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

REPLY BRIEF FOR PETITIONER

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June 7, 2021

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INTRODUCTION

Previously, petitioner North American Meat Institute ("NAMI") showed that the decision below conflicts with decisions of other circuits and this Court concerning the limits the Constitution imposes on a State's ability to adopt trade barriers designed to control production conditions in other States and countries. Thereafter, 20 States filed an *amicus* brief supporting review because the Ninth Circuit's ruling "eliminates any meaningful limit on the ability of California … to regulate extraterritorially," and "means different States in different circuits are subject to different constitutional constraints on their regulatory authority" in violation of "the fundamental principle of equal state sovereignty." Ind. Br. 11, 15.

In their opposition briefs, respondents do not undermine that showing, but instead offer a series of makeweight arguments. Their position that the deep and mature conflicts identified by NAMI and *amici* States are "illusory" is demonstrably wrong. Their procedural arguments fare no better because this case squarely implicates the conflicts among the lower courts. The courts below denied relief for the *sole* reason that NAMI was "unlikely to succeed on the merits," Pet. App. 2a, because, under controlling Ninth Circuit law, there were "no serious questions regarding the merits of NAMI's constitutional challenge," *id.* at 40a. Given those rulings, respondents' position that "this litigation is in its nascent stages," Intvrs. Opp. 12, is disingenuous. Absent immediate review of the Ninth Circuit's legal ruling, there can be (i) no further development of NAMI's core legal claims, (ii) no assessment by the courts below of the irreparable harm that Proposition 12 will visit on NAMI's members and the many thousands of farmers throughout the country with

whom they work, and (iii) no need for those courts to consider the *new* grounds that respondents *now* suggest they *may* have for defending Proposition 12. *E.g.*, Intvrs. Opp. 10, 14–15.[1]

This case squarely presents the threshold legal question whether the Constitution allows California to "attach restrictions to … imports in order to control commerce in other States." *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994). That question is of surpassing national importance, has generated a conflict among the circuits, and warrants immediate resolution by this Court.

The petition should be granted.

I. THIS CASE PRESENTS AN IMPORTANT, RECURRING ISSUE ON WHICH NINTH CIRCUIT PRECEDENT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT'S PRECEDENTS.

The fundamental question presented by this case—whether a State may ban imported products because it objects to the manner in which they were produced—is important and recurring. Indeed, this case is the latest in which States—particularly California, with its economic clout and penchant for imposing its policy preferences on others—have sought to export their regulatory standards by restricting access to their

[1] California's reticence to advance "consumer protection" and "health and safety" as local interests is understandable given that California's expert agency has concluded that Proposition 12's animal-confinement standards are not "accepted as standards within the scientific community to reduce food-borne illness, promote worker safety, the environment, or other human or safety concerns." Cal. Dep't of Food & Agric., *Animal Confinement – Notice of Proposed Action* ("*Notice of Proposed Action*") at 16 (May 2021), *available at* http://www.cdfa.ca.gov/ahfss/pdfs/regulations/AnimalConfinement1stNoticePropReg_05252021.pdf.

markets unless out-of-state commerce is conducted on in-state terms. See Cal. Opp. 10. Alone among the circuits, the Ninth Circuit—having previously fractured on the issue, see *Rocky Mountain Farmers Union* v. *Corey*, 740 F.3d 507 (9th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc)—is entrenched in "open defiance of controlling Supreme Court precedent." *Id.* at 519. And California is taking full advantage, now seeking to regulate agricultural practices throughout the Nation and abroad. Only this Court can restore uniformity. That is why 20 States have supported review, and why the federal government supported rehearing below.

Respondents try to wish away the conflict between the decision below (and the settled Ninth Circuit precedent it applied) and the decisions of other circuits and this Court. But the conflict is real—other circuits, faithfully applying this Court's precedents, have struck down laws materially indistinguishable from Proposition 12. Respondents cannot cite any case outside the Ninth Circuit upholding a similar import ban aimed at out-of-state production methods to which the State objects. This circuit split is particularly intolerable because it unfairly distorts our federal system by allowing California and other States in the Ninth Circuit to dictate regulatory standards for the Nation, while States in other circuits may not. "The Court should not allow this assault on States' equal sovereignty to continue." Ind. Br. 15.

A. The Decision Below Conflicts With Decisions Of Other Circuits.

1. Despite the ruling below, respondents contend that the Ninth Circuit has not limited the extraterritoriality doctrine to price regulations. Cal. Opp. 7–9; Intvrs. Opp. 20. But the *only* reason the panel rejected NAMI's extraterritoriality claim was that Proposition

12 "is not a price control or price affirmation statute." Pet. App. 2a. And that ruling followed *Association des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013) ("*Harris*")—which respondents insisted below was controlling and which refused to apply this Court's extraterritoriality cases to an analogous sales ban solely because it was not a price regulation. See *id.* at 951.

Respondents cite post-*Harris* cases applying the extraterritoriality doctrine more broadly. But those cases did not involve import restrictions and expressly distinguished *Harris* on that basis. See *Sam Francis Found.* v. *Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (en banc); *Daniels Sharpsmart, Inc.* v. *Smith*, 889 F.3d 608, 615 (9th Cir. 2018). Thus, the Ninth Circuit refuses to apply the extraterritoriality doctrine to import restrictions unless they involve price regulations. And the Ninth Circuit's most recent decision on the subject confirmed that, under *Harris*, "the extraterritoriality principle derived from the *Healy* line of cases now applies only when state statutes have the practical effect of dictating the price of goods sold out-of-state or tying the price of in-state products to out-of-state prices." *Ward* v. *United Airlines, Inc.*, 986 F.3d 1234, 1240 (9th Cir. 2021).

2. Regardless, under any reading of Ninth Circuit precedent, it conflicts with the law in other circuits. The conflict is especially stark with the Seventh Circuit, which repeatedly has struck down state laws that restricted imports to control out-of-state conduct. See, *e.g.*, *Legato Vapors, LLC* v. *Cook*, 847 F.3d 825 (7th Cir. 2017); see Pet. App. 34a n.11 (district court declining to follow *Legato* because it "is not the law of this circuit" and is "inconsistent with the Ninth Circuit's precedents").

Respondents try in vain to distinguish *Legato*, which struck down an Indiana law that conditioned in-state sales of vaping products on out-of-state manufacturers' compliance with Indiana-specified production requirements. See Cal. Opp. 12–13; Intvrs. Opp. 24. Respondents say the law in *Legato* "raise[d] obvious concerns about protectionist purposes." 847 F.3d at 833. But so does Proposition 12, and in any event the *Legato* court expressly declined to rest its decision on that basis. *Id.* They say the law in *Legato* regulated commercial transactions, but the court also struck down provisions regulating production conditions. *Id.* at 835. They say the law in *Legato* was enforceable against any manufacturer whose products reached Indiana, but the law's restrictions took the form of conditions of a permit for the sale of vaping products in Indiana, *id.* at 828, and Proposition 12 is no different—it likewise forbids the in-state sale of pork and veal not produced in compliance with California's dictates. And they say the law in *Legato* was "astoundingly specific," *id.* at 833, but even if that were a sound distinction in principle (it is not), Proposition 12 also imposes "astoundingly specific" requirements—down to the precise number of square feet that must be afforded to each breeding sow and veal calf. *Legato* is on all fours.

So too are cases striking down restrictions on imported waste. Pet. 16–19. Respondents dismiss these cases because they conditioned importation on the enactment of laws by the State of origin. See Cal. Opp. 13 n.5; Intvrs. Opp. 23. But a State has no more power to regulate out-of-state conduct directly than it does to require other States to adopt legislation. See *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 165 F.3d 1151, 1152–53 (7th Cir. 1999) (per curiam) ("No state has the authority to tell other polities what laws they must en-

act *or how affairs must be conducted outside its borders*" (emphasis added)). The New York law in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), conditioned importation on compliance with New York's minimum-price law, not on Vermont's adoption of the law. But it was unconstitutional nonetheless.

3. Respondents cite cases upholding product-safety and labeling laws. Cal. Opp. 12 & n.4. But NAMI has no quarrel with such laws, which regulate the *product* itself to prevent *in-state* harms. Proposition 12, in stark contrast, regulates the production *process* to prevent supposed *out-of-state* harms that—even if they were real—are no business of California's. See *Legato*, 847 F.3d at 832, 834 (distinguishing labeling laws from laws that regulate out-of-state production methods).[2]

In fact, these cases highlight the radical implications of the principle endorsed below. Under Ninth Circuit law—which does not require a showing of in-state harms and allows a State to ban imports simply to avoid "complicity" with out-of-state practices to which it objects—California could ban imported products if the workers who made them were not paid California's minimum wage or worked under conditions unacceptable to California. Such a principle would spell the end of the national common market.

B. The Decision Below Conflicts With This Court's Precedents.

Respondents fare no better in attempting to reconcile the decision below with this Court's precedents. The controlling decision is *Baldwin*, which struck

[2] While the Court need not assess how Proposition 12's confinement standards affect animal welfare, California's own proposed regulations recognize that Proposition 12 will likely "increas[e] breeding pig mortality." Cal. Dep't of Food & Agric., *Notice of Proposed Action*, *supra*, at 13.

down an import restriction materially identical to Proposition 12's Sales Ban. Decided before this Court had formulated its modern doctrinal categories under the Commerce Clause, *Baldwin* held that New York's sales ban violated the Constitution because it projected New York's legislation into Vermont and, by that very means, protected New York milk producers from out-of-state competition. Proposition 12 does the exact same thing—it levels the playing field between in-state and out-of-state farmers by subjecting out-of-state farmers who wish to do business in California to the same costly animal-confinement standards that California imposes on its own farmers. It is the same toxic mix of extraterritorial regulation and protectionism the Court unanimously condemned in *Baldwin*. This case is *Baldwin* for the 21st century.

Indeed, *Baldwin* refutes respondents' arguments at every turn. Respondents say Proposition 12 cannot be extraterritorial because it applies only to in-state sales. Cal. Opp. 7. The same was true in *Baldwin*, which makes clear that a law can be impermissibly extraterritorial even if it is triggered by in-state sales. See 294 U.S. at 519 & n.1; see also *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986) (the "mere fact that the effects" of a law "are triggered only by sales of [products] within the State … does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state"). Likewise, *Baldwin* refutes the notion that Proposition 12 cannot be discriminatory because the same confinement standards apply to in-state and out-of-state producers. See Cal. Opp. 6. In *Baldwin*, too, the same minimum price applied regardless of location. See also *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 340, 351 (1977) (striking down state law that "while neutral on its face," had a "leveling effect which

insidiously operate[d] to the advantage of local … producers" by eliminating out-of-state producers' competitive advantage).

In the end, respondents are left to contend that *Baldwin* is different because it involved prices. Cal. Opp. 14; Intvrs. Opp. 26. But that arbitrary distinction conflicts with *Carbone* (and *Hunt*). See Pet. 20–21. Respondents try to dismiss *Carbone* as a discrimination case. Cal. Opp. 14; Intvrs. Opp. 27 n.6. But this case also involves discrimination. Regardless, *Carbone* cited *Baldwin* for its extraterritoriality principle—and summarized that principle in a rule that reads as though it were written for this case: "States … may not attach restrictions to … imports in order to control commerce in other States." 511 U.S. at 393.

The Ninth Circuit's refusal to balance the competing interests further conflicts with *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Contrary to respondents' assertions, Cal. Opp. 17; Intvrs. Opp. 12–13, the lower courts did not reject NAMI's *Pike* claim based on any deficiencies in NAMI's factual showing. Rather, they held that the burdens at issue are *legally ineligible* for *Pike* balancing because they concern the costs of altering production methods, rather than burdening producers based on location or regulating in an area requiring national uniformity. Pet. App. 3a, 38a–39a. But this Court's cases recognize no "production method" exception to *Pike*. Here, too, the decision below openly defies this Court's precedents.

II. THE CASE PRESENTS AN IDEAL VEHICLE.

Contrary to respondents' arguments, the case presents an ideal vehicle for resolving these conflicts.

First, respondents argue that review is unwarranted because the Ninth Circuit's decision is "unpublished." Cal. Opp. 3–4; Intvrs. Opp. 2. That is wrong. "[T]he

Court grants certiorari to review unpublished and summary decisions with some frequency." Shapiro *et al.*, *Supreme Court Practice* § 4.11 (10th ed. 2013) (citing cases); see, *e.g.*, *Felkner* v. *Jackson*, 562 U.S. 594, 597 (2011) (per curiam) (reviewing and reversing Ninth Circuit's "three-paragraph unpublished memorandum opinion"); *Krupski* v. *Costa Crociere S.p.A.,* 560 U.S. 538, 546 (2010) (reviewing and reversing "unpublished *per curiam* opinion"). That is because, in the Ninth Circuit, as elsewhere, unpublished decisions are reserved for questions that are "fully answered by settled law in [the] circuit." *Adair* v. *Sunwest Bank*, 965 F.2d 777, 778 (9th Cir. 1992) (per curiam). Here, the unpublished ruling reflects that the governing law in the Ninth Circuit—which conflicts directly with precedent in other circuits—is well settled. This further confirms that review is warranted because the "subject over which the courts of appeals have split" is "a persistent conflict." Shapiro, *supra*, § 4.11.

Second, respondents argue that the case's interlocutory posture "'furnishe[s] sufficient ground for the denial of' certiorari." Intvrs. Opp. 11; see Cal. Opp. 18. That principle is inapplicable where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Shapiro, *supra*, § 4.18; see, *e.g.*, *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452, 459 (2012) (reviewing and reversing Ninth Circuit's denial of preliminary injunction); *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2370 (2018) (same). Here, the district court denied NAMI's preliminary-injunction motion for the sole reason that its legal challenges to Proposition 12 raised no "serious questions" under Ninth Circuit precedent. Pet. App. 40a. The Ninth Circuit, in turn, affirmed that "NAMI was unlikely to succeed on

the merits." *Id.* at 2a; see *id.* at 3a ("[T]he district court did not err when it refused to consider the other preliminary injunction factors."). The ruling below thus rejects the heart of NAMI's claims in the context of a request for a preliminary injunction seeking to avoid irreparable harm to NAMI's members that are already, and will soon be, subject to Proposition 12's unconstitutional regulatory dictates.[3]

Finally, respondents contend that the "litigation is in its nascent stages" and there has not been "proper [factual] development." Intvrs. Opp. 12; see Cal. Opp. 18. These arguments are specious. Respondents cannot avoid review by pointing to their own failure to respond to NAMI's showing that Proposition 12 does nothing to promote food safety. See Pet. 7. Indeed, California's Department of Food and Agriculture recently explained that Proposition 12 "does not directly impact human health and welfare of California residents." Cal. Dep't of Food & Agric., *Notice of Proposed Action*, *supra*, at 6. The posture of this case provides an ideal vehicle to test the Ninth Circuit's legal conclusion that a State may impose an import ban solely to avoid "complicity" with out-of-state practices to which it objects, even absent any local health-and-safety interest.

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[3] Respondents argue that the court of appeals ruled only that the district court did not abuse its discretion. Cal. Opp. 10; Intvrs. Opp. 21. But the courts' rulings below turned purely on the legal standards that apply in the Ninth Circuit, and not on any factual disputes or discretionary considerations. The abuse-of-discretion standard "does not shelter a district court that makes an error of law, because a 'district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017).

Moreover, relying on the same reasoning the Ninth Circuit affirmed, the district court has already dismissed NAMI's core claims.[4] Absent review, there will be no further factual "development" of claims that the district court has concluded, and Ninth Circuit has affirmed, raise "no serious questions." Pet. App. 40a. And there will be no assessment by the courts below of NAMI's showing that Proposition 12 imposes substantial and irreparable harm on NAMI's members and the thousands of farmers across the country with whom they partner to provide wholesome pork and veal to consumers within and without California.

CONCLUSION

For these reasons, the Court should grant review.

Respectfully submitted,

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[4] The district court dismissed NAMI's extraterritoriality claim and allowed the discrimination and *Pike* claims to proceed only with regard to the disparate lead time for compliance and the treatment of "bob" veal, neither of which implicates the core constitutional problems with Proposition 12. See Pet. 10 n.4.