No. 20-

IN THE

Supreme Court of the United States

NORTH AMERICAN MEAT INSTITUTE,
Petitioner,

v.

XAVIER BECERRA, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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February 26, 2021

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QUESTION PRESENTED

Whether the Constitution permits California to extend its police power beyond its territorial borders by banning the sale of wholesome pork and veal products imported into California unless out-of-state farmers restructure their facilities to meet animal-confinement standards dictated by California.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is the North American Meat Institute (NAMI), the nation's oldest and largest trade association representing packers and processors of pork and veal products, among others. NAMI has no parent corporation, and no publicly held company owns 10% or more of its stock.

The other parties to the proceedings below were Xavier Becerra, 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; Sonia Angell, in her official capacity as Director of the California Department of Public Health; 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.

RELATED PROCEEDINGS

No other case is directly related to the case in this Court within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

The North American Meat Institute (NAMI) respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit below.

OPINION BELOW

The Ninth Circuit's unpublished opinion is available at 825 F. App'x 518 and is reproduced at Pet. App. 1a–3a. The district court's order is reported at 420 F. Supp. 3d 1014 and is reproduced at Pet. App. 4a–40a.

JURISDICTION

The Ninth Circuit entered judgment on October 15, 2020, Pet. App. 1a, and denied rehearing and rehearing en banc on December 23, 2020, *id.* at 41a–42a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution empowers Congress, in relevant part, "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. California's Proposition 12, codified at Cal. Health & Safety Code § 25990 *et seq.*, is reproduced at Pet. App. 43a–51a.

INTRODUCTION

In the decision below, the Ninth Circuit rejected a constitutional challenge to a provision of California's Proposition 12 that bans the sale of wholesome pork and veal imported into California unless farmers in other States and countries spend hundreds of millions of dollars to restructure their facilities to meet unprecedented animal-confinement requirements dictated by

California (the "Sales Ban"). The Ninth Circuit's decision implicates conflicts with multiple circuit courts, including on the question whether a State may dictate the manner in which commerce occurs outside its borders through a Sales Ban that imposes obligations on out-of-state residents and usurps the regulatory authority of other States and countries over their own residents.

The question presented is exceptionally important—as shown, not least of all, by the *amicus curiae* briefs filed below by the United States on behalf of the Department of Agriculture, by 20 sovereign States, and by the National Association of Manufacturers, Chamber of Commerce, and Food Marketing Institute.[1] Proposition 12 will have a devastating effect on the pork and veal industries and thousands of small and family farmers throughout the Nation, who will have their substantial investments in their existing farm facilities upended by California's unconstitutional effort to dictate from afar the confinement standards for animals raised outside of California's borders.

Review is necessary to address whether Proposition 12's Sales Ban is consistent with the Constitution, and

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[1] The *amicus* brief filed by the United States below highlighted that California did not argue that "Proposition 12 protects the health and safety of California consumers." Brief for the United States in Support of the Petition for Rehearing at 12, *N. Am. Meat Inst.* v. *Becerra*, No. 19-56408 (9th Cir. Dec. 10, 2020), ECF No. 56. The United States explained that the Sales Ban "is likely to have several adverse effects on functions and programs of the U.S. Department of Agriculture," such as (i) making federal "[food] assistance programs more expensive and reduc[ing] the buying power of benefits under the Supplemental Nutrition Assistance Program," and (ii) requiring California regulators or their agents to inspect out-of-state farms, thereby creating "biosecurity concerns" that threaten to impose "additional burdens on USDA's Animal Plant and Health Inspection Service." *Id.* at 2–3.

to prevent the serious harms that California's regulatory overreach inflicts on NAMI's members and farmers throughout the Nation and abroad.

STATEMENT OF THE CASE

A. Constitutional Principles

This case presents fundamental questions about the scope of a State's authority to erect trade barriers in an effort to dictate production conditions in other States and countries and to protect in-state producers from out-of-state competition. These foundational questions, which this Court most often has elaborated under the Commerce Clause, are grounded in the Constitution's federal structure as a Union of 50 States that are sovereign within—but only within—their own territories. See, *e.g.*, *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 or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause").

First, this Court has long held that the Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders," and that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989). This prohibition on extraterritorial regulation "reflect[s] 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

(footnotes omitted).[2] Under this doctrine, "States and localities 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. Seeling, Inc.*, 294 U.S. 511 (1935)).

Second, this Court has long held—and recently reaffirmed—that the Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2459 (2019); see *id.* at 2460 (explaining that "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law," and that "removing state trade barriers was a principal reason for the adoption of the Constitution"). Thus, "state statutes that clearly discriminate against interstate commerce are routinely struck

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[2] Just as the Constitution's federal structure protects state sovereignty from infringement by the federal government, see, *e.g.*, *Printz* v. *United States*, 521 U.S. 898, 918–22 (1997), so too it protects state sovereignty from infringement by other States, see, *e.g.*, *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1780 (2017). Lower courts and scholars likewise agree that the extraterritoriality doctrine rests on structural principles of interstate federalism. See, *e.g.*, *Carolina Trucks & Equip., Inc.* v. *Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007) (Wilkinson, J.) ("The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude" that "reflects core principles of constitutional structure."); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 315–20 (1992); 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).

down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 274 (1988) (citations omitted); see *Carbone*, 511 U.S. at 392. This heightened scrutiny also applies to facially neutral statutes that have a "discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (citation omitted); see *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 194 (1994); *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977).

Third, under the "*Pike* balancing" doctrine, "States may not impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2090–91. Even when state laws "regulat[e] even-handedly," and thus are not subject to strict scrutiny, they are invalid if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* (first alteration in original) (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). In assessing this balance, "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel* v. *Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) (plurality op.). A law "may further the purpose so marginally and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Id.*

B. California's Proposition 12

In November 2008, California voters enacted Proposition 2, a ballot initiative entitled the Prevention of Farm Animal Cruelty Act, to "prohibit the cruel confinement of farm animals." Prop. 2 §§ 1–2. Proposition 2—which applied only within California's borders—prevented California's farmers from confining pregnant pigs, veal calves, and egg-laying hens in a way that prevented them from "[l]ying down, standing up,

and fully extending [their] limbs," or "[t]urning around freely." *Id.* § 3.

In 2010, the California legislature enacted AB 1437, which extended Proposition 2's confinement requirements for hens to out-of-state farmers by banning the sale of eggs from hens that were not confined in compliance with Proposition 2. Cal. Health & Safety Code § 25996. Although the statute's stated purpose was to "protect California consumers" from foodborne pathogens, *id.* § 25995(e), its legislative history 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, Assemb. Comm. on Appropriations, Bill Analysis of AB 1437 (May 13, 2009).[3]

In November 2018, California voters enacted Proposition 12, the measure at issue here. Entitled the Prevention of Cruelty to Farm Animals Act, Prop. 12 § 1, Proposition 12's stated purpose is "to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk

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[3] A coalition of States challenged AB 1437's sales ban under the Commerce Clause, but their challenge was dismissed for lack of standing. See *Missouri ex rel. Koster* v. *Harris*, 847 F.3d 646 (9th Cir. 2017). The States then invoked this Court's original jurisdiction. This Court called for the views of Solicitor General, who recommended that the Court *not* exercise its original jurisdiction because, among other things, the dispute was "better suited to a district court" by "a party directly regulated by the California laws." Brief for the United States as Amicus Curiae at 7, 22, *Missouri* v. *California*, No. 148, Original (U.S. Nov. 29, 2018). Thereafter, this Court denied review. *Missouri* v. *California*, 139 S. Ct. 859 (2019) (mem.).

of foodborne illness and associated negative fiscal impacts on the State of California," *id.* § 2. Proposition 12 was not accompanied by any legislative findings or evidence that meat from veal calves or breeding sows (or their offspring) not housed in compliance with Proposition 12 poses any increased risk of foodborne illness. In the district court, NAMI presented expert evidence demonstrating that any food-safety interest is illusory. See Ninth Circuit Excerpts of Record ("ER") 90–92 (¶¶8–16). At no point in the proceedings below did respondents contest that showing or attempt to defend Proposition 12 as a food-safety measure.

Proposition 12 provides that "[a] farm owner or operator *within the state* shall not knowingly cause any covered animal to be confined in a cruel manner." Cal. Health & Safety Code § 25990(a) (emphasis added). "Covered animal," as relevant here, includes "any calf raised for veal" or "breeding pig." *Id.* § 25991(f). "Confined in a cruel manner" means any one of the following acts:

> (1) Confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely.
>
> (2) After December 31, 2019, confining a calf raised for veal with less than 43 square feet of usable floorspace per calf.
>
> (3) After December 31, 2021, confining a breeding pig with less than 24 square feet of usable floorspace per pig.

Id. § 25991(e)(1)–(3).

These restrictions on animal confinement *within* California are not challenged here. Following AB 1437's model, however, Proposition 12 includes a Sales

Ban that extends the law's confinement requirements to out-of-state farmers whose products are imported into and sold in California. It provides that "[a] business owner or operator shall not knowingly engage in the sale within the state" of any (i) "Whole veal meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner," or (ii) "Whole pork meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner." Cal. Health & Safety Code § 25990(b)(1)–(2). Violations are punishable criminally by a fine of up to $1,000 and 180 days' imprisonment. *Id.* § 25993(b).

C. District Court Proceedings

NAMI, a trade association representing meat producers and packers, brought this action on behalf of its members seeking declaratory and injunctive relief against the Sales Ban, as applied to veal and pork from outside California, because it violates the Commerce Clause and federal structure of the Constitution. NAMI, supported by a coalition of States appearing as *amici curiae*, moved for a preliminary injunction, showing that the Sales Ban is unconstitutional because it (i) improperly regulates commerce that occurs entirely outside California's borders, (ii) discriminates against interstate commerce by artificially "leveling the playing field" to protect California producers from out-of-state competition, and (iii) imposes substantial burdens on interstate commerce that vastly exceed any legitimate local benefit.

On November 22, 2019, the district court denied NAMI's motion, holding that NAMI had not raised a serious question as to the Sales Ban's constitutional-

ity. Pet. App. 16a–40a. With regard to NAMI's extraterritoriality claim, the district court expressed skepticism that the doctrine applies outside the context of price regulations, but ultimately concluded that, regardless, Proposition 12 does not regulate extraterritorially because its application is triggered by in-state sales. *Id.* at 29a–35a. The court dismissed as "dicta" this Court's holding in *Carbone* that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *Id.* at 34a–35a n.11 (quoting *Carbone*, 511 U.S. at 393).

With regard to NAMI's discriminatory effect claim, the district court did not dispute that the Sales Ban's effect is to strip away the competitive advantage that out-of-state producers would have over in-state producers if they could sell their products in California without complying with the costly confinement requirements that Proposition 12 imposes on in-state producers. Nevertheless, the district court rejected NAMI's claim because the Sales Ban "applies equally to animals raised and slaughtered in California as [it does] to animals raised and slaughtered in any other state," Pet. App. 21a, and the out-of-state producers' competitive advantage arises from "a standard production method, available to any meat processor in any state that allows it," *id.* at 24a.

With regard to NAMI's claim under *Pike*, the district court concluded that the Sales Ban does not impose a "substantial burden" on interstate commerce because "it is directed to *how* meat products are produced, not *where*," and NAMI's complaint was "ultimately a complaint about the cost of complying with Proposition 12's requirements." Pet. App. 38a. Having concluded that the Sales Ban did not impose a substantial burden, the district court did not address NAMI's showing that the Sales Ban does not serve *any* legitimate local

interest because it does not advance any consumer-protection interest and because California has no legitimate interest in regulating how farm animals are housed in other States and countries.

As for the other preliminary-injunction factors, the district court "recognize[d] that complying with Proposition 12 could impose potentially significant costs upon at least some NAMI members," and that the "Eleventh Amendment may prevent the recovery of these costs," but declined to address NAMI's full irreparable harm showing, the balance of hardships, or the public interest given its conclusion that there were "no serious questions" on the merits. Pet. App. 39a–40a.[4]

D. Ninth Circuit Proceedings

NAMI appealed, supported again by a coalition of States led by Indiana, as well as by the National Association of Manufacturers, the Chamber of Commerce, and the Food Marketing Institute. The Ninth Circuit held oral argument on June 5, 2020.

More than four months later, on October 15, 2020, the Ninth Circuit issued a two-page, unpublished opinion affirming the district court on the ground that

[4] After NAMI appealed the denial of its preliminary-injunction motion, the district court granted in part and denied in part respondents' motion to dismiss NAMI's complaint. See *N. Am. Meat Inst.* v. *Becerra*, No. 2:19-CV-08569-CAS (FFMx), 2020 WL 919153 (C.D. Cal. Feb. 24, 2020). The court allowed the case to go forward only as to NAMI's claims—not at issue here—that the Sales Ban has a discriminatory purpose and favors in-state producers with regard to the lead time given to producers to come into compliance and the treatment of "bob" veal. *Id.* at *4–9. After NAMI amended its complaint, Dist. Ct. Dkt. 73, the district court stayed further proceedings pending resolution of NAMI's appeal, Dist. Ct. Dkt. 74.

"[t]he district court did not abuse its discretion in holding that NAMI was unlikely to succeed on the merits of its dormant Commerce Clause claim." Pet. App. 2a.

With regard to extraterritoriality, the court held that "[t]he 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–3a (citing *Healy*, 491 U.S. at 336, and *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 669–70 (2003)).

With regard to discriminatory effect, the court held that "[g]iven the inconsistencies in dormant Commerce Clause jurisprudence, the district court did not abuse its discretion in relying on *Association des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013), to hold 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.

With regard to *Pike*, the court held that "[t]he district court also did not abuse its discretion in holding that Proposition 12 does not substantially burden interstate commerce." Pet. App. 3a. The court asserted that "Proposition 12 does not impact an industry that is inherently national or requires a uniform system of regulation." *Id.* The court concluded that "[i]t was not an abuse of discretion 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." *Id.*

Finally, the court held that "because the district court did not abuse its discretion when it held that

NAMI was unlikely to succeed on the merits, the district court did not err when it refused to consider the other preliminary injunction factors." Pet. App. 3a.

NAMI petitioned for rehearing and rehearing en banc. The federal government and 20 States—Indiana, Alabama, Alaska, Arkansas, Georgia, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming—urged the Ninth Circuit to grant review. On December 23, 2020, the court denied the petition. Pet. App. 41a–42a.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the Ninth Circuit's decision conflicts with decisions of other federal courts of appeals on the question whether the Constitution limits a State's ability to extend its police power beyond its territorial borders through a trade barrier that dictates production standards in other States and countries. Under the Ninth Circuit's analysis, California is free to restrict imports by dictating the manner in which products are produced outside its borders. By doing so, California insulates in-state farmers from out-of-state competition, while imposing crushing burdens on out-of-state farmers and producers who have no political voice to shape the regulations that California has unilaterally determined to foist upon their operations outside of California.

I. The Ninth Circuit dismissed NAMI's showing that Proposition 12's Sales Ban is an impermissible extraterritorial regulation. Pet. App. 2a–3a. It ruled that the Constitution's prohibition on extraterritorial regulation is limited to "price control" and "price affirmation" statutes. *Id.* That ruling conflicts squarely with decisions of other federal courts of appeals which have struck down extraterritorial trade barriers outside the

arbitrary categories adopted by the Ninth Circuit, and expressly rejected the argument that the limits on a State's authority to regulate conduct outside its borders apply only to statutes that regulate the price of a product. See, *e.g.*, *Legato Vapors, LLC* v. *Cook*, 847 F.3d 825, 837 (7th Cir. 2017) (striking down state statute that "regulate[d] the production facilities and processes of out-of-state manufacturers"); *Ass'n for Accessible Meds.* v. *Frosh*, 887 F.3d 664, 670 (4th Cir. 2018) ("reject[ing] Maryland's argument that [this Court has] limited the extraterritoriality principle only to price affirmation statutes"). The Ninth Circuit's decision likewise conflicts with this Court's ruling that "States … may not attach restrictions to exports or imports in order to control commerce in other States" as it would "extend [their] police power beyond [their] jurisdictional bounds." *Carbone*, 511 U.S. at 393 (citing *Baldwin*, 294 U.S. at 511).

II. The Ninth Circuit's decision likewise conflicts with the Third Circuit's decision in *Cloverland-Green Spring Dairies, Inc.* v. *Pennsylvania Milk Marketing Board*, 298 F.3d 201 (3d Cir. 2002), which adhered to this Court's cases holding that a statute that levels the competitive playing field—and thus impermissibly strips away a competitive advantage possessed by out-of-state actors—supports a claim of discriminatory effect under the Commerce Clause. *Id.* at 211–13 (citing *Baldwin* and *Hunt*). In direct conflict, the Ninth Circuit ruled that there can be no discriminatory effect because "because [Proposition 12] treats in-state meat producers the same as out-of-state meat producers." Pet. App. 2a. Under the Ninth Circuit's analysis, the statutes struck down in *Baldwin* and *Hunt* would have been upheld even though they resulted in an impermissible leveling effect that "neutraliz[ed] advantages

belonging to the place of origin." *W. Lynn Creamery*, 512 U.S. at 196 (quoting *Baldwin*, 294 U.S. at 527).

III. Finally, the decision below conflicts with precedents of this Court and other circuits holding that a state law may not impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The Ninth Circuit refused to conduct the interest-balancing mandated by *Pike*, restricting *Pike*'s application to laws that "impact an industry that is inherently national or requires a uniform system of regulation." Pet. App. 3a. That restriction conflicts with this Court's precedents, which have not confined *Pike* in this way, and with decisions of other circuits, which have applied *Pike* more broadly. See, *e.g.*, *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)).

I. THE NINTH CIRCUIT'S EXTRATERRITORIALITY RULING CONFLICTS WITH MULTIPLE DECISIONS OF OTHER CIRCUITS AND WITH THIS COURT'S PRECEDENT.

NAMI showed below that Proposition 12's Sales Ban violates the prohibition on extraterritorial state regulation because its express purpose and practical effect are to control the confinement conditions for breeding sows and veal calves located outside California. See Prop. 12, § 1 (stating that Proposition 12's purpose is "to prevent animal cruelty by phasing out extreme methods of farm animal confinement"). California, of course, may regulate the confinement of farm animals within its own territory, as when it required California farmers to comply with Proposition 12's confinement requirements. See Cal. Health & Safety Code

§ 25990(a). California may not, however, impose its policy judgments 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. California may not, in other words, "attach restrictions to … imports in order to control commerce in other States." *Carbone*, 511 U.S. at 393 (citing *Baldwin*, 294 U.S. 511).

The Ninth Circuit, however, held that "Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute." Pet. App. 2a. In so doing, the panel followed earlier Ninth Circuit precedent rejecting a similar extraterritoriality challenge to California's foie gras ban on the same basis. See *Harris*, 729 F.3d at 951; see also *Ward* v. *United Airlines, Inc.*, Nos. 16-16415, 17-55471, 986 F.3d 1234, slip op. at 11 (9th Cir. Feb. 2, 2021) (reiterating 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").

The Ninth Circuit's arbitrary limitation of the extraterritoriality doctrine conflicts with the decisions of multiple other circuits and with this Court's precedents, which have not limited the doctrine to price regulations, but have applied it more broadly in a variety of contexts where States have sought to regulate extraterritorial commerce. The Court should grant review to resolve the circuit conflict and to reaffirm the foundational constitutional principle that States may not project their regulations beyond their borders.

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

The decision below conflicts with decisions of at least six other circuits, which have expressly rejected the argument that the extraterritoriality doctrine is limited to price regulations, and which have applied the doctrine in other contexts—including contexts that are materially indistinguishable from this case.

In *National Solid Wastes Management Association* v. *Meyer*, 63 F.3d 652 (7th Cir. 1995), for example, the Seventh Circuit explained 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." *Id.* at 659. The court struck down a Wisconsin law that forbade the disposal of imported waste in Wisconsin unless the jurisdiction where it originated had adopted Wisconsin's recycling standards. *Id.* at 660–61. The "practical effect of the Wisconsin legislation," the Court observed, was "to impose the requirements of Wisconsin law on numerous waste generators who neither reside, nor dispose of their waste in Wisconsin." *Id.* at 661.

After Wisconsin narrowed its ban so that it applied only when Wisconsin's standards were not applied to Wisconsin-bound waste, the Seventh Circuit again struck it down, reasoning that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders." *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam). Such extraterritorial laws, the court concluded, "would serve as a clog on interstate commerce." *Id.* "If Wisconsin can tell municipalities in Illinois or Minnesota what recycling ordinances they must adopt in order to transact interstate commerce, then so can Indiana (not to mention

Illinois and Minnesota).” *Id.* “The resulting conflict could stop all traffic at state borders.” *Id.*

More recently, the Seventh Circuit applied the same principles to strike down an Indiana law that—exactly like Proposition 12—prohibited the in-state sale of imported products (there, vaping products) unless the out-of-state facilities where they were produced complied with conditions specified by Indiana. See *Legato Vapors,* 847 F.3d at 829–37. Comparing the law to a hypothetical attempt to regulate conditions in “out-of-state barns where the cows are milked,” the court held that the law “regulate[d] the production facilities and processes of out-of-state manufacturers and thus wholly out-of-state commercial transactions.” *Id.* at 837. “With almost two hundred years of precedents to consider,” the court found not “a single appellate case permitting” such “direct regulation of out-of-state manufacturing processes and facilities.” *Id.* at 831. Thus, if the Ninth Circuit had applied the legal standard applicable in the Seventh Circuit, it would have struck down California’s Sales Ban.

The First Circuit, too, has struck down a state law—which had nothing to do with price regulation—that conditioned in-state business on out-of-state conduct. See *Nat’l Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 69–70 (1st Cir. 1999), *aff’d sub nom. Crosby* v. *Nat’l Foreign Trade Council*, 530 U.S. 363 (2000). In *Natsios*, the First Circuit invalidated a Massachusetts law that, in an effort to combat human-rights violations in Burma, effectively excluded companies from obtaining state government contracts if they did business in Burma. See *id.* at 45–46, 69–70. The court held that the law violated the extraterritoriality doctrine because “both the intention and effect of the statute [was] to change conduct beyond Massachusetts’s bor-

ders." *Id.* at 69. Thus, Massachusetts was not permitted to "conditio[n] state procurement decisions on conduct that occurs in Burma." *Id.* Yet the Ninth Circuit permitted California to condition access to its market on conduct that occurs outside California.

Other circuits also have struck down non-price regulations as impermissibly extraterritorial and/or expressly declined to limit the doctrine to price regulations. See, *e.g.*, *Ass'n for Accessible Meds.*, 887 F.3d at 670 ("reject[ing] Maryland's argument that [this Court has] limited the extraterritoriality principle only to price affirmation statutes"); *Am. Beverage Ass'n* v. *Snyder*, 735 F.3d 362, 373–76 (6th Cir. 2013) (striking down Michigan law that required certain beverages to be sold in unique-to-Michigan containers and prohibited the sale of those packaged beverages in other States); *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 102–04 (2d Cir. 2003) (striking down Vermont law that regulated Internet commerce outside Vermont); *Hardage* v. *Atkins*, 619 F.2d 871, 872 (10th Cir. 1980) (striking down Oklahoma law that regulated out-of-state waste disposal); see also *North Dakota* v. *Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016) (opinion of Loken, J.) ("[T]he Supreme Court has never so limited the [extraterritoriality] doctrine [to price regulations], and indeed has applied it more broadly.").

No other circuit has upheld a state law banning the in-state sale of imported products based solely on the State's objection to the conditions under which they were produced. And the only other circuit that has suggested the extraterritoriality doctrine is limited to price regulations—the Tenth Circuit, see *Energy & Envt. Legal Inst.* v. *Epel*, 793 F.3d 1169, 1173–75 (10th Cir. 2015) (Gorsuch, J.)—has in fact struck down a state law that, like Proposition 12, banned imported products in an effort to control conduct outside the

State. See *Hardage*, 619 F.2d at 872 (striking down Oklahoma statute that prohibited the importation of industrial waste unless the State in which the waste originated had adopted disposal standards similar to Oklahoma's). As the Tenth Circuit explained in *Hardage*, a State may not "forc[e] its judgment … on its sister states 'at the pain of an absolute ban on the interstate flow of commerce.'" *Id.* at 873 (quoting *Great Atl. & Pac. Tea Co.* v. *Cottrell*, 424 U.S. 366, 380 (1976)).

Accordingly, both the holding and the rationale of the Ninth Circuit's decision below conflict with the law in every other circuit to have considered the question, with the arguable exception of the Tenth Circuit. The Court should grant review to resolve this square split of authority and restore national uniformity on the fundamental question whether States may restrict access to their markets by dictating the manner in which products are produced outside their borders.

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

In addition to creating a circuit conflict, the Ninth Circuit's decision further conflicts with this Court's precedent. In *Baldwin*, this Court struck down a New York law that was structured identically to Proposition 12—a ban on the in-state sale of imported products (there, milk; here, pork and veal) based on commerce that occurred entirely outside the State (there, the price paid to the out-of-state producer; here, the confinement conditions on out-of-state farms). See 294 U.S. at 519. Proceeding from the premise that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," *id.* at 521, Justice Cardozo held for a unanimous Court that New York likewise could not use a sales ban to "regulat[e] by indirection the prices to be paid to producers in another [state],"

id. at 524. "One state may not put pressure of that sort upon others to reform their economic standards." *Id.* Rather, the Court held, if Vermont dairy farmers were being underpaid, "the legislature of Vermont and not that of New York must supply the fitting remedy." *Id.*

The court below refused to apply *Baldwin* because Proposition 12 "is not a price control or price affirmation statute." Pet. App. 2a; accord *Harris*, 729 F.3d at 951. That decision conflicts squarely with this Court's decision in *Carbone*, which applied *Baldwin*'s core holding—that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States," 511 U.S. at 393 (citing *Baldwin*, 294 U.S. 511)—to a non-price regulation. The law at issue in *Carbone* was a municipal waste-control ordinance, which the town defended as a measure designed to minimize its environmental footprint by "steer[ing]" locally generated waste "away from out-of-town disposal sites that it might deem harmful to the environment." *Id.* Citing *Baldwin*, this Court rejected that justification because it would "extend the town's police power beyond its jurisdictional bounds." *Id.*

Carbone thus confirms that the extraterritoriality principle applied in *Baldwin* extends beyond the price-regulation context. And, under that principle, Proposition 12's Sales Ban is manifestly unconstitutional. Just as New York could not restrict milk imports in an effort to control out-of-state prices, and just as Clarkstown could not restrict waste exports in an effort to control out-of-town waste disposal, California cannot restrict pork and veal imports in an effort to control out-of-state farming conditions. Nor, as respondents contended below, can California justify the Sales Ban as a measure to prevent California's "complicity" in out-of-state practices to which it objects. See *Harris*,

729 F.3d at 952–53. That is the precise rationale *Carbone* and *Baldwin* rejected as beyond a State's "jurisdictional bounds." *Carbone*, 511 U.S. at 393.

In support of its contrary holding, the Ninth Circuit erroneously relied on *Walsh*, 538 U.S. 644. See Pet. App. 2a–3a; see also *Harris*, 729 F.3d at 951. *Walsh* involved a challenge *to a price regulation*. It held only that there was no extraterritorial control in that case, and said nothing about the extraterritoriality doctrine's application outside the price-regulation context, an issue that was not before it. See *Ass'n for Accessible Meds.*, 887 F.3d at 669–70. *Walsh* did not purport to overrule *Carbone*. Nor did it take issue with this Court's formulation of the doctrine in cases like *Healy*, which have explained that "a state law that has the 'practical effect' of regulating commerce"—*of any kind*—"occurring wholly outside that State's borders is invalid under the Commerce Clause." *Healy*, 491 U.S. at 332; see also *id.* at 333 n.9 (observing that the plurality's holding in *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982)—a non-price regulation case—"significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation").

Finally, the Ninth Circuit's rationale is arbitrary. There is no principled reason to single out "price" regulation as the one form of extraterritorial activity that is off-limits, while allowing States to regulate every other form of out-of-state commerce. Such an ad hoc rule is incompatible not only with this Court's Commerce Clause precedent, but with 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." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980); see also *Shelby Cty.* v. *Holder*, 570 U.S. 529, 540 (2013) (recognizing the "historic tradition that all the States enjoy

equal sovereignty"). In our federal system, each "state is without power to exercise 'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson* v. *Emp'rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954); see also *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1882) ("No State can legislate except with reference to its own jurisdiction."). Where, as here, States "pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict … which renders the exercise of such power incompatible with the rights of other States, and with the constitution of the United States." *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827).

II. THE NINTH CIRCUIT'S DISCRIMINATION RULING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Ninth Circuit ruled 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. Review of that ruling is warranted because it conflicts with this Court's decisions in *Baldwin, Hunt*, and *West Lynn Creamery*, which hold that a State cannot close off competition from out-of-state producers by mandating that they abandon "advantages belonging to the place of origin." 512 U.S. at 194. Further, the Ninth Circuit's decision conflicts with decisions of other federal courts of appeals, which have held that the Commerce Clause limits facially neutral statutes that discriminate by eliminating a competitive advantage possessed by out-of-state competitors.

1. The Sales Ban discriminates against interstate commerce in precisely the same way as the New York sales ban struck down in *Baldwin*. There, New York adopted a system of minimum prices to be paid by milk

dealers to milk producers. 294 U.S. at 519. New York extended its in-state "protective prices" "to that part of the supply … which comes from other states" by mandating that "there shall be no sale within [New York] of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state." *Id.*; see *id.* at 521 ("The importer … may keep his milk or drink it, but sell it he may not."). *Baldwin* held that New York could not prohibit the sale of imported milk on the ground that the price paid to the out-of-state farmer was "less than would be owing in like circumstances to farmers in New York." *Id.* Justice Cardozo explained that "[s]uch a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties … had been laid upon the thing transported." *Id.* Thus, New York's facially neutral restriction was discriminatory because it "neutralize[d] economic advantages belonging to the place of origin." *Id.* at 528.

Likewise, *Hunt* struck down a North Carolina statute that required uniform labeling on all apples sold in-state because it "ha[d] the effect of stripping away from the Washington apple industry the competitive and economic advantages it ha[d] earned for itself," and "ha[d] a leveling effect which insidiously operate[d] to the advantage of local apple producers." 432 U.S. at 351. "Despite the statute's facial neutrality," and without "ascrib[ing] an economic protection motive to the North Carolina Legislature," this Court held that the law discriminated and that the State had failed to justify its discrimination. *Id.* at 352–53.

Finally, in *West Lynn Creamery*, this Court held that the Commerce Clause prohibits state laws that violate "the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be

produced at lower cost in other States." 512 U.S. at 193. Quoting *Baldwin*, this Court reaffirmed that "the police power may [not] be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state" because "[r]estrictions so contrived are an unreasonable clog upon the mobility of commerce" and "neutralize advantages belonging to the place of origin." *Id.* at 194.

2. Here, too, the Sales Ban insulates in-state producers from out-of-state competition. As in *Baldwin*, the Sales Ban's intended and inevitable effect is to protect California producers from bearing costs not borne by out-of-state competitors. It does so by subjecting out-of-state competitors to the same confinement requirements that California imposes on in-state producers. Cf. *Baldwin*, 294 U.S. at 528 (States may not "establish a wage scale … for use in other states, and … bar the sale of the products … unless the scale has been observed"). The Sales Ban is a protectionist trade barrier, leveling the playing field between in-state and out-of-state producers by blocking the flow of goods into California unless out-of-state producers comply with the same costly regulations to which California producers are subject under § 25990(a).

As in *Baldwin* and *Hunt*, Proposition 12 neutralizes the competitive advantage out-of-state producers would have if they could sell their products in California without complying with the confinement requirements California imposes on its own producers. "This effect renders the [Sales Ban] unconstitutional, because it, like a tariff, 'neutraliz[es] advantages belonging to the place of origin.'" *W. Lynn Creamery*, 512 U.S. at 196 (second alteration in original) (quoting *Baldwin*, 294 U.S. at 527); see also *Hunt*, 432 U.S. at 351

(striking down North Carolina apple labeling law because it had "the effect of stripping away" out-of-state producers' "competitive and economic advantages" and had "a leveling effect which insidiously operate[d] to the advantage of local apple producers").

For the same reason, the decision below conflicts with *Cloverland-Green*, 298 F.3d 201. There, the Third Circuit explained that *Baldwin* and *Hunt* stand for the proposition that "if a state regulation has the effect of protecting in-state businesses by eliminating a competitive advantage possessed by their out-of-state counterparts, heightened scrutiny applies." *Id.* at 212. The Third Circuit thus held that the Pennsylvania statute should have been subjected to "heightened scrutiny" reserved for discriminatory law under the Commerce Clause. *Id.* at 213; see also *Walgreen Co.* v. *Rullan*, 405 F.3d 50, 58 (1st Cir. 2005) (striking down facially neutral statute that had the effect of "protect[ing] the mostly local group of existing pharmacies from competitive pressure").[5]

The Sales Ban impermissibly imposes a leveling effect that protects in-state producers by stripping away competitive advantages enjoyed by out-of-state competitors. The Ninth Circuit's refusal to subject the Sales Ban to heightened scrutiny conflicts with decisions of this Court and the federal courts of appeals.

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[5] See also, *e.g.*, Laurence H. Tribe, *American Constitutional Law* § 6-8, at 1076 (3d ed. 2000) ("[J]ust as it was impermissible in *Baldwin v. Seelig* for New York to eliminate the *price* advantage of Vermont milk by mandating a minimum price, so, too, in *Hunt v. Washington State Apple Advertising Commission*, was it impermissible for North Carolina to eliminate the quality advantage of apples from Washington by proscribing Washington's use of a quality grading system that distinguished its apples from the local product.").

3. Finally, this Court has held that the Commerce Clause's prohibition on stripping away "competitive advantages" applies to favorable in-state regulatory treatment. Indeed, the New York law struck down in *Baldwin* applied equally to in-state and out-of-state competitors, but nonetheless was unconstitutional because it impermissibly "neutralize[d] advantages" arising from the fact that Vermont, unlike New York, did not dictate a minimum price to be paid to producers. *Baldwin*, 294 U.S. at 527; see also *Cloverland-Green*, 298 F.3d at 213 (ruling that heightened scrutiny would apply to a minimum-price law if it eliminated a competitive advantage enjoyed by out-of-staters "whose home states do not prop up milk producers' prices"). Here, too, California may not strip away favorable regulatory treatment afforded to out-of-state competitors by their home States and countries that have not imposed the same costly confinement requirements in their own jurisdictions.[6]

On this point, the district court was mistaken when it concluded that "the cost of retrofitting their facilities to comply with Proposition 12" "'is an equal-opportunity' burden." Pet. App. 25a–26a. The Sales Ban imposes no incremental burden on California producers, because they are subject to § 25990(a)'s California-specific confinement prohibitions. Further, even if a law

[6] The "competitive advantage" the Sales Ban strips away is not limited to "a standard production method, available to any meat processor in any state that allows it." Pet. App. 24a. Rather, NAMI's members have spent hundreds of millions of dollars adopting non-standard production methods, but those expenditures would be rendered obsolete by the unprecedented standards ushered in by Proposition 12. For example, pork producers have spent hundreds of millions of dollars to convert their sow farms to "group housing," which has been praised by animal-rights groups, but would "not comply with Proposition 12." ER147–48 (¶¶9–10); ER141–42 (¶¶4–5).

is facially neutral, that says nothing about whether it has an impermissible protectionist effect. Rather, "state laws that are facially neutral but have the effect of eliminating a competitive advantage possessed by out-of-state firms trigger heightened scrutiny." *Cloverland-Green*, 298 F.3d at 211 (citing *Hunt* and *Baldwin*). The same was true in *Baldwin*: the New York law struck down there imposed the same minimum-price requirement on out-of-state sales and in-state sales. Likewise, the North Carolina law struck down in *Hunt* applied the same labeling requirements "to all apples sold in closed containers in the State without regard to their point of origin." 432 U.S. at 349. The laws in *Baldwin* and *Hunt* were unconstitutional despite their facial neutrality because of their impermissible "leveling effect." *Id.* at 351. The Sales Ban is no different. It too "insidiously operates to the advantage of local … producers" by "stripping away" out-of-state producers' competitive advantage. *Id.*

Review should be granted because the decision below conflicts with decisions of this Court and the federal courts of appeals on the issue whether a State can adopt a regulation that levels the playing field in a manner that denies out-of-state farmers and producers a competitive advantage.

III. THE NINTH CIRCUIT'S REFUSAL TO CONDUCT *PIKE* BALANCING CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUITS.

The Ninth Circuit's rejection of NAMI's *Pike* claim further conflicts with precedents of this Court and other circuits holding that a state law violates the Commerce Clause if it imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

1. As NAMI showed below, the Sales Ban is a prototypical violation of the Commerce Clause under *Pike* because it imposes massive burdens on interstate commerce with *no* countervailing legitimate local interest. The Sales Ban requires out-of-state veal and pork farmers to either abandon California (approximately 12% of the U.S. market) or spend hundreds of millions of dollars reconstructing their existing barns and constructing new ones to comply with California's confinement requirements. And it requires processors, packers, and distributors that do business in California to bear increased costs for Proposition 12-compliant animals and to reorganize their operations to serve the California market. The result will be less veal and pork, produced, processed, and distributed less efficiently, to fewer consumers, at higher prices.

The burdens the Sales Ban imposes on out-of-state producers are substantial by any measure. Take the veal industry, which consists of hundreds of small family farms located primarily in the Midwest. ER98 (¶3). These farmers just completed a decade-long, industry-wide transition to group housing, at a cost of $150 million. ER98–99 (¶¶4–7). They built their barns in line with European Union standards, which at the time were the world's most demanding, requiring 19.4 square feet per calf. ER99 (¶6). To comply with Proposition 12, these farmers would have to more than *double* their square footage—at a cost that may well be prohibitive, particularly while they are still paying down long-term debt from the last round of improvements. See ER99–100 (¶¶6–12), ER132–34 (¶¶5–10), ER136–38 (¶¶4–10).

Proposition 12 will also substantially burden the pork industry. The costs of altering facilities will run into the hundreds of millions of dollars in capital investments and increased operating costs. See ER 142

(¶¶5–6), ER147–49 (¶¶9–13), ER153–54 (¶¶4–8), ER158–60 (¶¶9–13), ER 165–66 (¶¶7–12). Many of these costs will be borne by independent, small farmers who supply NAMI's members. See *id.* Compliance also will increase the cost of processing and distributing meat destined for California, which will require segregated production and distribution lines. See ER142–43 (¶¶7–10), ER149 (¶14), ER154–55 (¶¶9–11), ER160–61 (¶14), ER167 (¶¶13–15).

California cannot point to *any* legitimate local interest justifying these substantial burdens. As NAMI showed below—and no party disputed—the Sales Ban serves no consumer-protection interest because there is no relation between the prohibited confinement conditions and food safety. Instead of promoting the health or welfare of either consumers or animals *in California*, the Sales Ban leverages California's buying power in an effort to force out-of-state farmers to adopt California's preferred animal-husbandry practices. See Prop. 12 § 2 (Proposition 12 seeks to "phas[e] out" confinement conditions California deems to be "crue[l]"). But California has no legitimate *local* interest in how farm animals are housed outside its borders. See *Carbone*, 511 U.S. at 393. Accordingly, the massive burden imposed by Proposition 12 is clearly excessive because there is no offsetting local benefit.

2. The Ninth Circuit, however, rejected NAMI's *Pike* claim without even weighing the competing interests. It held that the Sales Ban does not "substantially burden" interstate commerce because it (i) "precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographical origin," and (ii) "does not impact an industry that is inherently national or requires a uniform system of regulation." Pet. App. 3a. Neither rationale can be reconciled with this Court's precedent.

Initially, in asking whether the Sales Ban burdens producers "based on their geographical origin," Pet. App. 3a, the Ninth Circuit conflated *Pike* with the prohibition on discrimination. A law that burdens out-of-state producers based on their geographical origin is discriminatory, and hence subject to strict scrutiny. See *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) ("'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."). By contrast, this Court has established *Pike* balancing as a *separate* tier of scrutiny applicable to *nondiscriminatory* laws. 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, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (plurality op.).

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. 3a. 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 before interstate shipment, 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—without any indication that a court's duty to balance the competing interests is confined to particular contexts or industries. And this Court has applied *Pike* to strike

down a state law that, like the Sales Ban, banned imported products, without asking whether the industry was inherently national or required uniform regulation. See *Great Atl.*, 424 U.S. at 375–76 (applying *Pike* to strike down a Mississippi regulation that excluded milk imported from Louisiana).

The decision below also conflicts with decisions of other circuits. In *Yamaha Motor Corp.*, for example, the Fourth Circuit expressly rejected the argument that "*Pike* balancing applies only when a 'generally nondiscriminatory' state law 'undermine[s] a compelling need for national uniformity in regulation.'" 401 F.3d at 572 (alteration in original). The court explained that, under this Court's precedent, "*Pike* balancing is conducted in situations where a need for national uniformity is not implicated." *Id.* And the court struck down a Virginia law restricting the opening of new motorcycle dealerships in Virginia, concluding that *Pike* balancing applies "where interstate commerce is burdened by a state law that imposes barriers to market entry." *Id.* at 572–73.

Other circuits, too, have ruled that cognizable "burdens" under *Pike* are not limited to laws that undermine a need for nationally uniform regulation, but also include, for example, "regulations that have a disparate impact on in- versus out-of-state entities." *VIZIO, Inc.* v. *Klee*, 886 F.3d 249, 259 (2d Cir. 2018) (quoting *N.Y. Pet Welfare Ass'n, Inc.* v. *City of New York*, 850 F.3d 79, 91 (2d Cir. 2017)); see also *V-1 Oil Co.* v. *Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997); *Yamaha Motor Corp.*, 401 F.3d at 569 ("The *Pike* test requires closer examination … when a court assesses a statute's burdens, especially when the burdens fall predominantly on out-of-state interests."). Consistent with these decisions, NAMI showed that the Sales Ban's heavy burdens fall primarily on out-of-

state interests, who lack political representation in California. Yet that showing was irrelevant to the Ninth Circuit's analysis because, in the court's view, Proposition 12 does not discriminate based on geographical origin or "impact an industry that is inherently national or requires a uniform system of regulation." Pet. App. 3a.[7]

In thus confining the *Pike* inquiry and refusing to conduct the balancing of interests mandated by this Court's decisions, the Ninth Circuit wrongly denied NAMI and its members the critical constitutional protection for *all* industries against state laws that impose excessive burdens on interstate commerce.

CONCLUSION

For these reasons, the Court should grant review.

Respectfully submitted,

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February 26, 2021

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[7] While there may be no need for a nationally uniform standard for housing farm animals, such that each State is free to regulate confinement conditions within its own borders as it sees fit, there emphatically *is* a need for uniformity if interstate and foreign trade is to be conditioned on adherence to particular confinement standards. Such a national standard would, of course, have to come from Congress, not California or any other individual State.