (upholding Kentucky prohibition on in-state price gouging despite argument that online marketplace requires nationally uniform pricing, because seller's choice to sell online cannot divest State of control over sales in-state).

Indeed, in *Baldwin* itself, the Court addressed New York's argument that requiring farmers to be well-paid

protects health as farmers otherwise might "be tempted to save the expense of sanitary precautions." 294 U.S. at 523. The Court found that purpose too attenuated. If New York were concerned about the potential consequences of "uncared for cattle," the Court held, it must address those concerns through "measures of repression more direct and certain" than price regulation. *Id.* at 523-524. For example, "milk may be excluded if necessary safeguards have been omitted." *Ibid.* That "more direct and certain" regulation is what Proposition 12 embodies. It "excludes" from California markets products from animals not merely "uncared for" but treated cruelly—exclusions California voters have judged appropriate to promote food safety, to ensure the enforceability of in-state standards, and to ensure California consumer confidence in the overall acceptability of the animal products they purchase. Pet. App. 43a; see *United States* v. *Stevens*, 559 U.S. 460, 469 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies.").[6]

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[6] Petitioner's reliance on *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994), see Pet. 20, is puzzling. *Carbone* addressed a town ordinance requiring all solid waste to be processed at a local facility before being leaving the municipality. *Id.* at 386. The Court focused its analysis on "first, whether the ordinance discriminates against interstate commerce, and second, whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *Id.* at 390 (citation omitted). The two sentences addressing extraterritoriality, which petitioner repeatedly invokes, merely explain that the town cannot justify "attach[ing] restrictions to exports or imports in order to control commerce in other States" to protect the environment in those States. *Id.* at 393. *Carbone* stands for nothing more than the unremarkable principle that "State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.* at 394.

B. The Ninth Circuit's Discrimination Ruling Is Consistent with Other Circuits' and This Court's Precedents

The decision below declares that "[t]he district court did not abuse its discretion * * * [in] hold[ing] that Proposition 12 does not have a discriminatory effect because it treats in-state meat producers the same as out-of-state meat producers." Pet. App. 2a (citing *Eleveurs*, 729 F.3d 937). Petitioner insists that the decision creates a circuit conflict by not discussing cases that invalidate state statutes that, although facially neutral, were designed to neutralize out-of-state competitors' advantages. But silence in an unpublished decision is just that—silence—not a holding. Petitioner's argument warranted no discussion because it has no merit.

1. Invoking *Baldwin*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), and *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1997), petitioner urges that Proposition 12 discriminates against out-of-state competition because it denies producers the "'advantages belonging to the place of origin.'" Pet. 22 (quoting *West Lynn Creamery*, 512 U.S. at 194). Proposition 12 bears no resemblance to those cases.

West Lynn Creamery concerned pricing regulations that were "effectively imposed only on out-of-state products." 512 U.S. at 194. The assessments' "avowed purpose" and "undisputed effect" was to "enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States." *Ibid.* The law achieved that goal by taxing all sales to Massachusetts milk dealers, and then distributing proceeds to Massachusetts dairy farmers so they effectively would bear no portion of the assessments' costs. *Ibid.* Proposition 12 does not tax animal-product sales and redistribute proceeds to local pro-

ducers. Moreover, petitioner has yet to adduce any facts showing that its members face any "actual or prospective competition between the supposedly favored and disfavored entities in a single market." *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 300 (1997). Without such competition, "there can be no local preference" or "undue burden * * * to which the dormant Commerce Clause may apply." *Ibid.* Any relevant factual analysis must proceed in the district court, not here.

In *Hunt*, the Court considered a North Carolina statute mandating that apple labels employ only the USDA's grading system, which "stripp[ed] away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system." 432 U.S. at 351. The statute thus sought to deny consumers information—to prevent an advertising method for genuinely superior apples—to protect the sales of inferior, local apples. But the "competitive advantage" petitioner claims here is no more than its members' desire to exploit supposedly lower-cost (but cruel and unsafe) production methods that California has deemed unacceptable for products sold in California. The Commerce Clause does not require California to create a two-track regulatory system in order to accommodate the highly centralized production and distribution methods favored by certain producers. It is "not the purpose of the Commerce Clause to permit the Judiciary to create market distortions." *Wayfair*, 138 S. Ct. at 2094.

2. Petitioner's other circuit cases are similarly inapposite. The statute in *Cloverland-Green Spring Dairies, Inc.* v. *Pennsylvania Marketing Board*, 298 F.3d 201 (3d Cir. 2002), like the ones in *Baldwin* and *West Lynn Creamery*, was designed to protect the local milk industry. The statute was "indistinguishable from the protectionist

effects deemed fatal in *Baldwin* and *Washington State Apple*." *Id.* at 213.

In *Walgreen Co.* v. *Rullan*, 405 F.3d 50 (1st Cir. 2005), the law required that pharmacies seeking to open or relocate in Puerto Rico obtain a "certificate of necessity and convenience," which effectively gave "an on-going competitive advantage to the predominantly local group of existing pharmacies." *Id.* at 52, 58. Proposition 12 does not advantage California producers. It does not distinguish new producers from old ones or in-state producers from out-of-state. It "treats alike all [animal products] sold in the State, without any preference for local producers or local products." U.S. Br. in *Missouri* v. *California*, No. 148, Original, at 21 (Nov. 2018); U.S. Br. in *Indiana* v. *Massachusetts*, No. 149, Original, at 13 (Nov. 2018).[7]

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[7] Petitioner complains that its members have invested heavily in "nonstandard production methods" that Proposition 12 "render[s] obsolete," and that Proposition 12 "imposes no incremental burden on California producers, because they are subject to § 25900(a)'s California-specific confinement prohibitions." Pet. 26 & n.6. But petitioner denies seeking review of any contention that California producers unfairly benefited from more "lead time." Pet. 10 n.4; see p. 19, *supra*. No court has had the opportunity to address petitioner's cost-based contentions—which seem at odds with the evidence regardless. Pet. App. 28a-29a n.9 (conceding that some of petitioner's members are already in compliance with Proposition 12's standards); p. 13, *supra* (large producer conceding it will comply and "faces no risk of material losses"). Final implementing regulations, moreover, have yet to issue, Pet. App. 26a-27a & n.7, and many of the regulations will implement new requirements for *all* producers, see Cal. Health & Safety Code § 25991(e)(2)-(5). For those regulations, "California farmers, as well as out-of-state farmers, will have the *same* amount of 'lead time' to comply." Pet. App. 27a n.8. Any debate about cost or relative burdens at this stage would be fact-bound and unworthy of this Court's attention.

C. The Ninth Circuit's *Pike* Ruling Is Consistent with Other Circuits' and This Court's Precedents

Finally, petitioner attacks two sentences in the unpublished decision below addressing petitioner's argument under *Pike*. "It was not an abuse of discretion," the court of appeals ruled, "to conclude that Proposition 12 does not create a substantial burden because the law precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographical origin." Pet. App. 3a. The court also noted that "Proposition 12 does not impact an industry that is inherently national or requires a uniform system of regulation." *Ibid.*

Petitioner argues (at 30) that the court of appeals "conflated *Pike* with the prohibition on discrimination." As this Court has explained, there is "no clear line between" the discrimination and *Pike* analyses, and "several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations." *Tracy*, 519 U.S. at 298 n.12 (collecting cases). The Court in *Pike* was motivated by "particular suspicion" of "state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike*, 397 U.S. at 145; see *Tracy*, 519 U.S. at 298; Pet. App. 38a.

Nor does the non-precedential decision below cabin *Pike* to "industr[ies] that [are] inherently national or requir[e] a uniform system of regulation." Pet. 29. The Ninth Circuit regularly applies *Pike* balancing in cases where there is no viable claim that the industry requires national uniformity. See, *e.g.*, *Eleveurs*, 729 F.3d at 952;

Am. Fuel & Petrochemical Mfrs. v. *O'Keeffe*, 903 F.3d 903, 916 (9th Cir. 2018); *Ward*, 986 F.3d at 1242.

Here, the court of appeals noted that "Proposition 12 does not substantially burden interstate commerce," Pet. App. 3a, because (as this Court explained in *Tracy*) "a small number of [the Court's] cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, * * * where such laws undermined a compelling need for national uniformity in regulation," 519 U.S. at 298 n.12. The Ninth Circuit's sound observation that Proposition 12 does not fall within that narrow class of cases creates no conflict.

Petitioner's remaining authorities merely reflect unremarkable and routine application of *Pike* balancing outside the national uniformity context, which the Ninth Circuit does as well. *Yamaha Motor Corp., U.S.A.* v. *Jim's Motorcycle, Inc.*, for example, invalidated a blatantly protectionist Virginia statute—which was "uniquely anticompetitive"—after weighing burdens on interstate commerce. 401 F. 3d 560, 571-573 (4th Cir. 2005). The court noted that the burdens fell primarily on out-of-state interests, while in-state motorcycle dealers "st[ood] to benefit from the law's enforcement." *Ibid.* The result would be the same under Ninth Circuit law.

Finally, petitioner presses its *Pike* arguments on the merits. Pet. 28-29. Its arguments, however, hinge on dubious assertions that have yet to be litigated and that this Court cannot evaluate on this record. Moreover, petitioner focuses on alleged harms to individual producers, rather than to interstate commerce. Cf. *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 127-128 (1978) (Commerce Clause "protects the interstate *market*, not particular interstate firms" (emphasis added)). And petitioner improperly minimizes or ignores Proposition 12's local benefits

based on untested factual assertions. Proposition 12 serves important health-and-safety and consumer-protection objectives that cannot be disregarded even under petitioner's expansive theory of the dormant Commerce Clause. And the important humane and moral purposes of Proposition 12 are supported by longstanding precedent. *Stevens*, 559 U.S. at 469 ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."); *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (noting that the enactment of laws codifying and enforcing moral values is a function inherent to state governments, whose traditional police power "is defined as the authority to provide for the public health, safety, and morals").[8]

Petitioner invites this Court to leap over the undeveloped and interlocutory posture of this case, and to disregard all of the other constitutional justifications for Proposition 12, in order to articulate an unprecedented vision of the dormant Commerce Clause—a vision in which the legitimate moral concerns of the State and the interests of its citizens count for nothing, and the desire of certain businesses to disregard state boundaries to sell what they want wherever they want is constitutionally privileged. Even if this Court were interested in considering that view, such consideration should wait for a case in which the essential facts have been tested, the legal issues have been

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[8] See also *Cresenzi Bird Imps., Inc.* v. *State of New York*, 658 F. Supp. 1441, 1447 (S.D.N.Y. 1987), aff'd, 831 F. 2d 410 (2d Cir. 1987) (per curiam) ("'New York has a legitimate interest in regulating its local market conditions which lead, in a short causal chain, to the unjustifiable and senseless suffering and death of thousands of captured wild birds.' The State has an interest in cleansing its markets of commerce which the Legislature finds to be unethical." (citation omitted)).

fully evaluated, and the issues are properly presented. This is not that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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