No. 19-56408

IN THE

United States Court of Appeals for the Ninth Circuit

NORTH AMERICAN MEAT INSTITUTE,

Appellant,

v.

XAVIER BECERRA, et al.,

Appellee,

and

THE HUMANE SOCIETY OF THE UNITED STATES, et al.,

Intervenor-Defendants.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-08569-CAS-FFM, District Judge Christina A. Snyder

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND FOOD MARKETING INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

Peter C. Tolsdorf
Erica Klenicki
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th Street, NW
Washington, DC 20001
Phone: (202) 637-3000

Counsel for National Association of Manufacturers

Catherine E. Stetson
Kyle M. Druding
Danielle Desaulniers Stempel*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Phone: (202) 637-5600
Fax: (202) 637-5910
cate.stetson@hoganlovells.com

Counsel for Amici Curiae

* *Admitted only in Maryland; practice supervised by principals of the firm admitted in D.C.*

January 10, 2020

Additional Counsel Listed on Inside Cover

Additional counsel:

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
Phone: (202) 463-5948

Counsel for Chamber of Commerce of the United States of America

Stephanie K. Harris
FOOD MARKETING INSTITUTE
2345 Crystal Drive, Suite 800
Arlington, VA 22202
Phone: (202) 220-0614

Counsel for Food Marketing Institute

CORPORATE DISCLOSURE STATEMENT

Amici are the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Food Marketing Institute. Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), undersigned counsel certifies that each is a nonprofit trade association, and that each has no parent corporation and no publicly held corporation owns 10% or more of any of *amici*'s stock.

Dated: January 10, 2020

/s/ Catherine E. Stetson
Catherine E. Stetson

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STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* submit this brief without an accompanying motion for leave to file because all parties have consented to its filing. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Founded in 1912, the Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of

more than three million businesses of every size, in every industry, and from every region of the country. Its membership includes businesses across all segments of the economy, including the agriculture and food sectors.

Food Marketing Institute (FMI) proudly advocates on behalf of the food retail industry, which employs nearly 5 million workers and represents a combined annual sales volume of almost $800 billion. FMI member companies operate nearly 33,000 retail food stores and 12,000 pharmacies. FMI membership includes the entire spectrum of food retail venues: single owner grocery stores, large multi-store supermarket chains, pharmacies, and online and mixed retail stores. Through programs in public affairs, food safety, research, education, health and wellness, and industry relations, FMI offers resources and provides valuable benefits to almost 1,000 food retail and wholesale member companies and serves 85 international retail member companies. In addition, FMI has almost 500 associate member companies that provide products and services to the food retail industry.

Amici represent their members' interests in matters before Congress, the Executive Branch, and the courts. NAM and the Chamber regularly file *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving challenges to state and federal regulations. Like NAM and the Chamber, FMI has filed *amicus curiae* briefs in cases that implicate issues of special concern to its members. *Amici* have a strong interest in

this case because Proposition 12 discriminatorily regulates the conduct of farmers, manufacturers, and producers nationwide, and could have broader adverse effects on upstream and downstream sectors and end users. In addition, Proposition 12, and the district court's rationale upholding it, may embolden other states to discriminate against out-of-state interests, resulting in a complex web of inconsistent and competing extraterritorial regulations in the agriculture and food industries, and beyond. Fragmenting these interstate markets will create inefficiencies and could impose significant costs on industry and consumers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). By declining to enjoin Proposition 12—a law that seeks to control the out-of-State production of pork and veal—the District Court made a hash of that deeply rooted tradition.

State laws violate the Commerce Clause when they discriminate against out-of-state commerce, regulate extraterritorially, or substantially burden out-of-state producers absent a sufficient and legitimate local interest. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–579 (1986). Proposition 12 violates the Commerce Clause three times over. First, the purpose of this regulation is to level the pork- and veal-production playing field to the

benefit of California producers over out-of-State producers. Second, Proposition 12 plainly regulates beyond California's borders, impinging on other states' sovereign authority to legislate within their own jurisdictions. Third, because Proposition 12's ostensible purpose—improving confinement conditions for farm animals—is wholly untethered from any California-specific nexus, the substantial and market-distorting compliance costs that will be felt nationwide far outstrip any ancillary benefits that may flow to California consumers.

The District Court evaded these straightforward conclusions by recharacterizing what Proposition 12 actually does. To avoid meaningfully scrutinizing whether Proposition 12 applies beyond California's borders, the District Court also wrote off as dicta longstanding Supreme Court precedent. And as for the question of burdens and benefits, the District Court simply declined to perform the required balancing test.

Letting the District Court's erroneous decision stand spells havoc for our national food supply. If California can enact laws controlling the production of out-of-State pork and veal to the benefit of in-State producers, so too can Texas dictate how avocados and tomatoes are grown in California. States and localities could also rely on the District Court's logic to justify setting nationwide standards for virtually any geographically favored industry that is elsewhere disfavored. Allowing states to assert their own protectionist policy preferences on

manufacturers and producers nationwide will fracture national markets into regional and local affairs. But that future is precisely what the framers intended the Commerce Clause to prevent, as the federal courts have recognized in striking down such regulatory overreaches since the Founding. Proposition 12 is no different.

ARGUMENT

I. The District Court Erroneously Excepted California's Discriminatory And Extraterritorial Prohibition Of Pork And Veal Sales From Full Constitutional Scrutiny.

The United States Constitution provides that "Congress," and Congress alone, "shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cls. 1, 3. A core purpose of the Commerce Clause is "to prevent state governments from imposing burdens on unrepresented out-of-state interests merely to assuage the political will of the state's represented citizens." *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002) (holding that cap on nonresident hunting designed to increase recreational-hunting opportunities for Arizona citizens is subject to "strict scrutiny" under the Commerce Clause). Although local regulation will often and inevitably have some effects on interstate commerce, that Clause limits states' and localities' ability to "erect barriers against interstate trade." *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (internal quotation marks omitted); *see also Daniels Sharpsmart, Inc. v. Smith*, 889

F.3d 608, 615 (9th Cir. 2018) ("The mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions."). The Commerce Clause thus "prevents the States from adopting protectionist measures" and "preserves a national market for goods and services." *Tennessee Wine & Spirits*, 139 S. Ct. at 2459.

Federal courts apply a "two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman*, 476 U.S. at 578–579. The first tier includes state statutes that "directly regulate[ ] or discriminate[ ] against interstate commerce" or have the effect of "favor[ing] in-state economic interests over out-of-state interests." *Id.* at 579. Such regulations are "virtually *per se* invalid," *id.*, and will be upheld only if the state proves, "under rigorous scrutiny," that there are "no other means to advance a legitimate local interest" available, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *accord NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). Statutes that impose "only indirect effects on interstate commerce and regulate[ ] evenhandedy" fall into the second tier. *Brown-Forman*, 476 U.S. at 579. For regulations in this tier, courts employ a balancing test that asks "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.*

Just as states have long claimed the right to use their general police powers to regulate interstate commerce in agriculture and food products, the federal courts have long put those claims to the test and, when appropriate, invalidated those attempts found constitutionally lacking. *See, e.g.*, *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977) (holding invalid import restrictions on out-of-State apples); *Schollenberger v. Pennsylvania*, 171 U.S. 1, 14 (1898) (same for sales ban on oleomargarine). Proposition 12 is no different. This classic discriminatory regulation seeks to control the out-of-State production of pork and veal in a manner that favors California citizens. And, as with virtually all discriminatory regulations, California has not and cannot demonstrate that Proposition 12 survives the rigorous scrutiny the Constitution compels.

Analyzing Proposition 12 as a facially neutral regulation (which it is not) leads to the same result: Any potential interest California might have in enacting this regulation is dwarfed by the substantial burdens it will impose on commerce nationwide. The District Court's contrary conclusion should be reversed.

A. Proposition 12 Discriminates Against Out-of-State Commerce.

Any state regulation that "discriminat[es]" against out-of-state commerce is "virtually *per se* invalid." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Oregon*, 511 U.S. 93, 99 (1994). That is true whether the regulation is facially discriminatory, or facially neutral but nonetheless has a "discriminatory

purpose or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citation omitted). " '[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys.*, 511 U.S. at 99.

Proposition 12 is infected with both a discriminatory purpose and effect. Because it is cut from the same cloth as state regulations that "are routinely struck down," it, too, must suffer the same fate. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988) (collecting cases).

For the reasons laid out in Appellant's brief (at 4–7, 15–23), the tortuous history of Proposition 12—and its direct forebear Proposition 2—is replete with evidence showing California's desire to "level the playing field so that in-state producers" would not be "disadvantaged" by out-of-State competition. *See, e.g.*, Cal. Assembly Comm. on Appropriations, Bill Analysis of AB 1437 (May 13, 2009); Mot. for Leave to File a Bill of Compl., *Missouri v. California*, No. 22O148 at 18–20 ¶¶ 77–85 (U.S. Dec. 4, 2017)[1] (explaining that Assembly Bill 1437, which implemented Proposition 2, was designed "to eliminate any competitive disadvantage to California producers arising from California's stifling regulatory environment").

[1] *Available at* https://bit.ly/36dEe2x.

Obvious, too, is the disparate impact that Proposition 12 has on out-of-State pork and veal producers. Non-Californian producers face the following ultimatum: Comply with California's latest animal-confinement ukase or face the total exclusion of their products from the California market. As the numerous declarations submitted before the District Court make clear, the costs of that compliance effort will run in the hundreds of millions of dollars nationwide, and will force the entire veal and pork sector—spanning farmers, packers, and distributers—to upend their current practices from coast-to-coast, which will require a substantial outlay of time and operational resources. Appellant's Br. 8, 20, 40, 46–51. The upshot of Proposition 12 is therefore precisely the sort of state-created leveling effect operating to "neutralize advantages belonging to the place of origin" that the Commerce Clause stands as a bulwark against. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

The District Court avoided that straightforward conclusion by recharacterizing Proposition 12 as eliminating for out-of-State producers "just a preferred method of production," and creating " 'an equal-opportunity' burden" shared by resident and nonresident producers alike. ER15–16 (quoting *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 553 (6th Cir. 2001)). Not so. Crediting the District Court's reworked account would eviscerate the

Constitution's protections for a broad swathe of interstate economic activity and allow states to implement precisely the patchwork of disruptive, protectionist measures that the Framers feared. *Oregon Waste Sys.*, 511 U.S. at 98 ("The Framers granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.' " (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–326 (1979))).

Among other shortcomings, the District Court's attempted evasion cannot be squared with the Supreme Court's seminal decisions in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). In *Baldwin*, the Court invalidated New York's Milk Control Act, which was framed as a facially neutral regulation requiring that those seeking to buy milk from lower-cost states, such as Vermont, must nevertheless pay New York's artificially raised rate. Rejecting any "[n]ice distinctions" between "direct and indirect burdens," the Court held that a state regulation violates the Commerce Clause "when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." *Baldwin*, 294 U.S. at 522. The Milk Control Act, in purpose and operation, would have allowed New York to

"promote the economic welfare of *her* farmers"—notwithstanding the obvious harms to both in- and out-of-State milk consumers—by "guard[ing]" against open competition with out-of-State producers. *Id.* (emphasis added). Because that would have opened the door to precisely the kind of "rivalries and reprisals that" the Commerce Clause was designed to prevent, New York's parochial and discriminatory measure could not stand. *Id.*

The *Baldwin* Court was not swayed by New York's argument that the Milk Control Act was nevertheless permissible because it would provide New Yorkers with a more regular supply of pure and sanitary milk. *Id.* at 522–523. For one, there was "neither evidence nor presumption" that the Act would actually achieve these goals. *See id.* at 524. "But apart from such defects of proof," the Court explained, New York could "not put pressure of that sort" on another state: "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.* Or, as Justice Cardozo put it for the unanimous Court, blind deference to one state's ostensible exercise of a police power would "eat up the rule under the guise of an exception." *Id.* at 523.

Similarly in *Hunt*, the Court rejected North Carolina's attempt to prohibit the import of apples bearing Washington State quality grades. North Carolina argued that the ban served "to protect its citizenry from fraud and deception in the

marketing of apples," but the Supreme Court saw the statute for what it really was: A facially neutral statute that both "burden[ed] interstate sales of Washington apples" and "discriminat[ed] against them." 432 U.S. at 349–350. As in *Baldwin*, North Carolina's statute imposed disproportionate costs on out-of-State producers, by "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself." *Id.* at 351. In other words, the law had "a leveling effect which insidiously operate[d] to the advantage of local apple producers." *Id.* Because North Carolina failed to put forward sufficient evidence to justify that disruptive, protectionist measure, the State's statute could not "stand . . . even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace." *Id.* at 348, 352–353.

California's Proposition 12 is close kin to New York's Milk Control Act and North Carolina's apple-grade statute. Cloaked as an exercise of the State's police power, Proposition 12's facially neutral regulation of pork and veal sales is just the latest iteration of parochial legislation designed to advantage one state's citizens at the expense of all others through an insidious, constitutionally proscribed "leveling effect." *Id.* at 351. Because California has not and cannot justify the burdens it seeks to impose on interstate commerce with any legitimate local purpose, Proposition 12, too, must give way.

B. Proposition 12 Regulates Extraterritorially.

Proposition 12 also exceeds the Constitution's limits by seeking to regulate commerce outside California's borders. The doctrine of extraterritoriality prohibits states from "regulating commerce occurring wholly outside [their] borders." *Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989). Accordingly, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone*, 511 U.S. at 393. No matter how wise California or New York or Texas or Vermont may believe a particular policy to be, "[o]ne state cannot be permitted to dictate what other states must do within their own borders." *Daniels Sharpsmart*, 889 F.3d at 615; *accord BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570–571 (1996).

This principle has deep roots in the Constitution's structure and the Nation's history. State sovereignty is a cornerstone of our constitutional compact, and reflects our Country's "union of States, equal in power, dignity and authority," *Coyle v. Smith*, 221 U.S. 559, 567 (1911). "The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States"—a limitation that is inherent in "the original scheme of the Constitution." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *see also Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1497–98 (2019). Thus "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*,

104 U.S. 592, 594 (1881); *see also New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (calling this territorial limit an "obvious[]" and "necessary result of the Constitution"). When "States pass beyond their own [territorial] limits . . . there arises a conflict of sovereign power . . . which renders the exercise of such a power incompatible with the rights of other States, and with the [C]onstitution of the United States." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827) (opinion of Johnson, J.); *see also Boyle v. Zacharie*, 31 U.S. (6 Pet.) 635, 643 (1832) (Story, J.) (confirming that Justice Johnson spoke for the *Ogden* majority).

Proposition 12's sales ban ignores these foundational bounds on California's authority. That law is the latest—and most consequential—assertion of California's authority over its sister states' regulation of agriculture and food production to date: It requires out-of-State farmers, producers, and distributors to spend hundreds of millions of dollars to restructure their operations nationwide, simply because California voters decided to adopt a particular policy preference. Appellant's Br. 8, 20, 40, 46–51. One state's power to regulate beyond its borders, directly or otherwise, simply does not stretch that far, for "state autonomy over 'local needs' does not inhibit 'the overriding requirement of freedom for the national commerce.' " *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)).

The District Court's contrary decision gives short shrift to these foundational limits. The court recognized—as it must—that the extraterritoriality doctrine exists, and that it applies to regulations like Proposition 12. *See* ER20–21 & n.10; Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 Marq. L. Rev. 497, 498 (2016) (explaining that this doctrine "still serves well the dual purposes of promoting interstate commerce and discouraging hostility among states while each carries out its own policies in its own best interest"). But the District Court failed to meaningfully scrutinize the scope of Proposition 12 because it concluded that the regulated conduct does not take place "wholly outside" California's jurisdiction. ER21–23 ("The Court accordingly concludes that NAMI has not raised any serious questions on the merits of its extraterritoriality claim."). To reach that conclusion, the District Court, in a footnote, wrote off as "dicta" the Supreme Court's longstanding and straightforward instruction that " '[s]tates and localities may not attach restrictions to exports or imports in order to control commerce in other states.' " ER22 n.11 (quoting *C & A Carbone*, 511 U.S. at 393).

That crabbed reading narrows the doctrine into nothingness, and—not surprisingly—is incompatible with recent decisions from this Court and other circuits. For example, in *Christies*, the en banc Court held that California's Resale Royalty Act violated the Commerce Clause because it regulated sales of fine art

"that take place outside California" with "no necessary connection with the state other than the residency of the seller." 784 F.3d at 1323. Likewise, in *Legato Vapors, LLC v. Cook*, the Seventh Circuit rejected Indiana's attempt to "dictate[] how out-of-state manufacturers" of electronic cigarettes and vaping devices that sold products in Indiana "must build and secure their facilities, operate assembly lines, clean their equipment, and contract with security providers." 847 F.3d 825, 830 (7th Cir. 2017). That law, like Proposition 12, reflected "direct regulation of out-of-state facilities and services," and carried significant and costly consequences by requiring out-of-State manufacturers to restructure their operations. *Id.* at 834. Indiana, like California here, argued that the Act was "facially neutral," regulated activities "not wholly outside Indiana," and "applie[d] equally to in-state and out-of-state manufacturers." *Id.* at 830. But the Seventh Circuit rejected those arguments because the practical effects of Indiana's vaping regulations on out-of-State entities went beyond the "mere incidental effects of a facially neutral law." *Id.* at 830, 834. Although "reasonable and even-handed purity requirements on vaping products sold in Indiana" may well be constitutionally permissible, the State could "not try to achieve that goal by direct extraterritorial regulation of the manufacturing processes and facilities of out-of-state manufacturers." *Id.* at 834.

Similarly, the First Circuit sustained a challenge to a Massachusetts law that restricted the Commonwealth's ability to purchase goods or services from companies that did business with the country of Burma (now Myanmar) in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). The statute was enacted in response to human-rights violations committed by the Burmese Government based on "the historic concerns of the citizens of Massachusetts with supporting the rights of people around the world." *Id.* at 47 (internal quotation marks omitted). Though arising under the Foreign Commerce Clause, the Court recognized—and properly enforced—the same limits on Massachusetts's assertion of extraterritorial authority as an independent ground for invalidating that sales ban. Because "both the intention and effect of the statute [was] to change conduct beyond Massachusetts's borders," the Commonwealth ran afoul of the constitutional principle that a state "may not regulate conduct wholly beyond its borders." *Id.* at 69 (citing *Beer Inst.*, 491 U.S. at 336). Notably, the First Circuit also rejected Massachusetts's argument that "a company doing business with Burma can simply forgo contracts with Massachusetts," because allowing "state laws to stand on this ground" would "read the Commerce Clause out of the Constitution." *Id.* at 70 ("If Massachusetts can enact a Burma law, so too can California or Texas.").

California has no more power to regulate beyond its borders than Nevada, Indiana, or Massachusetts. This Court should reiterate that straightforward constitutional truth, and correct the District Court's departure from settled law.

C. Proposition 12 Will Substantially And Irreparably Burden Out-of-State Producers, And No Legitimate Local Interest Justifies This Burden.

Proposition 12 also flunks the Commerce Clause's test for facially neutral regulations that impose *indirect* effects on interstate commerce. Such regulations are permissible only if the State has a "legitimate" interest in that regulation, and "the local benefits" of the regulation "clearly exceed[]" the "burden on interstate commerce." *Brown-Forman*, 476 U.S. at 579; *see Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). Setting aside the substantial evidence that Proposition 12 is discriminatory and directly burdens interstate commerce, it still cannot pass muster: California has no legitimate local interest in regulating the manner in which pork and veal are produced outside the State's borders. And even if there were such an interest, any gains to the State and its citizens are dwarfed by the compliance costs and market distortions that this law will impose nationwide.

Proposition 12 is not California's first foray into America's larder. The past fifteen years have seen a dramatic uptick in far-reaching food regulation from a small group of states, California chief among them. Indeed, the regulatory impulse for "wealthy, powerful states" to exercise their "outsized influence" to adopt

preferred regulatory regimes that are effectively binding not just "within the home state but also [o]n others who trade with that state" is so linked to the Golden State that scholars refer to it as the "California Effect." Baylen J. Linnekin, *The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 Chap. L. Rev. 357, 373 (2010). To date, California's increasingly ambitious efforts to reshape the nation's food chain in the State's own image have had mixed success. *Compare, e.g., Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012) (holding California meat-processing regulations designed to restructure slaughterhouse operations preempted by the Federal Meat Inspection Act), *and Nat'l Meat Ass'n v. Brown*, No. CVF-08-1963 LJO DLB, 2009 WL 426213, at *11 (E.D. Cal. Feb. 19, 2009) (same, and declining to reach Commerce Clause argument in light of preemption holding), *with Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) (rejecting constitutional challenges to force-feeding ban in foie gras production).

Whatever the outer line on California's legitimate authority to regulate out-of-State activity that touches on its citizens, Proposition 12 far exceeds that mark. Starting with the putative benefits of Proposition 12's sales ban, that side of the scale is empty because the State has *no* legitimate interest in controlling out-of-State activity that does not threaten to harm *California* consumers.

This Circuit's case law is unambiguous that a state is empowered to regulate in a manner that burdens interstate commerce only to address "*local* harms," *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103–04 (9th Cir. 2013) (emphasis added), or "minimize the *in-state* harm caused by products sold in-state," *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 952–953 (9th Cir. 2019) (emphasis added) (explaining that California is not empowered to regulate fuel production and use merely because "it thinks that it is the state that knows how best to protect Iowa's farms, Maine's fisheries, or Michigan's lakes").

As it appeared in the ballot initiative ratified by California voters,[2] 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 of foodborne illness and associated negative fiscal impacts on the State of California." Prevention of Cruelty to Farm Animals Act, Prop. 12 § 2. *See* Appellant's Br. 5–6, 43–44; Appellant's Stat. Add. 1; *see also* Defs' Opp. to Pl.'s Mot. for Prelim. Inj. at 8–9,

[2] The ballot-initiative process is a uniquely Californian governance tool that allows "California citizens a way to propose laws and constitutional amendments without the support of the Governor or the Legislature." Office of the Att'y Gen., *Ballot Initiatives*, State of Cal. Dep't of Justice, https://oag.ca.gov/initiatives (last visited Jan. 10, 2020). Because ballot initiatives like Proposition 12 are necessarily devoid of legislative findings "[n]o federal court has deferred to the terms of a state ballot proposition where the proposition trenches on a federal constitutional right." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1167 (S.D. Cal. 2019) (collecting cases), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019).

ECF No. 24 (acknowledging that the purpose of Proposition 12 is "to prevent animal cruelty"). That rationale is wholly untethered from any California nexus when applied to the *out-of-State* production of pork and veal. *See C & A Carbone*, 511 U.S. at 393 (holding a locality's desire to minimize its own environmental footprint does not justify the regulation of out-of-state commerce).

As for California's claim that Proposition 12 also aims "to protect 'the health and safety of California consumers,' " Def's Opp. to Pl.'s Mot. for Prelim. Inj. at 8–9, that too falls flat. The mere "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.). Thus, even if Proposition 12 was designed for that "purpose"—a claim wholly devoid of any evidentiary support, *see* Appellant's Br. 5–6, 43–44—because there is no evidence that this regulation has incidental health or safety benefits specific to California consumers, "the State's safety interest [is] illusory," *Kassel*, 450 U.S. at 671.

In any event, the concrete, imminent, and excessive compliance burdens that Proposition 12 would impose on non-California residents subsume any potential cognizable benefit to California consumers. California's law will result in a restructuring of pork and veal supply chains across the nation. That is, after all, the whole point of these paternalist, "California-knows-best" style laws. "The

California effect has meant that the state's food regulations and bans extend far beyond its borders, either because its regulations or bans encourage other states or the federal government to adopt them, or because they force producers to change their offerings nationwide, or because they force the regulated industry to seek preemptive nationwide regulation." Linnekin, *supra*, at 384–385. That necessarily disrupts the "natural functioning of the interstate market," *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (internal quotation marks omitted), and "impair[s] the free flow of materials and products across state borders," *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154–55 (9th Cir. 2012).

The District Court simply failed to account for the undisputed burdens that Proposition 12 will place on out-of-State producers. Although the court acknowledged that Proposition 12 could impose "significant costs upon at least some NAMI members," it nevertheless held that this fell short of a "substantial burden on interstate commerce" because Proposition 12 merely "precludes a preferred, more profitable method of operating in a retail market." ER24–26. (internal quotation marks omitted). In other words, the District Court held that because Proposition 12 "is directed to *how* meat products are produced, not *where*," there was no need to perform the balancing test mandated by *Pike*. *See id.* (emphasis in original).

Not so. There is no "production method" exception that categorically exempts otherwise-burdensome regulations from *Pike*'s balancing test. *See* 397 U.S. at 144–145 (enjoining an order requiring interstate cantaloupe growers to make "a capital expenditure of approximately $200,000" to pack fruit in Arizona because the law was extremely burdensome and the State had only a "tenuous interest in having the company's cantaloupes identified as originating in Arizona"). For good reason. Were states simply permitted to skirt the Constitution's structural limits on regulations affecting interstate commerce by framing away obvious real-world harms as merely the removal of a potential "production method," that would effectively immunize *any* local regulation, regardless of the extent or reach of its effects, from Commerce Clause scrutiny.

Applying the proper standard and balancing Proposition 12's wholly speculative and at-most-minimal health and safety benefits against these enormous burdens on interstate commerce demonstrates that reversal is independently warranted on this basis.

II. Allowing Proposition 12 To Take Effect Would Green-Light Similar Regulatory "Leveling" Efforts Nationwide.

Without this Court's intervention, the District Court's decision allowing Proposition 12 to stand will be an invitation to states and localities across the country to engage in similar regulatory "leveling" efforts in the agriculture and food sectors, and beyond. The resulting regulatory race to the bottom would be

harmful to our national economy and leave us "with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Tennessee Wine & Spirits*, 139 S. Ct. at 2460.

California has no inherent right to impose its preferred regulatory policies on the rest of the nation. Although the federal government sometimes expressly authorizes the State to adopt its own regulatory standards on certain topics of unique interest, *cf.* 42 U.S.C. § 7543(e)(2)(A) ("authoriz[ing] California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines" that are more stringent than "Federal standards"), California has no similar authority when it comes to the production of pork and veal. And absent such authority, California—like every other state and locality—is bound by the Commerce Clause, which prohibits the enactment of laws that, like Proposition 12, seek to "level the playing field so that in-state producers" will not be "disadvantaged" by out-of-State competition. *See* Cal. Assembly Comm. on Appropriations, Bill Analysis of AB 1437 (May 13, 2009).

That makes sense. If California can assert legal control over out-of-State meat production to benefit in-State producers, then North Carolina can do the same when it comes to Washington's apple production, and New York can regulate Vermont's milk production. And that protectionist impulse is not limited to food. States could rely on a similar theory to regulate supply chains in virtually any

industry. Under the District Court's approach, the Commerce Clause would not stop New Jersey from asserting its say over how Michigan makes cars to benefit Garden State dealerships. Nor would it prevent Texas from laying claim to how clothing must be manufactured in North Carolina to benefit Lone Star cotton growers. Now multiply that protectionist disruption by fifty, because if California or New Jersey or Texas is permitted to impose such a prohibition, so too can every other state.

These risks are not hypothetical. As Appellant explains, Proposition 12 will force out-of-State pork and veal farmers, producers, and manufacturers to choose between spending significant sums of money to update their entire supply lines to conform with California's view of the appropriate standards, cutting production to satisfy California's regulatory demands, creating separate production and distribution lines for this one State, or withdrawing from the highly lucrative California market. Appellant's Br. 46–51. Moreover, Massachusetts has a similar sales ban with differing restrictions. *See* Prevention of Farm Animal Cruelty Act, 2016 Mass. Acts 1052. There is a serious risk that other localities will follow suit, resulting in a patchwork of regulatory requirements that will effectively eliminate the national pork and veal market. *See* Linnekin, *supra*, at 366–67, 385, 387 (explaining that, after California banned trans fats, "dozens of discordant state laws" followed).

These are precisely the fears that motivated the creation of the Commerce Clause. As James Madison explained, allowing states to restrict commerce or impermissibly burden out-of-state producers and manufacturers "tends to beget retaliating regulations." *See* James Madison, *Vices of the Political System of the United States*, *in* 2 Writings of James Madison 361, 363 (Gaillard Hunt ed., 1901). Alexander Hamilton likewise worried that, if allowed to "multip[y] and extend[ ]," "[t]he interfering and unneighborly regulations of some States" would become "serious sources of animosity and discord." The Federalist No. 22 (Alexander Hamilton); *see also* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1885–86 & n.29 (2011) (collecting other examples of the founders' "references to the nation's commercial woes, including discord among the states"); Letter from James Monroe to James Madison (July 26, 1785) (explaining that allowing the states to pursue separate commercial policies "establish'd deep-rooted jealousies & enmities between them" which, if allowed to persist, "will become instrumental in their hands to impede & defeat those of each other").[3]

For nearly two hundred years, the Supreme Court and courts of appeals have heeded the framers' concerns and prevented states from discriminating against out-of-state commerce, regulating beyond their borders, and acting in a way that

[3] *Available at* https://bit.ly/2SWWhGD.

burdens interstate commerce absent a sufficiently strong and legitimate local interest. *See Tennessee Wine & Spirits*, 139 S. Ct. at 2459 (summarizing the origins of this Commerce Clause concept); *see also, e.g.*, *Kassel*, 450 U.S. 662; *Hunt*, 432 U.S. 333; *Baldwin*, 294 U.S. 511; *Legato Vapors*, 847 F.3d 825; *Christies*, 784 F.3d 1320; *Natsios*, 181 F.3d 38. The District Court's decision breaks with that long tradition, and should be reversed.

CONCLUSION

For these reasons, the District Court's denial of preliminary injunctive relief should be reversed.

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Respectfully submitted,

/s/ *Catherine E. Stetson*

Peter C. Tolsdorf
Erica Klenicki
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th Street, NW
Washington, DC 20001
Phone: (202) 637-3000

Counsel for National Association of Manufacturers

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

Catherine E. Stetson
Kyle M. Druding
Danielle Desaulniers Stempel*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
cate.stetson@hoganlovells.com

* *Admitted only in Maryland; practice supervised by principals of the firm admitted in D.C.*

Counsel for Amici Curiae

Phone: (202) 463-5948

Counsel for Chamber of Commerce of the United States of America

Stephanie K. Harris
FOOD MARKETING INSTITUTE
2345 Crystal Drive, Suite 800
Arlington, VA 22202
Phone: (202) 220-0614

Counsel for Food Marketing Institute

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,059 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ *Catherine E. Stetson*
Catherine E. Stetson

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on January 10, 2020.

/s/ *Catherine E. Stetson*
Catherine E. Stetson