No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN MEAT INSTITUTE IN SUPPORT OF PETITIONERS

PAUL J. ZIDLICKY*
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com

Counsel for Amicus Curiae
North American Meat Institute

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* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

LEGISLATIVE MATERIAL Page

SCHOLARLY AUTHORITY

INTERESTS OF *AMICUS CURIAE*[1]

The North American Meat Institute ("NAMI") is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. NAMI member companies account for more than 95% of the United States output of these products. NAMI advocates on behalf of its members in connection with legislation and regulation affecting the meat industry.

NAMI's members own and raise hogs and veal calves in various States across the country and sell pork and veal to customers in California. In 2019, NAMI filed an action, similar to this one, challenging Proposition 12's sales ban as a violation of the Commerce Clause and horizontal federalism. See *N. Am. Meat Inst.* v. *Becerra*, No. 2:19-cv-08569 (C.D. Cal. filed Oct. 4, 2019). The district court denied a preliminary injunction, 420 F. Supp. 3d 1014 (C.D. Cal. 2019); the Ninth Circuit affirmed in an unpublished opinion, 825 F. App'x 518 (9th Cir. 2020) (mem.); and this Court denied certiorari, 141 S. Ct. 2854 (2021) (mem.). On the merits, NAMI's case remains at the complaint stage, awaiting resolution of the appeal in this case.[2]

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] The district court dismissed NAMI's original complaint for failure to state a claim. See *N. Am. Meat Inst.* v. *Becerra*, No. 2:19-CV-08569, 2020 WL 919153 (C.D. Cal. Feb. 24, 2020). After NAMI amended its complaint, the court stayed the case pending NAMI's appeal of the order denying a preliminary injunction. The case remains pending before the district court.

NAMI thus has a direct and substantial interest in this case, which presents fundamental questions about the scope of a State's authority to erect trade barriers in an effort to dictate production conditions outside the State. Under the Ninth Circuit's misguided decision below, California is free to use access to its market as a lever to dictate from afar the manner in which farm animals are housed outside California's borders. As a result, NAMI's members and farmers throughout the country face an untenable Hobson's choice: either abandon the California market—approximately 13% of the entire U.S. market—or spend hundreds of millions of dollars restructuring their production facilities and supply chains to suit California's preferences.

The Constitution does not permit California to control the terms of out-of-state commerce in this way. California may regulate how farm animals are housed in California, but it may not foist its animal-housing standards on out-of-state farmers, upon pain of exclusion from the California market. Doing so would extend the State's police power beyond its jurisdictional bounds and strike at the heart of the national common market the Constitution was designed to ensure. "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539 (1949); accord *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2460 (2019) ("[R]emoving state trade barriers was a principal reason for the adoption of the Constitution.").

Because, as explained below, Proposition 12 violates this Court's settled precedent and will have a devastating impact on interstate commerce in pork and veal, NAMI respectfully urges the Court to reverse.

SUMMARY OF ARGUMENT

Proposition 12's sales ban—which precludes the sale in California of imported meats unless farmers in other States and countries radically restructure their facilities and methods to comply with California's animal-housing standards—is an impermissible extraterritorial regulation. A fundamental premise of our federal system is that each State is a sovereign laboratory of democracy, but only within its own borders. As a result, the Constitution denies California the authority to dictate the conditions under which farm animals must be housed outside California's borders.

Nor may California erect trade barriers whose purpose and effect are to regulate commerce outside the State. As this Court unanimously held more than 85 years ago, and has repeatedly reaffirmed since, States "may not attach restrictions to exports or imports in order to control commerce in other States," because doing so "would extend [their] police power beyond [their] jurisdictional bounds." *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994) (citing *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)). That is precisely what Proposition 12 does—it attaches restrictions to wholesome imported meats to control how farm animals are raised outside California.

Proposition 12's sales ban also is invalid under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), because it imposes substantial burdens on interstate commerce that vastly exceed any legitimate local benefits. Proposition 12 severely burdens interstate commerce by

forcing pork and veal producers to spend hundreds of millions of dollars building and operating California-compliant facilities or exit the California market. These burdens—which fall almost exclusively on out-of-state interests—are not offset by *any* countervailing local interest. Proposition 12's sales ban does nothing to promote the health and safety of California consumers. And California has no legitimate interest in how farm animals are housed in other State and countries.

ARGUMENT

I. PROPOSITION 12 IMPROPERLY REGULATES EXTRATERRITORIAL COMMERCE.

A. The Constitution Prohibits State Laws That Regulate Conduct Outside Their Borders.

"We start with first principles." *United States* v. *Lopez*, 514 U.S. 549, 552 (1995). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz* v. *United States*, 521 U.S. 898, 918–19 (1997) (quoting The Federalist No. 39, at 245 (James Madison)). That federal structure is (i) "reflected throughout the Constitution's text," *id.* at 919 (citing cases and constitutional provisions), (ii) "implicit … in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones," *id.* (citing U.S. Const. art. I, § 8), and (iii) "rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,'" *id.* (alteration in original) (quoting U.S. Const. amend. X).

Under that federal structure, "[o]ne cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907). As explained in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), "[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others" such that "the laws of one State have no operation outside of its territory, except so far as is allowed by comity." *Id*. at 722. Consequently, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Brown* v. *Fletcher's Est.*, 210 U.S. 82, 89 (1908) (quoting *Pennoyer*, 95 U.S. at 722).

As a result, extraterritorial regulation by a State violates the "principles of interstate federalism embodied in the Constitution," in its structure, and in its provisions, including, but not limited to, the Commerce Clause. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). Just as state sovereignty limits the power of the federal government, *New York* v. *United States*, 505 U.S. 144 (1992), so too does the sovereignty of each State place a reciprocal "limitation on the sovereignty of all of its sister States," *Woodson*, 444 U.S. at 293*;* see also *Printz*, 521 U.S. at 918–19; *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 540 (2013) (recognizing the "historic tradition that all the States enjoy equal sovereignty" (citation omitted)). Each "state is without power to exercise 'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson* v. *Emps. Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954).

The Court has enforced this federal structure in a variety of contexts. It has held that the Constitution limits "the coercive power of a State" over nonresident litigants as "'a consequence of territorial limitations on the power of the respective States.'" *Bristol-Myers Squibb Co.* v. *Superior Ct.*, 137 S. Ct. 1773, 1780 (2017) (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958)); see also *Woodson*, 444 U.S. at 294 (the constitutional principle "of interstate federalism" "may sometimes act to divest the State of its power"). Further, because "no single State [can] … impose its own policy choice on neighboring States," the Court has held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 571–72 (1996). And, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts," such that "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977)).[3]

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[3] See also, *e.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809, 827–28 (1975) (Virginia's "police powers do not reach" "information about activities outside [its] borders"); *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 440 (1943) ("Texas is without power to give extraterritorial effect to its laws."); *Osborn* v. *Ozlin*, 310 U.S. 53, 62 (1940) (a State may not "reac[h] beyond her borders to regulate a subject which [i]s none of her concern because the Constitution has placed control elsewhere"); *N.Y. Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York ….").

Finally, the Court has held that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar*, 457 U.S. at 642–43 (plurality opinion)). An extraterritorial law "exceeds the inherent limits of the enacting State's authority," and is irreconcilable with "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335–36 (footnote omitted); see also *Carbone*, 511 U.S. at 393 (extraterritorial laws "extend the [State's] police power beyond its jurisdictional bounds" (citing *Baldwin*, 294 U.S. 511)).

Thus, although the extraterritoriality doctrine is often associated with the Commerce Clause, its roots lie much deeper. They arise from the Constitution's federal structure as a Union of 50 separate sovereigns whose regulatory jurisdiction is defined and limited by their territorial boundaries. See *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring) (suggesting that Commerce Clause doctrines may be "misbranded products of federalism"). Like other constitutional doctrines enforced by the Court, the prohibition on extraterritorial state regulation is "a historically rooted principle embedded in the text and structure of the Constitution." *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019) (noting the Court's application of doctrines of judicial review, sovereign immunity, executive privilege, executive

immunity, the President's removal power, and intergovernmental tax immunity).[4]

As shown below, Proposition 12's sales ban is an extraterritorial law that violates the Constitution.

B. States May Not Restrict Imports To Control Commerce In Other States.

1. This is not the first time the Court has confronted a state-imposed ban on the sale of imported goods that turned on whether out-of-state commerce was conducted according to in-state terms. That was precisely the situation in *Baldwin*, where Justice Cardozo, writing for a unanimous Court, had no trouble discerning that such a law is fundamentally incompatible with the Commerce Clause and the constitutional design.

The law at issue in *Baldwin* was part of a New York statutory scheme that "set up a system of minimum prices to be paid by [milk] dealers to producers." 294 U.S. at 519. In addition to establishing the minimum price to be paid to New York producers on sales occurring in New York—a provision whose validity the Court did not question, see *id.*—the law contained a separate provision forbidding the in-state sale of milk bought outside New York if the price paid to the out-of-state producer was less than New York's minimum price. See *id.* at 519 & n.1. Thus, an importer who bought milk in another State (there, Vermont) at a

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[4] See also, *e.g.*, Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1884–95 (1987) (explaining that the extraterritoriality doctrine "is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole").

price below New York's minimum price could "keep his milk or drink it, but sell it he [could] not." *Id.* at 521.

In considering the importer's challenge to New York's sales ban, the Court proceeded from two undisputed premises: that "New York ha[d] no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," and that "New York [was] equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones." *Id.* The question, then, was whether New York could circumvent these limitations on its authority by banning the sale of imported milk "if the price that ha[d] been paid for it to the farmers of Vermont [was] less than would be owing in like circumstances to farmers in New York." *Id.*

The Court's unanimous answer was "no." Although *Baldwin* preceded the formulation of the modern doctrinal categories under the Commerce Clause, the Court's opinion applied two strands of the Court's current Commerce Clause jurisprudence—the condemnation of state economic protectionism and the prohibition on extraterritorial state regulation.

First, as to economic protectionism, the Court reasoned that New York's sales ban created a trade barrier whose "avowed purpose" and "necessary tendency" was "to suppress or mitigate the consequences of competition between the states." *Id.* at 521–22. Recalling that "a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation,'" *id.* at 522 (citations omitted), the Court reasoned that "[i]f New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the

door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation," *id.* New York thus could not use its authority over in-state sales to "establis[h] an economic barrier against competition with the products of another state or the labor of its residents." *Id.* at 527. "Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin." *Id.*

Second, as to extraterritorial regulation, the Court rejected New York's argument that its sales ban could be justified as a means to uplift the standard of living of out-of-state dairy farmers and thereby ensure an adequate supply of sanitary milk. See *id.* at 523–24. New York contended that if milk producers did not earn a sufficient income, the milk supply would be threatened, and producers would be "tempted to save the expense of sanitary precautions." *Id.* at 523. The Court was unmoved. It held that New York could not "regulat[e] by indirection" the prices paid to producers in other States. *Id.* at 524. Any relationship "between earnings and sanitation [was] too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." *Id.* And New York could not use access to its market to "pressure" other States "to reform their economic standards." *Id.* "If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy." *Id.*

The Court also emphasized the radical implications of New York's sales ban. If New York could condition importation on the price paid to the out-of-state

producer, "[t]he next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business." *Id.* The Court recognized that States can protect the health and safety of their own citizens, such as by "regulat[ing] the importation of unhealthy swine or cattle or decayed or noxious foods." *Id.* at 525 (citations omitted). But New York's sales ban was of a different order: "It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in *other* states, and to bar the sale of the products … unless the scale has been observed." *Id.* at 528 (emphasis added).

In the end, the Court recognized that to uphold New York's sales ban "would be to invite a speedy end of our national solidarity." *Id.* at 523. "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Id.*

2. Respondents have previously attempted to dismiss *Baldwin* as a "Depression-era case." Answering Brief of State Defendants at 16, *N. Am. Meat Inst.* v. *Becerra*, No. 19-56408 (9th Cir. Jan. 31, 2020). But far from being defunct, *Baldwin* is a foundational precedent—indeed, this Court has described it as "the leading" Commerce Clause case. *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 195 n.11 (1994) (quoting *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 275 (1988)). The decision has been cited in this Court's opinions more than 60 times, and retains all of its vitality.

Most relevant here is the Court's reaffirmation of *Baldwin* in *Carbone*. In *Carbone*, the Court invalidated a town ordinance requiring all nonhazardous solid waste generated within or brought into the town to be deposited at a transfer station to separate recyclable from nonrecyclable items before leaving the municipality. 511 U.S. at 386–88. The Court determined the ordinance was subject to strict scrutiny because of its protectionist "design and effect." *Id.* at 392. The town attempted to "justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment." *Id.* at 393. The Court rejected this justification as an improper attempt to "extend the town's police power beyond its jurisdictional bounds." *Id.* Citing *Baldwin*, the Court held that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *Id.*[5]

Baldwin also featured centrally in this Court's decisions in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy*, 491 U.S. 324, which invalidated state price-affirmation laws that tied maximum in-state prices for alcoholic beverages to out-of-state prices and thereby controlled prices charged outside the State. Citing *Baldwin*, the Court "reaffirm[ed] and elaborat[ed] on [its] established view that a state law that has the 'practical effect' of regulating commerce occurring

[5] The district court in NAMI's case wrongly dismissed this holding of *Carbone* as "dicta." 420 F. Supp. 3d at 1032 n.11. The portion of the Court's opinion summarized above set forth the Court's reason for rejecting a justification for the town's ordinance, and thus was an essential part of the Court's holding. See, *e.g.*, *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1126 (2019) ("[J]ust as binding as this holding is the reasoning underlying it."); *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1404 (2020) (plurality opinion).

wholly outside that State's borders is invalid under the Commerce Clause." *Healy*, 491 U.S. at 332 (discussing *Baldwin*); *Brown-Forman*, 476 U.S. at 580 (same)

3. Nor has the Court ever retreated from the principle that States may not restrict imports to control out-of-state commerce. Citing *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644, 669–70 (2003), the Ninth Circuit has suggested that the "the extraterritoriality principle in *Baldwin*, *Brown-Forman*, and *Healy* should be interpreted narrowly as applying only to state laws that are 'price control or price affirmation statutes.'" Pet. App. 8a; see also *N. Am. Meat Inst.*, 825 F. App'x at 520 (holding that the district court in NAMI's case did not err "in concluding that Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute").

That limitation is inconsistent with this Court's precedent. For one, the Ninth Circuit's list of extraterritoriality cases conspicuously omits *Carbone*, which applied *Baldwin*'s extraterritoriality principle outside the price-control context—the town in *Carbone* was seeking to control out-of-state waste disposal practices, not out-of-state prices. See 511 U.S. at 393. *Carbone* thus refutes any notion that the extraterritoriality doctrine is limited to price regulations. See also *Healy*, 491 U.S. at 333 n.9 (observing that the plurality's extraterritoriality holding in *Edgar*—a non-price control case—"significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation"). Moreover, the rule formulated by this Court precludes States from regulating *any* form of "commerce that takes place wholly outside of the State's borders," not just out-of-state prices. *Id.* at 336 (quoting *Edgar*, 457 U.S. at 642–43 (plurality opinion)).

Nor is there any principled reason to single out price regulation as the only form of extraterritorial regulation that is off-limits to the States. See *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) (explaining that, although some of this Court's extraterritoriality cases "involved price affirmation statutes, the principles set forth in these decisions are not limited to that context"). As discussed above, the extraterritoriality doctrine ultimately is rooted in the Constitution's federal structure, under which "[t]he sovereignty of each State … implie[s] a limitation on the sovereignty of all of its sister States." *Woodson*, 444 U.S. at 293. Just as States have sovereignty over all forms of commerce within their borders, not just prices, States lack sovereignty over any form of commerce outside their borders. There is no reason to think, for example, that the result in *Baldwin* would have been different if New York had conditioned the sale of imported milk on Vermont dairy farmers' adherence to New York's maximum hours law rather than New York's minimum price law.

Walsh is not to the contrary. It involved a challenge *to a price regulation*, and said nothing about the extraterritoriality doctrine's application outside the price-regulation context, an issue not before it. *Walsh* also did not involve a state law that restricted imports to control commerce outside the State. The purpose of the state law in *Walsh* was to reduce *in-state* drug prices, not to change manufacturers' out-of-state conduct. See 538 U.S. at 653–54. And the State's prior-authorization requirement was triggered by conduct directly involving the State (the manufacturer's refusal to enter into a rebate agreement with the State), not by the conditions under which the drugs were produced outside the State. See *id.* at 649–50. *Walsh* has no bearing on the issue presented here.

C. Proposition 12's Sales Ban Is An Impermissible Extraterritorial Regulation.

1. Measured against these principles, Proposition 12's sales ban cannot stand. It violates the prohibition on extraterritorial state regulation because its purpose and effect are to control the housing of farm animals outside California. Proposition 12's express purpose is to "phas[e] out" animal-confinement conditions that California deems "crue[l]," Cal. Prop. 12, § 2—regardless of the animals' location. And its practical effect is to require out-of-state farmers to comply or forfeit access to the California market. Furthermore, as petitioners have shown, compliance with Proposition 12 will require dramatic changes to an integrated national industry, increasing prices for consumers everywhere and affecting interstate transactions that have no connection to California. Such regulation of interstate commerce "is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes." *Healy*, 491 U.S. at 340.

Proposition 12 squarely violates the standard prohibiting extraterritorial regulation set forth in this Court's decisions in *Baldwin*, *Healy* and *Carbone*. Specifically, Proposition 12 transgresses the bright-line rule that "States … may not attach restrictions to exports or imports in order to control commerce in other States." *Carbone*, 511 U.S. at 393 (citing *Baldwin*, 294 U.S. 511); cf. *Energy & Env't Legal Inst.* v. *Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.) (discussing how Commerce Clause doctrine could be described as involving a background "rule of reason" and "more demanding '*per se*' rules applied to discrete subsets of cases").

To paraphrase Yogi Berra, this case is *Baldwin* all over again. Just as it was undisputed in *Baldwin* that "New York ha[d] no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," 294 U.S. at 521, there is no question here that California lacks power to regulate how farm animals are housed outside California's borders. Cf. *Printz*, 521 U.S. at 920 ("[T]he State has no legitimate interest in protecting nonresident[s]."") (alterations in original) (quoting *Edgar*, 457 U.S. at 644). California could not, for example, decree that farmers throughout the country must comply with Proposition 12's confinement requirements and send its law enforcement officers to arrest farmers who do not comply. See *supra*, Part I.A.; *Bonaparte* v. *Tax Ct.*, 104 U.S. 592, 594 (1882) ("No State can legislate except with reference to its own jurisdiction.").

The question, then, is whether California can evade this restriction on its authority by using the presence of imported meats in the State as a jurisdictional hook to regulate animal-housing conditions on out-of-state farms. *Baldwin* makes clear the answer is "no"—a State may not "regulat[e] by indirection" out-of-state conduct that it lacks power to regulate directly by conditioning the importation of wholesome foods on compliance with the State's regulations regarding the terms of out-of-state commerce. 294 U.S. at 524; see also *Brown-Forman*, 476 U.S. at 580 (holding that 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").

This case is no different. Proposition 12's sales ban is structured identically to the sales ban in *Baldwin*—as a prohibition on the in-state sale of wholesome

imported foods (there, milk; here, pork and veal) triggered by conduct that occurred entirely outside the State (there, the price paid to the out-of-state dairy farmer; here, the housing conditions on out-of-state farms). And it is unconstitutional for the same reason.

Carbone is to like effect, with the immaterial difference that it involved a restriction on exports rather than imports.[6] There was no question in *Carbone* that the town had jurisdiction over the waste products at issue—the town's ordinance applied only to waste that was physically present in the town. See 511 U.S. at 387. But the town could not use the presence of the waste within its borders as a jurisdictional hook to prevent the waste's disposal at "out-of-town disposal sites that it might deem harmful to the environment." *Id.* at 393. To allow this, the Court reasoned, "would extend the town's police power beyond its jurisdictional bounds." *Id.* Likewise, allowing California to leverage its authority over in-state sales to regulate out-of-state animal-housing conditions would extend California's police power beyond its jurisdictional bounds.

California also cannot circumvent the limits on its regulatory jurisdiction by reframing its interest as avoiding contributing to out-of-state practices to which it objects. See *Ass'n des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937, 952 (9th Cir. 2013) (justifying an import ban as a way for California to

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[6] The town's restriction in *Carbone* could be characterized as a restriction on the import of waste-processing services, as well as a restriction on the export of unprocessed waste. See 511 U.S. at 391–92. But the distinction is immaterial. *Carbone* made clear that *Baldwin*'s holding, which involved imports, applies equally to exports. See *id.* at 393 (citing *Baldwin* for the proposition that "States … may not attach restrictions to *exports or imports* in order to control commerce in other States" (emphasis added)).

"prevent complicity in a practice that it deemed cruel to animals"). That was the precise rationale this Court rejected in *Carbone*, where the town sought to justify its export restriction as a way to prevent locally generated waste from being disposed of elsewhere in ways the town deemed environmentally unsound. Likewise, New York could not have changed the result in *Baldwin* by arguing that it wanted to avoid "complicity" in the impoverishment of Vermont dairy farmers. *Carbone* and *Baldwin* establish that a State may not impose trade barriers as a means to prevent locally produced supply (*Carbone*) or demand (*Baldwin*) from contributing to perceived problems outside the State.

Were it otherwise, States could use import restrictions to regulate all manner of out-of-state production conditions. Under the same logic it uses to defend Proposition 12, California could ban the import of all goods produced under working conditions it deems suboptimal or "cruel"—*e.g.*, goods produced by workers who were paid less than California's minimum wage, who worked more than California's maximum number of hours, or who were not provided a California-specified level of medical or family leave. Or California could ban imported goods produced by companies headquartered in States with public policies that are objectionable to California. And if California can export its regulations in this way, then so can Texas and Florida and every other State. This would balkanize the national economy, producing trading blocs of like-minded States and "creat[ing] just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. And it would allow large States to use their economic clout to impose their policy preferences on smaller States. It would, in short, spell the end of the national common market.

2. Reaffirming that States may not restrict imports to control out-of-state commerce would not affect States' authority to impose product safety or labeling requirements. Cf. *Energy & Env't Legal Inst.*, 793 F.3d at 1175 (expressing concern about "problems of overinclusion" if the extraterritoriality doctrine required courts to "strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels"). When a State regulates the properties of goods sold in-state or their packaging to prevent in-state harms resulting from the goods' in-state use, the State acts within its jurisdictional authority. See, *e.g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 470–74 (1981) (upholding regulation of milk containers). In such cases, both the harms the State seeks to prevent and their immediate causes occur within the State's territory and hence within its regulatory jurisdiction. Any required changes to manufacturers' out-of-state production processes are not ends in themselves; they are incidental to the State's effort to prevent in-state harms resulting from the use of products in the State. Such regulations have long been understood as a permissible exercise of the State's police power, see *Baldwin*, 294 U.S. at 525–26, and will be upheld so long as they do not discriminate against or excessively burden interstate commerce, see *Clover Leaf Creamery*, 449 U.S. at 470–74.

Proposition 12 is fundamentally different. It seeks to change out-of-state farming practices, not because they cause any harms to animals in California, but because California disagrees with those production methods. See Cal. Prop. 12, § 2 (stating that Proposition 12's purpose "is to prevent animal cruelty by phasing out extreme methods of farm animal confinement"). But California's legitimate interest in protecting farm animals from perceived "cruelty" extends only

to animals in California, and is fully met by Proposition 12's separate restriction on how farmers in California house their animals. See Cal. Health & Safety Code § 25990(a) ("A farm owner or operator *within the state* shall not knowingly cause any covered animal to be confined in a cruel manner." (emphasis added)). The purpose and effect of the sales ban are to force out-of-state farmers to conform their practices to California's standards. But California may not impose its policy choices on other States and countries by conditioning access to its market on out-of-state farmers' compliance with California's dictates regarding farming conditions outside California.

Nor can California defend the sales ban as a consumer-protection measure. Petitioners' allegations—which must be taken as true at this stage—establish that "[t]here is no link between Proposition 12's sow housing requirements and food safety or foodborne illness." Pet. App. 229a ¶ 442; see Petrs. Br. 12–14.[7] Moreover, the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.*, already requires federal inspection of all cattle and swine processed for human consumption, and "establishes an elaborate system of inspecting live

[7] The same is true of Proposition 12's housing requirements for veal calves. In support of NAMI's motion for a preliminary injunction, NAMI submitted an expert declaration from Dr. Keith E. Belk, Head of the Department of Animal Sciences at Colorado State University, who explained that "no credible scientific evidence supports an assertion that changing current confinement standards for veal calves or breeding pigs to comply with Proposition 12 would diminish the risk of foodborne illness from whole veal or pork meat or otherwise improve food safety." Declaration of Dr. Keith E. Belk ¶ 10, *N. Am. Meat Inst.*, No. 2:19-cv-08569 (C.D. Cal. Oct. 4, 2019), ECF No. 15-2. In response, respondents neither submitted contrary evidence nor attempted to defend Proposition 12 as a food-safety measure.

animals and carcasses in order to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products." *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452, 455–56 (2012) (cleaned up). There is no basis to believe that out-of-state farmers' compliance with Proposition 12 would have any effect on the health and safety of California consumers. Regardless, any such relation "is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." *Baldwin*, 294 U.S. at 524.

3. Finally, *Baldwin* and *Carbone* cannot be dismissed because they involved economic protectionism. The State in *Baldwin* and the town in *Carbone* both offered non-protectionist justifications for their laws. In *Baldwin*, New York contended that it was not seeking to protect its dairy farmers from competition, but to ensure a steady supply of sanitary milk by providing out-of-state dairy farmers a sufficient income. See *id.* at 522–23. And in *Carbone*, the town argued that it was not seeking to advantage its in-town processer, but to protect the environment from harmful out-of-state disposal practices. See 511 U.S. at 393. The Court in both cases rejected these rationales not because they were pretexts, but because they illegitimately sought to remedy perceived problems outside the State. The principle that States may not attach restrictions to imports or exports to control commerce outside the State thus stands on its own; it does not depend on a showing that the restriction is also a protectionist measure. See also *Healy*, 491 U.S. at 340 (treating discrimination as "a second respect" in which the law violated the Commerce Clause, not as a condition of the Court's holding that the law violated the extraterritoriality doctrine).

In any event, Proposition 12's sales ban is protectionist in precisely the same way New York's sales ban in *Baldwin* was—it "neutralize[s] advantages belonging to the place of origin." 294 U.S. at 527. Regardless of whether the sales ban was motivated by a protectionist purpose,[8] it necessarily has the effect of leveling the playing field between in-state and out-of-state producers by ensuring that out-of-state producers who sell in California are subject to the same costly housing requirements that apply to California producers. Without the sales ban, out-of-state producers in States that do not impose the same requirements would have a cost advantage over in-state producers. The sales ban eliminates that competitive advantage and thus has a protectionist effect. See *W. Lynn Creamery*, 512 U.S. at 194–96 (invalidating law that "enable[d] higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States"); *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977) (invalidating law that had a "leveling effect" by

[8] Proposition 12's sales ban is modeled on a provision the California legislature added to Proposition 2, the 2008 ballot initiative that first imposed the requirement that pregnant pigs, veal calves, and egg-laying hens not be confined in a way that prevents them from "[l]ying down, standing up, and fully extending [their] limbs" or "[t]urning around freely." Cal. Prop. 2, § 3. As enacted, Proposition 2 did not contain a sales ban and thus did not affect farmers outside California. But in 2010, the California legislature enacted AB 1437, which added a provision banning the sale of eggs from hens that were not confined in compliance with Proposition 2. Cal. Health & Safety Code § 25996. A committee report explained that "[t]he intent of this legislation [was] to level the playing field so that in-state producers [were] not disadvantaged" by competition from out-of-state producers who were not subject to the same confinement requirements. Cal. Assemb. Comm. on Appropriations, Bill Analysis of AB 1437 (May 13, 2009).

raising of out-of-state producers' costs and "stripping away" their "competitive and economic advantages").

II. PROPOSITION 12 EXCESSIVELY BURDENS INTERSTATE COMMERCE.

Proposition 12's sales ban further violates the Commerce Clause because it imposes burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Indeed, this case is an easy one under *Pike* because the massive burdens Proposition 12 imposes on interstate trade in pork and veal are not offset by *any* legitimate local benefits—certainly none sufficient to justify the disproportionate costs Proposition 12 imposes on the predominantly out-of-state pork and veal industries, which have no voice in California's political process.

A. The Sales Ban Substantially Burdens Interstate Commerce.

1. By any measure, the burdens Proposition 12 imposes on interstate commerce are substantial. As petitioners have alleged, compliance with Proposition 12 will require major changes to the national pork industry, forcing farmers to reconstruct their existing barns and construct new ones to comply with California's housing requirements; requiring farmers to adopt less safe and more labor-intensive methods of production; causing industry consolidation, with some farmers being forced out of business; and decreasing the supply and increasing the price of pork for consumers not just in California, but nationwide. See Petrs. Br. 45–46. Petitioners' allegations—which are accepted as true at this stage—are consistent with the declarations NAMI filed in its case, which showed that the pork industry's costs of complying with Proposition 12 will run into the hundreds of millions of dollars in capital investments

and increased operating costs. See Plaintiff's Notice of Motion and Motion for Preliminary Injunction at 19–21, *N. Am. Meat Inst.*, No. 2:19-cv-08569 (C.D. Cal. Oct. 4, 2019), ECF No. 15.

Proposition 12 will have a similarly devastating impact on the veal industry, which consists of hundreds of small family farms located primarily in the Midwest. See *id.* Prior to the passage of Proposition 12, veal producers had only just completed a decade-long, industry-wide transition to group housing, at a cost of $150 million. They built their barns in line with European Union standards, which at the time were the world's most demanding. Those standards specified square-footage requirements that varied with the size of the calf, requiring at most 19.4 square feet for the largest calves. To comply with Proposition 12's requirement that each calf, regardless of size, must have at least 43 square feet of floorspace, farmers would have to more than double their barns' square footage. For many of these small farmers, the cost of remodeling their barns and constructing new ones to comply with Proposition 12—particularly while they are still paying the long-term debt incurred for the last round of capital improvements—is prohibitive.

2. The court of appeals nonetheless held that petitioners failed to plead a substantial burden on interstate commerce because, in that court's view, *Pike* balancing is required only when a state law discriminates against interstate commerce or produces inconsistent regulation of activities that are inherently national or require a uniform system of regulation. See Pet. App. 17a; see also *N. Am. Meat Inst.*, 825 F. App'x at 520 (rejecting NAMI's *Pike* claim on the same basis).

The Ninth Circuit's arbitrary categories are inconsistent with this Court's precedent. In asserting that

"most statutes that impose a substantial burden on interstate commerce do so because they are discriminatory," Pet. App. 17a (alteration and citation omitted), the Ninth Circuit conflated two distinct tiers of Commerce Clause scrutiny. A law that discriminates against out-of-state producers is subject to strict scrutiny, not *Pike* balancing. See, *e.g.*, *Or. Waste Sys., Inc.* v. *Dep't of Env't Quality*, 511 U.S. 93, 99 (1994). This Court has established *Pike* balancing as a *separate* tier of scrutiny applicable when the law at issue is *nondiscriminatory*. See *id.* ("If a restriction on commerce is discriminatory, it is virtually *per se* invalid. … By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce" are analyzed under *Pike*.); accord *Wayfair*, 138 S. Ct. at 2091; *Dep't of Revenue* v. *Davis*, 553 U.S. 328, 353 (2008); *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (plurality opinion).

Thus, the Ninth Circuit effectively confined *Pike* balancing to contexts in which States regulate "inherently national" industries or ones in need of a "uniform system of regulation." Pet. App. 17a (citation omitted). But this Court has never limited *Pike* in that way. In *Pike* itself, this Court struck down an Arizona law requiring in-state packaging of cantaloupes, without suggesting that cantaloupe packaging is an inherently national industry or one in need of uniform regulation. This Court's formulation of the *Pike* standard asks only whether the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," *Wayfair*, 138 S. Ct. at 2091 (quoting *Pike*, 397 U.S. at 142)—without restricting a court's duty to balance the competing interests to particular contexts or industries. And this Court has applied *Pike* to strike down a state law that, like Proposition 12, banned imports, without asking whether the industry

was inherently national or required uniform regulation. See *Great Atl. & Pac. Tea Co.* v. *Cottrell*, 424 U.S. 366, 375–76 (1976) (striking down a Mississippi regulation that excluded milk imported from Louisiana); see also *Yamaha Motor Corp., U.S.A.* v. *Jim's Motorcycle, Inc.*, 401 F.3d 560, 572 (4th Cir. 2005) (rejecting argument that "*Pike* balancing applies only when a 'generally nondiscriminatory' state law 'undermine[s] a compelling need for national uniformity in regulation'" (alteration in original)).

3. The court below further erred in pretermitting the *Pike* inquiry on the ground that Proposition 12 merely "increase[s] compliance costs, without more." Pet. App. 17a. The burdens here go well beyond compliance costs. See Petrs. Br. 48–49. And virtually all burdens on interstate commerce can ultimately be reduced to increased costs. After all, the problem with state regulations of the length of trains and trucks is not that they foreclose interstate trade, but that they burden it "by substantially increasing its cost and impairing its efficiency." *S. Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 779 (1945); see also *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 445 & n.21 (1978). While not every incremental increase in compliance costs will be a substantial burden, the magnitude of the costs and other burdens here cannot simply be brushed aside.

That is especially so because the burdens fall disproportionately on out-of-state interests. When a state law adversely affects in-state interests, the "State's own political processes will serve as a check against unduly burdensome regulations." *Raymond Motor Transp.*, 434 U.S. at 444 n.18; see also *Clover Leaf Creamery*, 449 U.S. at 473 n. 17 ("The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse."). By

contrast, when "the burden of state regulation falls on interests outside the state," a more searching inquiry is needed because the burden "is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *S. Pac. Co.*, 325 U.S. at 767 n.2.

Here, the burdens fall almost exclusively on out-of-state interests because California has very little domestic pork production. See Petrs. Br. 8 (explaining that California imports 99.87% of its pork). The same is true with regard to veal. California does not produce milk-fed veal and thus must rely on imports to meet its needs. See Declaration of Dale Bakke ¶ 17, *N. Am. Meat Inst.*, No. 2:19-cv-08569 (C.D. Cal. Oct. 4, 2019), ECF No. 15-3 ("Bakke Decl."). On the other hand, California *is* a significant producer of "bob" veal, which is produced from calves that are "culled" from California dairy farms. See *id.* But because these calves are not deemed by California to be "raised for veal," Proposition 12 does not apply to them. See Cal. Health & Safety Code § 25991(d); Cal. Draft Regs. § 1321(aa)(1), https://www.cdfa.ca.gov/ahfss/Prop12.html.

Likewise, Proposition 12 does not apply to the thousands of other calves raised on California's dairy farms. California is the nation's leading milk producer, with more milk cows than any other State. See Bakke Decl. ¶ 16. Calves on California's dairy farms are raised in facilities similar to out-of-state veal facilities, often in pens with less than 17 square feet per calf—far less than the 43 square feet required by Proposition 12. See *id.* For reasons unknown, California did not extend Proposition 12's confinement requirements to California dairy calves that support a major California industry. Instead, California exempted its dairy farmers from the burdensome requirements it imposed on

out-of-state veal farmers, thereby "mollif[ying]" "one of the in-state interests which would otherwise lobby against" them. *W. Lynn Creamery*, 512 U.S. at 200.

B. The Sales Ban Serves No Legitimate Local Interest.

Because the court of appeals erroneously held there was no substantial burden, it did not assess whether Proposition 12's sales ban advances legitimate local interests. See Pet. App. 19a. For the reasons already explained, it does not—any asserted interest in the health and safety of California consumers is illusory, and California has no legitimate interest in how farm animals are housed outside its borders. See *Carbone*, 511 U.S. at 393. Accordingly, the massive burdens imposed by Proposition 12 are clearly excessive because there is no offsetting legitimate local benefit.

CONCLUSION

For these reasons, and those provided by petitioners, the Court should reverse the judgment below.

Respectfully submitted,

PAUL J. ZIDLICKY*
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com

Counsel for Amicus Curiae
North American Meat Institute

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* Counsel of Record