No. 19-56408

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH AMERICAN MEAT INSTITUTE

Plaintiff-Appellant,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Defendants-Appellees,

THE HUMANE SOCIETY OF THE UNITED STATES, ET AL.,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-8569-CAS-FFM

BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant North American Meat Institute ("NAMI") is a private non-profit trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. NAMI has no parent corporation. No publicly held corporation has a 10% or greater ownership in NAMI.

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INTRODUCTION

This case presents the issue whether California can insulate its farmers from out-of-state competition by projecting its agricultural regulations beyond its borders and banning the sale of wholesome meats imported into California unless farmers in other States and countries comply with the animal-confinement requirements California voters adopted in Proposition 12. Under longstanding Supreme Court precedent, the answer is no. California is not permitted to devastate the out-of-state veal and pork industries, and the independent farmers who for generations have labored in them, by dictating from afar the manner in which farm animals must be raised outside California's borders. Because the North American Meat Institute ("NAMI") is likely to prevail on the merits of its constitutional challenge, and because NAMI's members and countless farmers throughout the nation will suffer severe irreparable harm absent preliminary injunctive relief, this Court should reverse and remand for entry of a preliminary injunction against Proposition 12's sales ban ("Sales Ban").

NAMI is likely to prevail on the merits because the Sales Ban violates the Commerce Clause and interstate federalism in three respects. *First*, it erects a protectionist trade barrier that shields California producers from out-of-state competition. The Sales Ban impermissibly "levels the playing field" between California and out-of-state producers by stripping away out-of-state producers' competitive advantage. This protectionism violates the Commerce Clause and cannot survive strict

scrutiny. *See, e.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521–28 (1935).

Second, the Sales Ban violates the constitutional prohibition on extraterritorial state regulation. *See, e.g.*, *Healy v. Beer Inst.*, 491 U.S. 324, 335–37 (1989); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323–25 (9th Cir. 2015) (en banc). "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). That is precisely what the Sales Ban does—it projects California law worldwide by banning the in-state sale of wholesome meats imported from other States and countries unless out-of-state farmers comply with California's animal-confinement requirements.

Third, the Sales Ban substantially and unduly burdens interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). By requiring producers to either exit the California market or spend hundreds of millions of dollars building California-compliant facilities, the Sales Ban substantially impairs the free flow of goods in interstate commerce. And the resulting burdens, which will be borne primarily by out-of-state businesses, clearly exceed any legitimate local interest.

Absent a preliminary injunction, the Sales Ban will irreparably injure NAMI's members and farmers throughout the country. The Sales Ban renders obsolete the facilities in which veal and pork farmers already have invested hundreds of millions

of dollars, and requires them either to spend hundreds of millions more or to exit the California market and suffer the resulting loss of revenue and customer goodwill. Neither category of harm can be remedied post-trial because of California's sovereign immunity. And because a preliminary injunction would not harm California, the balance of equities and public interest tip sharply in favor of an injunction.

The district court's contrary decision—which rested solely on its conclusion that there are no "serious questions" on the merits—misconstrues controlling Commerce Clause precedent. Contrary to the district court's conclusion, no decision of the Supreme Court or this Court allows California to exclude imported products from its market unless out-of-state producers comply with California's dictates regarding production conditions, where neither those conditions nor the resulting products cause any in-state harms. To the contrary, affirming the district court would set this Circuit at odds with both Supreme Court precedent and decisions of other circuits, which have struck down materially indistinguishable laws. The decision below should be reversed, and the Sales Ban should be preliminarily enjoined.

JURISDICTION

The district court had original jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this civil action arises under the U.S. Constitution. The district court denied NAMI's motion for a preliminary injunction on November 22, 2019, *see* Excerpts

of Record ("ER") 1–26, and NAMI timely noticed this appeal on December 3, 2019, *see* ER27. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED

Whether the district court erred in refusing to preliminarily enjoin the Sales Ban as applied to imported veal and pork produced outside California.

STATEMENT OF THE CASE

A. Proposition 2 and Assembly Bill 1437

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. Effective January 1, 2015, 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 his or her limbs," or "[t]urning around freely." *Id.* § 3. As proponents of Proposition 2 emphasized during the initiative campaign, California farmers were given more than six years to restructure their facilities and operations to come into compliance before the prohibitions took effect. *See* Sec'y of State of Cal., *Official Voter Information Guide* 18 (Nov. 4, 2008) (emphasizing that farmers would have "ample time" to comply).

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 that were not subject to the same confinement requirements. Assemb. Comm. on Appropriations, Bill Analysis of AB 1437 (May 13, 2009).[1]

B. Proposition 12

In November 2018, California voters enacted Proposition 12, the text of which is reproduced in the addendum to this brief. 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 of foodborne illness and associated negative fiscal impacts on the State of California," *id.* § 2. California farmers already had been required to comply with the confinement standards implemented by Proposition 2. For the first time, Proposition 12 applied California's animal-confinement standards for veal calves and breeding sows outside California. Proposition 12 was not accompanied by any legislative findings or

[1] 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 unsuccessfully sought to invoke the Supreme Court's original jurisdiction. *See Missouri v. California*, 139 S. Ct. 859 (2019) (mem.).

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, neither defendants nor their intervenors attempted to defend the law as a food-safety measure or responded to NAMI's showing that any food-safety interest is illusory. *See* ER90–92 (¶¶8–16).

In a provision not challenged here, 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" means "any calf raised for veal, breeding pig, or egg-laying hen who is kept on a farm." *Id.* § 25991(f). "Farm" means "the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber," but does not include "live animal markets" and "establishments at which mandatory inspection is provided under the Federal Meat Inspection Act." *Id.* § 25991(i).

> "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 confinement requirements do not apply during medical research, veterinary care, transportation, exhibitions, slaughter, temporary periods for animal husbandry, or the five-day period before a sow's expected delivery date and when it is nursing offspring. *Id.* § 25992. They also do not apply to the thousands of calves on California's dairy farms that are not "raised for veal," which can still be tethered and confined in small enclosures. ER101 (¶16).

Following AB 1437's model, Proposition 12 also 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 "(1) 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 (2) "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).[2] Violations are punishable criminally by a fine of up to

[2] "Sale" means "a commercial sale by a business that sells any item covered by this chapter, but does not include any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act." *Id.* § 25991(o). A "sale" is "deemed to occur at the location where the buyer takes physical possession of [a covered] item." *Id.* The Sales Ban exempts "combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products." *Id.* § 25991(u)–(v).

$1,000 and 180 days' imprisonment. *Id.* § 25993(b). This lawsuit challenges the Sales Ban as applied to imports of pork and veal produced outside California.

The Department of Food and Agriculture and the Department of Public Health were required to promulgate implementing regulations by September 1, 2019. *Id.* § 25993(a). Proposed regulations addressing pork or veal have not yet issued.

C. Impact of the Sales Ban

As demonstrated by the declarations submitted by NAMI in the district court, the Sales Ban will inflict substantial and irreparable harm on the out-of-state veal and pork industries, including on thousands of small farmers throughout the nation. *See infra*, Part II. The veal and pork industries have spent hundreds of millions of dollars constructing and modernizing their existing farms and facilities, but they will be rendered obsolete if the Sales Ban is allowed to stand because they do not satisfy California's unprecedented animal-confinement requirements. The Sales Ban would upend current industry practices without any evidence that Proposition 12 enhances either animal welfare or food safety. As a result, many veal and pork producers will likely be driven from the California market, and those who remain will have to spend hundreds of millions of dollars to bring their facilities and operations into compliance with Proposition 12.

D. Proceedings Below

NAMI, a national 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. ER183. NAMI, supported by nine States appearing as *amici curiae*, moved for a preliminary injunction. Defendants, supported by intervenor animal-welfare groups and *amicus curiae* Association of California Egg Farmers, opposed NAMI's motion.

On November 22, 2019, the district court denied NAMI's motion, holding that NAMI had not raised any serious questions as to whether the Sales Ban (i) discriminates in purpose or effect, ER11–18; (ii) regulates extraterritorial commerce, ER19–23; or (iii) substantially burdens interstate commerce, ER23–25. 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 or the balance of hardships given its conclusion that there were "no serious questions" on the merits. ER26.

SUMMARY OF ARGUMENT

I. The district court erred in holding NAMI had failed to demonstrate a likelihood of success or even "serious questions" on the merits. As applied to pork

and veal from outside California, the Sales Ban violates the Commerce Clause and interstate federalism in three respects.

A. The Sales Ban violates the Commerce Clause's prohibition on protectionist legislation that discriminates against interstate commerce. The Sales Ban impermissibly strips away the competitive advantage that out-of-state producers have over in-state producers because their home States have not imposed the same costly confinement restrictions that California imposes on its farmers. This "leveling effect" triggers heightened scrutiny, which defendants and their intervenors made no effort to satisfy below, and which the Sales Ban cannot survive given the lack of any legitimate state interest and the availability of nondiscriminatory alternatives.

B. The Sales Ban further violates the constitutional prohibition on extraterritorial state legislation. The express purpose and practical effect of the Sales Ban are to "phas[e] out" farming conditions in other States and countries that California lacks power to regulate. Under longstanding Supreme Court precedent, California cannot condition access to its market as a means to control out-of-state production processes, where neither those processes nor the resulting products imported into California cause any in-state harms. A contrary conclusion would allow California and other States to export their regulatory standards throughout the nation, balkanize the national economy, and foment trade wars and friction among the States that the Constitution was enacted to prevent.

C. The Sales Ban also violates the Commerce Clause under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). It imposes substantial burdens on interstate commerce that vastly outweigh any legitimate local benefits. The Sales Ban significantly impairs the free flow of pork and veal products into California by banning their sale in California unless out-of-state producers spend hundreds of millions of dollars to construct California-compliant facilities. These burdens, borne primarily by out-of-state interests who have no representation in California's political process, are not justified by *any* legitimate local interest, and certainly not by any interest sufficient to outweigh the enormous burdens on interstate commerce.

II. Absent a preliminary injunction, NAMI's members and countless farmers throughout the country will suffer severe irreparable harm. Even aside from the violation of their constitutional rights, which itself is irreparable, the Sales Ban irreparably harms veal and pork producers by putting them to a Hobson's choice: either spend millions of dollars to comply with California's confinement requirements—on top of the millions they already spent to modernize their existing facilities—or be excluded from the California market and suffer the resulting loss of revenues and customer goodwill. Either way, Proposition 12 subjects veal and pork producers to tremendous costs, none of which can be recovered post-trial because California's sovereign immunity precludes a damages action against the State.

III. The public interest and equities favor a preliminary injunction. Both factors require compliance with the Constitution. And California will suffer no harm if the Sales Ban—which serves no legitimate state interest—is preliminarily enjoined pending adjudication of the lawsuit, whereas NAMI's members and veal and pork farmers throughout the country will be irreparably harmed if it is not.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018). Under this Court's precedent, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* Denial of a preliminary injunction is reviewed for abuse of discretion. *Id.* at 613. "A district court abuses its discretion if it bases a decision 'on an erroneous legal standard or a clearly erroneous finding of fact.'" *Id.*

ARGUMENT

I. NAMI Is Likely To Prevail On The Merits.

The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. "[T]he

Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). As the Supreme Court recently reaffirmed, "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) (internal quotation marks omitted). "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.'" *Or. Waste*, 511 U.S. at 98 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

Under the Commerce Clause, a state law that "[d]iscriminat[es] against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the [State] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. "[S]tate statutes that clearly discriminate against interstate commerce are routinely struck 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). This heightened scrutiny applies not

only to statutes that facially discriminate, but also 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*, 432 U.S. at 350–53.

Further, under the extraterritoriality doctrine, "[a] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336. Under this doctrine, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *Carbone*, 511 U.S. at 393 (citing *Baldwin*, 294 U.S. 511). "One state cannot be permitted to dictate what other states must do within their own borders." *Daniels*, 889 F.3d at 615; *see Christies*, 784 F.3d at 1323; *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993).

Finally, a law violates the Commerce Clause if "the burden imposed on [interstate and foreign] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. In assessing that 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). Rather, such regulations "may further the purpose so margin-

ally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Id.*; *see also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443–47 (1978).

A. The Sales Ban Is A Protectionist Trade Barrier.

The Sales Ban is a discriminatory trade barrier that denies out-of-state farmers and processors open access to the California market unless they abandon "advantages belonging to the place of origin." *W. Lynn Creamery*, 512 U.S. at 194. Specifically, Proposition 12 requires them to reconstruct their barns and production facilities to meet an unprecedented mandate imposed from afar by California voters. These so-called "political process losers," ER15—who have no voice in California's "political process"—are protected instead by the Commerce Clause.

1. The Sales Ban discriminates against interstate commerce in 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 required that its in-state "protective prices" would be "extended to that part of the supply … which comes from other states" so 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."). The *Baldwin* Court 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.* The Court 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.* New York's facially neutral restriction was discriminatory because it "neutralize[d] economic advantages belonging to the place of origin." *Id.* at 528.[3]

Likewise, in *West Lynn Creamery*, the Supreme Court explained 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*, the Supreme 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

[3] As discussed below, *Baldwin* addressed both the discriminatory nature of New York's sales ban and its extraterritorial effect. *See Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 212 n.14 (3d Cir. 2002). Here, too, Proposition 12's Sales Ban involves the same combination of protectionism and extraterritorial regulation that Justice Cardozo's unanimous opinion condemned in *Baldwin*. Whether analyzed under the standards governing discrimination or extraterritoriality, *Baldwin* holds that a State may not protect in-state businesses from the competitive disadvantages created by the State's regulations by requiring out-of-state businesses to comply with the same in-state regulations as a condition of access to the State's market.

"[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.

And, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Supreme Court 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." *Id.* at 351. "Despite the statute's facial neutrality," and without "ascrib[ing] an economic protection motive to the North Carolina Legislature," the Court held that the law discriminated and that the State had failed to justify its discrimination. *Id.* at 352–53.[4]

Here, too, the Sales Ban operates to insulate 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 compet-

[4] Contrary to the district court's conclusion, ER 16 n.6, *Hunt* makes clear that *Baldwin*'s "leveling effect" holding is not confined to "price-setting statutes." *See also Cloverland-Green*, 298 F.3d at 212 ("[J]ust as it was impermissible in [*Baldwin*] for New York to eliminate the *price* advantage of Vermont milk … so, too, in [*Hunt*] was it impermissible for North Carolina to eliminate the *quality* advantage of apples from Washington…." (first alteration in original) (quoting Lawrence H. Tribe, *American Constitutional Law* § 6–8, at 1076 (3d ed. 2000))). Here, the Sales Ban eliminates out-of-state producers' *cost* advantage, which confers a price advantage.

itors. It does so by subjecting out-of-state competitors to the same confinement requirements that California imposes on in-state producers if they want to compete in California. *See 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 thus operates as 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 cost 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.[5] "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 (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"); *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d

[5] *See* ER50 (acknowledging that, prior to adoption of Proposition 12, the "turnaround" standard that previously applied only to California farmers under Proposition 2 was a "disadvantage" that they "had to deal with … for a longer period of time").

201, 212 (3d Cir. 2002) ("*Baldwin* and [*Hunt*] show 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."). The Sales Ban impermissibly imposes a leveling effect that protects in-state producers by stripping away competitive advantages enjoyed by out-of-state competitors.

2. The district court admitted that "the cost of retrofitting … facilities to comply with Proposition 12" may be an "expensive" burden, ER16, but rejected NAMI's claim because "the only 'competitive advantage' that NAMI contends will be stripped away by Proposition 12 is a standard production method, available to any meat processor *in any state that allows it*, to concentrate livestock in its facilities at certain densities," ER15 (emphasis added). That ruling is mistaken.

The prohibition on stripping away "competitive advantages" applies to favorable in-state regulatory treatment. 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 other States and countries.

Further, the "competitive advantage" that Proposition 12 strips away is not limited to "a standard production method, available to any meat processor in any state that allows it." ER15. Rather, many of NAMI's members have spent hundreds of millions of dollars adopting non-standard production methods, but those expenditures do not satisfy the unprecedented standards ushered in by Proposition 12. The veal industry recently completed a 10-year, $150 million investment to move from standard practices to group housing, but those efforts are rendered obsolete by Proposition 12's newly minted confinement standards. ER99 (¶¶7–8). Pork producers also 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) (describing Smithfield's 10-year, $360 million investment to convert to group housing); ER141–42 (¶¶4–5) (reconfiguring and constructing barns would cost "tens of millions of dollars, on top of the expenses independent farmers have incurred for recent renovations that may now not meet Proposition 12's specific requirements").[6]

[6] *See also* ER141–42 (¶¶4–5) (describing Proposition 12's impact on "more than 500 independent family farmers across the Midwest, many of which have been Hormel suppliers for generations"); ER146–49 (¶¶4, 11, 13) (describing impact on more than 3,000 independent farmers who would "be required to restructure their farms");

The district court further ruled that even if "NAMI members' current processing practices actually confer a cognizable competitive advantage that Proposition 12 threatens, the loss of that asserted advantage would not be discriminatory," because "the cost of retrofitting their facilities to comply with Proposition 12" "is an equal-opportunity burden." ER16. That is mistaken. 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 is facially neutral, "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

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ER166 (¶¶10–12) ("[F]armers would be required to make substantial capital investments to eliminate gestation crates, restructure their farms to adopt group housing of breeding sows, adopt new procedures to care for breeding sows, and train their employees with respect to these new procedures."); ER157–60 (¶¶4, 11–13) (describing impact on "250 company-owned and independent family farms in Indiana, Michigan, Ohio and Pennsylvania"); ER153 (¶6) ("Compliance with Proposition 12 will be extremely burdensome for the independent farmers who sell their hogs to Tyson.").

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.*

Finally, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), does not compel a different result. *Harris* ruled that the ban on the sale of *foie gras* that resulted from force-feeding was "not discriminatory" because it applied to "both intrastate and interstate products." *Id.* at 948. It did not, however, address whether a facially neutral statute satisfies the Commerce Clause even if its practical and intended effect is to burden and discriminate against out-of-state competitors. *See Bacchus*, 468 U.S. at 268 (striking down facially neutral statute designed to benefit in-state interests); *cf. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1092 (9th Cir. 2013) (analyzing whether regulation that applied to in-state and out-of-state interests stripped away competitive advantage from out-of-state competitors). And the Supreme Court's decisions in *Baldwin*, *Hunt*, and *Bacchus* make clear that statutes that have the effect of protecting in-state interests from out-of-state competition run afoul of the Commerce Clause even when they apply the same standards to in-state and out-of-state businesses.

The district court concluded that *Harris* rejected "the same argument that NAMI asserts here; namely, that '[a] state statute is unconstitutional not just when

it discriminates on its face or in its purpose but also where it has a discriminatory *effect*.'" ER13 (alteration in original) (quoting *Harris* plaintiffs' appeal brief). That is mistaken. In *Harris*, there were no in-state *foie gras* producers to protect. *See* Appellants' Opening Brief at 9–10, *Harris*, 729 F.3d 937 (No. 12-56822), 2012 WL 5915406 ("*Harris* Plaintiffs' Br."); Appellees' Brief at 37 n.6, *Harris*, 729 F.3d 937 (No. 12-56822), 2012 WL 11859585 ("*Harris* Defendants' Br.") ("[O]ut-of-state foie gras producers are not at a disadvantage under section 25982 because in-state foie gras producers do not even exist."). The only discriminatory *effect* argument advanced by the plaintiffs in *Harris* related to the effect of the *foie gras* sales ban on the sale of *duck breasts* (not *foie gras*) in California. *See Harris* Plaintiffs' Br. 53 (arguing that California consumers of out-of-state "duck breasts were already starting to turn to in-state sellers of substitute duck breasts"); *Harris* Defendants' Br. 31 ("Appellants' argument is that section 25982 deprives them of a competitive advantage with respect to duck products other than foie gras."). The *Harris* Court mooted that discriminatory effect argument by ruling that the sales ban there applied only to *foie gras* and did "not prohibit the sale of duck breasts … or other non-liver products from force-fed birds." 729 F.3d at 945. *Harris* thus did not address NAMI's discriminatory effect showing.[7]

[7] Proposition 12 further discriminates to the extent it (i) obligates out-of-state producers to satisfy the "turnaround" standard without the same six-year lead time California farmers were given, or (ii) exempts "bob veal" from California dairy farms

3. The Sales Ban is invalid because California has not and cannot "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. Indeed, defendants and their intervenors made no effort below to defend the Sales Ban under rigorous scrutiny. *See* Defs. Opp'n 13, ECF No. 24 ("[T]he Court need not determine whether [the ban] survives strict scrutiny."); Invrs. Opp'n 14–15, ECF No. 25-10 (addressing only *Pike*).

Initially, California cannot justify the Sales Ban as a means of ensuring regulatory parity for in-state and out-of-state producers whose products are sold in California. The Sales Ban must be "justified by a valid factor *unrelated to economic protectionism*," *New Energy*, 486 U.S. at 274 (emphasis added), and forced regulatory parity *is* protectionism, *e.g.*, *Baldwin*, 294 U.S. at 521. California has no valid interest in protecting its producers from the competitive disadvantage its confinement requirements create by subjecting out-of-state competitors to those same standards. "[T]he Commerce Clause prohibits a State from using its regulatory power to

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from the confinement standards applicable to out-of-state veal producers. ER16–17 & nn.7–8. The district court concluded that these challenges were premature because California has not yet adopted regulations that were due on September 1, 2019. The regulatory vacuum, however, imposes imminent and concrete harm because NAMI members must take actions well in advance of the ultimate dates that Proposition 12's obligations take effect. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) ("phase in over a five-year period" did not obviate harm because plaintiff could not "flip a switch" to come into compliance); *see infra*, Part II (explaining that compliance with Proposition 12 will take years).

protect its own citizens from outside competition." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980).

Nor can the Sales Ban be justified as an animal-welfare measure. The challenged applications of the Sales Ban (namely, to imported pork and veal produced outside California) concern only animals raised outside California's borders. California has no "legitimate local interest," *Carbone*, 511 U.S. at 392, in how farm animals are housed in other States and countries, because it "may not attach restrictions to exports or imports in order to control commerce in other States," *id.* at 393 (citing *Baldwin*, 294 U.S. 511). California lacks authority to regulate out-of-state farming conditions. *See Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1882) ("No State can legislate except with reference to its own jurisdiction."). Further, California cannot justify the Sales Ban as a means to prevent California consumers from creating demand for products that result from out-of-state farming practices that California disfavors. *See Carbone*, 511 U.S. at 393 (locality could not "justify [its discriminatory] flow control ordinance as a way to steer [locally generated] solid waste away from out-of-town disposal sites that it might deem harmful to the environment" because such a justification "would extend the town's police power beyond its jurisdictional bounds"). Just as the town in *Carbone* could not restrict exports of locally generated waste to avoid contributing to out-of-town environmental harms, California cannot close its borders to interstate commerce in pork and veal to

prevent its citizens from "contributing" to out-of-state farming practices with which it disagrees. Accepting that justification "would extend [California's] police power beyond its jurisdictional bounds." *Id.*[8]

Nor can California justify the Sales Ban as a consumer-health measure. Defendants made no attempt below to rebut NAMI's showing that Proposition 12's food-safety justification is illusory, and they did not identify any other in-state harms purportedly traceable to animal-confinement conditions in other States. No scientific evidence establishes a link between Proposition 12's confinement requirements and a diminished risk of foodborne illness from pork or veal. ER90–92 (¶¶8–16). This is especially true regarding Proposition 12's ban on the sale of "the meat of immediate offspring of a [breeding sow] who was confined in a cruel manner." Cal. Health & Safety Code § 25990(b)(2). Piglets spend only a few weeks with the sow while nursing, during which time Proposition 12's confinement requirements do not apply. *Id.* § 25992(f). No scientific evidence supports the notion that a sow's confinement conditions have any bearing on the risk of foodborne illness from the meat of her offspring, which are raised separately and not brought to market until months after leaving the barns where they were born. ER92 (¶16).

[8] California's asserted interest in animal welfare is further undermined because Proposition 12 applies only to calves that are "raised for veal," and not to the thousands of similarly situated calves in California that are raised for milk and beef production. *See infra*, Part I.C.2; ER101 (¶16).

Moreover, an extensive scheme of federal regulation already exists to ensure meat safety. ER90–91 (¶9). The Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq.*, requires the Department of Agriculture ("DOA") to inspect all cattle and swine slaughtered and processed for human consumption, and "establishes an elaborate system of inspecting live animals and carcasses in order to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455–56 (2012) (internal quotation marks and alterations omitted). DOA's Food Safety and Inspection Service ("FSIS") "has issued extensive regulations to govern the inspection of animals and meat, as well as other aspects of slaughterhouses' operations and facilities," to promote the FMIA's "dual goals of safe meat and humane slaughter." *Id.* at 456 (citing 9 C.F.R. § 300.1 *et seq.* (2011)). Under these federal regulations, "FSIS inspects all meat and poultry animals to look for signs of disease, contamination, and other abnormal conditions, both before and after slaughter … on a continuous basis—meaning that no animal may be slaughtered and dressed unless an inspector has examined it." Renée Johnson, Cong. Research Serv., RS22600, *The Federal Food Safety System: A Primer* 6 (2016). "Inspectors monitor operations, check sanitary conditions, examine ingredient levels and packaging, review records, verify food safety plans, and conduct statistical sampling and testing of products for pathogens and residues during their inspections." *Id.* (footnote omitted).

Any attempt to justify the Sales Ban as a health and safety measure is further undermined by its exceptions. *See Raymond Motor Transp.*, 434 U.S. at 444–45 (asserted safety interest was undermined "by the maze of exemptions … the State itself allows"); *Kassel*, 450 U.S. at 671 n.12, 675–78 (plurality) (similar). The Sales Ban applies only to "[w]hole pork meat" and "[w]hole veal meat," Cal. Health & Safety Code § 25990(b)(1)–(2), both of which exclude "combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products," *id.* § 25991(u)–(v). In addition, the statute exempts "any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act." *Id.* § 25991(o); *see also id.* § 25991(i) (defining "[f]arm" to exclude such establishments). The confinement requirements also do not apply to live animal markets, *id.*; during medical research, veterinary care, transportation, exhibition, or slaughter, *id.* § 25992(a)–(e); during temporary periods for animal husbandry purposes, *id.* § 25992(g); or during the five days before a sow's expected delivery date and when it is nursing piglets, *id.* § 25992(f). These exceptions belie any notion that the prohibited sales pose a public-health danger.

Given the lack of scientific evidence that confining breeding sows and veal calves as required by Proposition 12 has any consumer health or safety benefit, the existing federal inspection scheme, and the statute's numerous exceptions, the Sales Ban cannot "pass the 'strictest scrutiny.'" *Or. Waste*, 511 U.S. at 101 (quoting

Hughes, 441 U.S. at 337). California's burden of justification is "heavy," *id.*, and cannot be met by the unsupported "incantation of a purpose to promote the public health or safety," *Kassel*, 450 U.S. at 670 (plurality); *see also Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 366 (1992).

California also has nondiscriminatory alternatives. If it is concerned that the prohibited sales pose a health and safety risk not already adequately addressed by the federal inspection scheme, it can subject pork and veal meat to additional inspection at the point of sale to consumers. *See, e.g.*, Cal. Health & Safety Code § 114035. And it can educate consumers about the safe handling and cooking of raw meats. What it cannot do is ban interstate trade in pork and veal based on unsupported assertions that farming practices in other States and countries pose speculative risks to California consumers. *Cf. Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976) ("Mississippi is not privileged under the Commerce Clause to force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk.").

B. The Sales Ban Controls Extraterritorial Commerce.

The Sales Ban also violates the extraterritoriality doctrine, which precludes "application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336. This doctrine, which stems from both the

Commerce Clause and structural federalism, reflects "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 with their respective spheres." *Id.* at 335–36 (footnote omitted).[9] Under this doctrine, "States … may not attach restrictions to exports or imports in order to control commerce in other States," as this would "extend [their] police power beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393 (citing *Baldwin*, 294 U.S. 511).

1. This case is controlled by *Carbone* and *Baldwin*. Proposition 12 attaches the exact same type of restriction to imports as the law struck down in *Baldwin*—a ban on in-state sales based not on the nature of the product or its attributes, but on whether out-of-state commerce was conducted according to in-state terms. *See Baldwin*, 294 U.S. 511 (striking down New York law banning in-state sale of milk acquired out-of-state at a price below New York's minimum price). The sales ban in *Baldwin* improperly sought to "project [New York's] legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521. Likewise, here, Proposition 12's Sales Ban is designed expressly to control farming practices that occur wholly outside California—the housing of breeding sows and

[9] 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); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

veal calves on farms in other States and countries. *See* Prop. 12 § 2 (Proposition 12's stated purpose is to "phas[e] out" the prohibited confinement methods); *Healy*, 491 U.S. at 336 ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.").

California lacks power to impose its confinement standards on out-of-state farmers by levying on them civil or criminal penalties for noncompliance. *See, e.g.*, *Baldwin*, 294 U.S. at 521; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("[N]o single State [can] … impose its own policy choice on neighboring States."); *Bonaparte*, 104 U.S. at 594 ("No State can legislate except with reference to its own jurisdiction."). *Baldwin* makes clear that California also cannot regulate out-of-state farming practices "by indirection" by banning the in-state sale of wholesome imported meats unless the out-of-state farmer complied with California's confinement regulations. *See Baldwin*, 294 U.S. at 524 ("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.").[10]

[10] *Baldwin* also confirms that the Sales Ban's application only to in-state sales does not shield it from the extraterritoriality doctrine. The same was true of the sales ban in *Baldwin*, which restricted milk sales *only* in New York. *See* 294 U.S. at 519 & n.1. Under *Baldwin*, the Commerce Clause prohibits *de facto* extraterritorial state regulation even if the regulation is nominally predicated upon conduct that occurs within the State. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986) (the "mere fact that the effects" of a law "are triggered only by sales of [products] within the State … does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state").

Allowing California to do so would "extend the [State's] police power beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393 (citing *Baldwin*, 294 U.S. 511).

The district court dismissed the controlling standard from *Carbone* as "dicta." ER22 n.11. But the relevant language in *Carbone* reflected the Court's *reason* for rejecting a justification for the law, and thus was an essential part of the Court's holding. In fact, *Carbone* extended the Court's prior holding for "imports," which were at issue in *Baldwin*, to "exports," which were at issue in *Carbone*. And this Court has applied *Carbone* to prevent California from restricting *exports* to control out-of-state commerce. *See Daniels*, 889 F.3d at 615–16 & n.14 (holding that a California statute regulating the out-of-state disposal of medical waste exported from California likely violated the extraterritoriality doctrine). The issue here is whether the same rule that unquestionably applies to *exports* also applies to *imports*. *Carbone* and *Baldwin* confirm that it does. *See Carbone*, 511 U.S. at 593 ("States … may not attach restrictions to *exports or imports* in order to control commerce in other States." (emphasis added) (citing *Baldwin*, 294 U.S. 511)).

2. The district court, however, ruled this case was controlled by this Court's cases upholding California's and Oregon's low-carbon fuel regulations. ER22 n.11 (concluding that these cases allow States to regulate out-of-state "production *methods*, rather than the products themselves"). But that ignores the critical limitations in those decisions. The fuel-regulation cases rule only that a State "may

regulate with reference to *local harms*, structuring its internal markets to set *incentives* for firms to produce *less harmful products* for sale in [the State]." *Rocky Mountain*, 730 F.3d at 1104 (emphases added). That is not what Proposition 12 does. Unlike the fuel regulations, Proposition 12 does not merely create price "incentives"; it *bans* noncompliant products from the market. *Cf. id.* at 1105 ("No form of fuel would be excluded…."). Moreover, unlike the fuels in *Rocky Mountain*, whose production and use were alleged to cause "harms … within the state's borders," *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 953 (9th Cir. 2019) (emphasizing the alleged impact "on California's own air quality, snowpack, and coastline"), here neither the prohibited sales nor the out-of-state confinement conditions cause any harms in California, *see supra*, Part I.A.3.

Even *with* these limitations, six judges of this Court concluded that California's fuel regulation violated the extraterritoriality doctrine. *See Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 517–19 (9th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc). At a minimum, there is a "serious question" whether the Sales Ban, which *eliminates* these critical limitations on the regulation of out-of-state production processes, violates the extraterritoriality doctrine.

That is especially so because other circuits have struck down laws that are materially indistinguishable from Proposition 12. In *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017), the Seventh Circuit struck down an Indiana law that

banned the in-state sale of vaping products unless the manufacturers' out-of-state production facilities complied with Indiana's specifications. Comparing the law to a hypothetical attempt to regulate the conditions in "out-of-state barns where the cows are milked," the court held that the law impermissibly "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.[11]

Similarly, in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69–70 (1st Cir. 1999), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the First Circuit struck down a Massachusetts law that 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 this restriction on government contracts violated the extraterritoriality doctrine because "both the intention and effect of the statute [was] to change conduct beyond Massachusetts's borders." *Id.* at

[11] *Legato Vapors* reaffirmed earlier Seventh Circuit precedent striking down laws that restricted waste imports to control out-of-state recycling practices. *See Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153–54 (7th Cir. 1999); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657–61 (7th Cir. 1995).

69. Just as Massachusetts could not "conditio[n] state procurement decisions on conduct that occurs in Burma," *id.*, California cannot condition access to its market on out-of-state farmers' compliance with Proposition 12's confinement restrictions.

3. The district court "hesitate[d]" to apply the extraterritoriality doctrine here given *Harris*'s limitation of the doctrine to the price-control context. ER21. But that holding—which was the *only* reason the *Harris* Court gave for rejecting the extraterritoriality challenge there, 729 F.3d at 951—cannot be reconciled with this Court's subsequent en banc decision in *Christies*, which applied the extraterritoriality doctrine to strike down a non-price control. *See* 784 F.3d at 1324–25 & n.1 (striking down statute requiring out-of-state art sellers to locate the artist and pay a royalty); *see also Daniels*, 889 F.3d at 615–16 (applying extraterritoriality doctrine to California law regulating disposal of medical waste products outside California). Given the en banc decision in *Christies*, any "contention that the extraterritoriality doctrine is limited to price control or price affirmation statutes is without merit." *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1024 (E.D. Cal. 2017).[12]

Nor does *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), restrict the extraterritoriality doctrine to price controls. *Walsh*

[12] Nor is *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136 (9th Cir. 2015), to the contrary. *See id.* at 1146 (upholding shark fin ban because it did "not fix prices in other states, require those states to adopt California standards, *or* attempt to regulate transactions conducted wholly out of state" (emphasis added)).

addressed alleged effects on pharmaceutical *prices*, *id.* at 658, and held only that the indirect pricing effects there did not amount to extraterritorial control, *id.* at 669. The Court did not address whether the doctrine applies outside the price-control context, and certainly did not overrule earlier cases like *Carbone*, which apply the doctrine to non-price controls. *See also Healy*, 491 U.S. at 333 n.9 (observing that the plurality's extraterritoriality holding in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)—a non-price control case—"significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation"); *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 670 (4th Cir. 2018) (rejecting argument that the extraterritoriality doctrine is limited to price-affirmation statutes), *cert. denied*, 139 S. Ct. 1168 (2019) (mem.); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) (same); *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 doctrine [to price controls], and indeed has applied it more broadly."). An *ad hoc* price-control limitation would also be unprincipled—under *Healy*, States lack authority to control *any* "conduct beyond the boundaries of the State," not just prices. 491 U.S. at 336.

4. The unconstitutionality of the Sales Ban is further confirmed by "considering how [it] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*; *see Daniels*, 889 F.3d at 616; *Legato*, 847 F.3d at 834. Other States

may follow California's lead—indeed, Massachusetts has already enacted a similar sales ban. *See* Prevention of Farm Animal Cruelty Act, 2016 Mass. Acts 1052. If every State enacted a similar sales ban, producers would be forced to choose between complying with the most restrictive confinement regulation, segregating their operations to serve different States, or abandoning certain markets altogether. The result would be "to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude," *Healy*, 491 U.S. at 337, and to foment "rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation," *Baldwin*, 294 U.S. at 522.

Moreover, if California can ban the sale of wholesome pork and veal because it objects to the way farm animals are housed in other States, there would be no reason California or any other State could not likewise ban the sale of any other imported product solely because it objects to how it was produced. *See Natsios*, 181 F.3d at 70 ("If Massachusetts can enact a Burma law, so too can California or Texas."). By the same logic, California could ban the sale of goods produced by workers who were paid less than a California-specified wage or who worked more than a California-specified number of hours. Texas, in turn, could ban the sale of goods produced by companies that discriminate against employees based on their political viewpoints or whose workers lack right-to-work protections. Embracing a

principle with such far-reaching implications would spell the end of the national common market the Commerce Clause was enacted to protect.

5. Finally, there is no warrant for the district court's skepticism about the extraterritoriality doctrine's "continued vitality." ER20 n.10. As the court acknowledged, the Supreme Court has "not expressly overruled the doctrine," *id.*—or even called it into question. Indeed, this Circuit and others continue to enforce the doctrine when States overstep their bounds. *See, e.g.*, *Christies*, 784 F.3d at 1323–25; *Daniels*, 889 F.3d at 615–16; *Legato*, 847 F.3d at 829–37; *Frosh*, 887 F.3d at 667–73; *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 373–76 (6th Cir. 2013); *Natsios*, 181 F.3d at 69–70; *North Dakota*, 825 F.3d at 919–22 (opinion of Loken, J.).

Moreover, as the Supreme Court has long held, it is a fundamental feature of our federal system that each State's legislative jurisdiction is defined and limited by its territorial boundaries. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) ("The sovereignty of each State … implie[s] a limitation on the sovereignty of all its sister States." (alteration and omission in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980))); *Watson v. Emp'rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954) (each "state is without power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries"); *Brown v. Fletcher's Estate*, 210 U.S. 82, 89 (1908) (the "several States are of equal dignity and authority, and the independence

of one implies the exclusion of power from all others").[13] By "pass[ing] beyond [its] own limits, and the rights of [its] own citizens," and attempting to regulate and "phas[e] out" out-of-state farming practices that cause no in-state harms, California has exercised a power it does not possess and that is "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).

C. The Sales Ban Unduly Burdens Interstate Commerce.

The Sales Ban also violates the Commerce Clause because the burden it imposes on interstate and foreign commerce "is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142; *see, e.g.*, *Union Pac. R.R. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 870–72 (9th Cir. 2003). This is not a case where an otherwise legitimate regulation has "indirect" or "incidental" interstate effects. *Pike*, 397 U.S. at 142. The Sales Ban's express purpose is to control interstate and foreign commerce by compelling out-of-state farmers to make costly changes to their facilities to "phas[e] out" the prohibited confinement methods or be excluded from the California market. Because the Sales Ban directly and disproportionately burdens

[13] *See also, e.g.*, 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).

interstate commerce, and does not produce *any* legitimate local benefits, it "cannot be harmonized with the Commerce Clause." *Kassel*, 450 U.S. at 671 (plurality).

1. The Sales Ban substantially burdens interstate commerce in veal and pork. As detailed in the declarations NAMI submitted, and as discussed further below in Part II, the Sales Ban requires out-of-state veal and pork farmers to either abandon the California market, substantially reduce their production, 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 who do business in California to bear increased costs for Proposition 12-compliant animals and to reorganize their operations to serve the California market. *See* ER5. The result will be less veal and pork, produced, processed, and distributed less efficiently, to fewer consumers, at higher prices. These burdens on interstate commerce in pork and veal are undoubtedly substantial. *See Pike*, 397 U.S. at 140, 144–45 (finding Commerce Clause violation where regulation's "practical effect" required plaintiff to build facilities "that would take many months to construct and would cost approximately $200,000"); *Raymond Motor Transp.*, 434 U.S. at 445; *Kassel*, 450 U.S. at 674 (plurality).

The district court erred in finding "no serious argument that Proposition 12 imposes any substantial burden on interstate commerce." ER25. *First*, the court concluded that "these anticipated effects do not demonstrate that Proposition 12 will

interfere with the flow of veal or pork products into California." ER24. But this ignores that for producers who cannot feasibly comply with Proposition 12—such as Catelli Brothers, *see* ER133–34 (¶¶9–10)—the Sales Ban *blocks* the flow of veal and pork products into California. For this reason alone, the Sales Ban significantly "impair[s] the free flow of … products across state borders." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154–55 (9th Cir. 2012).[14] In ruling to the contrary, the district court "attached insufficient significance to the interference effected by the [Sales Ban] upon the national interest in freedom for the national commerce." *Great Atl.*, 424 U.S. at 375 (holding that Mississippi regulation violated Commerce Clause under *Pike* because it excluded "wholesome milk produced in Louisiana" from Mississippi (alterations omitted)).

Second, for those who continue selling pork and veal in California, the district court wrongly dismissed "the cost of complying with Proposition 12's requirements." ER25. The Sales Ban "substantially increase[s] the cost" of interstate trade with California. *Raymond Motor Transp.*, 434 U.S. at 445. Farmers will have to spend millions of dollars constructing and maintaining new barn space, and to com-

[14] This case is thus unlike *Optometrists*, where the plaintiffs "produced [no] evidence that the challenged laws interfere[d] with the flow of eyewear into California," and "any optician, optometrist, or ophthalmologist remain[ed] free to import eyewear originating anywhere into California and sell it there." 682 F.3d at 1155.

pensate for these costs, processers, packers, and distributors will have to pay a premium for Proposition 12-compliant animals. And, unless they follow Proposition 12 nationwide, they will have to reorganize slaughter, packing, and distribution operations to segregate animals and products that comply with the law from those that do not. At each step, from farm to table, the Sales Ban "engenders inefficiency and added expense." *Kassel*, 450 U.S. at 674 (plurality). The district court erred in ignoring these enormous costs. *See Raymond Motor Transp.*, 434 U.S. at 445 & n.21.

Third, the district court erred in dismissing these burdens as irrelevant. *See* ER24–25. Discrimination and interference with activities that require uniform regulation are not the only kinds of burdens that are "suspect" under *Pike*. This Court also has considered, for example, whether the law has significant extraterritorial effects or imposes burdens that fall primarily on out-of-state interests. *See Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994). These "types of impacts on interstate commerce are of special importance in the balance with the state's putative interest," *id.*, because "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected," *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945).

That is the case here. California produces no milk-fed veal and accounts for a small percentage of U.S. hog production. ER101 (¶16 & Ex.3). Proposition 12's

burdens thus fall primarily on out-of-state interests who have no representation in California's political process. Moreover, with regard to the Sales Ban, the interests of the California producers who are affected by Proposition 12 are directly opposed to the interests of out-of-state producers. The Sales Ban imposes no incremental burden on in-state producers because they are subject to § 25990(a)'s California-specific confinement prohibition. And, without the Sales Ban, in-state producers would be at a competitive disadvantage vis-à-vis out-of-state producers who could sell their products in California without complying with Proposition 12's costly confinement requirements. The affected in-state interests thus have every incentive to advocate for a sales ban to level the playing field, as they did when they lobbied for AB 1437, and as *amicus* Association of California Egg Farmers has done in this very case.

2. These substantial burdens violate the Commerce Clause because there is not "even a colorable showing" that the Sales Ban advances any legitimate local interest. *Optometrists*, 682 F.3d at 1156 n.17.[15] The *only* interest defendants and their intervenors advanced below was California's asserted interest in animal welfare. But while California undoubtedly has a legitimate interest in the welfare of animals *in California*, the challenged applications of the Sales Ban—to pork and veal produced *outside California*—do not advance that interest. And California has no legitimate

[15] Here, the State has not advanced *any* local health, safety, or welfare justification for Proposition 12. Nor could it. *See supra*, Part I.A.3.

local interest in dictating the housing conditions for farm animals in other States and countries, because, as the Supreme Court has held, a State has no legitimate interest in "restrict[ing] … imports in order to control commerce in other States." *Carbone*, 511 U.S. at 393 (town could not justify its ordinance as a way to prevent locally generated waste from causing out-of-town environmental contamination).[16]

But even if California had a cognizable interest in out-of-state farming conditions, any such interest is clearly outweighed by the burdens the Sales Ban imposes on interstate commerce. That is particularly so given (i) the ban's disproportionate impact on out-of-state interests, and (ii) its under-inclusiveness. As to the first, California has targeted out-of-state producers for burdens it is unwilling to impose on its own farmers when doing so would harm a major California industry. ER101 (¶16). California is the nation's leading milk producer; its dairy farmers raise thousands of calves in production systems similar to out-of-state milk-fed veal facilities, with far less than 43 square feet per calf. *Id.* Yet, because these calves are not "raised

[16] *Harris* is not to the contrary. The Court there deferred to *the legislature's* judgment that the *foie gras* sales ban would contribute to "preventing animal cruelty *in California*." 729 F.3d at 952–53 (emphasis added). Here, defendants did not defend the Sales Ban's challenged applications as a means of preventing animal cruelty in California, nor could they. And there is no legislative judgment to defer to because Proposition 12 was a ballot initiative. *See, e.g.*, *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 944–45 (9th Cir. 1995) (en banc), *vacated on other grounds*, 520 U.S. 43 (1997); *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1167 (S.D. Cal. 2019) ("No federal court has deferred to the terms of a state ballot proposition where the proposition trenches on a federal constitutional right…."), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019).

for veal," they are not subject to Proposition 12—not even, apparently, when they are "culled" for production of "bob" veal, of which California is, again, a leading producer. ER101–02 (¶¶16–17). As to the second, the Sales Ban is riddled with exceptions that permit sales of pork and veal products even when the animals were not housed in compliance with Proposition 12. *See supra*, Part I.A.3; *Raymond Motor Transp.*, 434 U.S. at 444–45 ("maze of exemptions" undermined State's asserted interest); *Kassel* 450 U.S. at 671 n.12, 675–78 (plurality).

California's asserted interest in animal welfare should thus be disregarded, or heavily discounted, because that interest is important to California only when out-of-state interests bear the economic brunt of the regulation. *See Kassel*, 450 U.S. at 675–76 (plurality) ("Less deference to the legislative judgment is due … where the local regulation bears disproportionately on out-of-state residents and businesses."). California should not be permitted to regulate the out-of-state veal and pork industries, and the independent farmers who for generations have labored in these industries, based on its asserted animal-welfare interest when it has exempted major California industries that raise similarly situated animals from regulation.

II. NAMI's Members Will Suffer Irreparable Harm Absent An Injunction.

As NAMI showed below, and the district court did not dispute, NAMI's members will suffer severe irreparable harm unless the Sales Ban is preliminarily enjoined. *See* ER5, 26. This factor weighs strongly in favor of a preliminary injunction.

See, e.g., *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057–59 (9th Cir. 2009); *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851–52 (9th Cir. 2009), *vacated on other grounds by Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012).

First, the violation of NAMI members' constitutional rights is itself irreparable harm. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) ("We have stated that an alleged constitutional infringement will often alone constitute irreparable harm."); *see also, e.g.*, *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[D]eprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury."); *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1185 (D. Colo. 2001) (same); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) (same).

Second, Proposition 12 puts NAMI's members to a "Hobson's choice"—either comply with Proposition 12 at enormous cost or be excluded from the California market. *See Am. Trucking*, 559 F.3d at 1057–59. Either way, NAMI's members will be forced to bear substantial costs (i) in direct outlays to comply with Proposition 12's confinement requirements, to the extent compliance is even feasible, or (ii) in lost revenue and customer goodwill, to the extent they are forced to exit California.

And because California's sovereign immunity precludes recovery of these costs from the State, there is no adequate remedy at law. *See Cal. Pharmacists Ass'n*, 563 F.3d at 852. These harms are substantial, imminent, and irreparable, and will be suffered by thousands of farmers throughout the country absent an injunction.

As to veal, Proposition 12's 43-square-foot requirement—which took effect on January 1, 2020—imposes ruinous burdens on veal farmers. As explained by the President of the American Veal Association, the milk-fed veal industry—which consists of roughly 600 family farms located primarily in Indiana, Michigan, New York, Ohio, Pennsylvania, and Wisconsin—just spent 10 years and $150 million transitioning their barns to group housing without tethering. ER98–99 (¶¶3–7). With expenditures averaging around $225,000 per farm, many farmers financed this transition by taking on long-term debt, which they are still paying down, and entering into long-term production contracts with processers to cover the costs. ER99 (¶7). Proposition 12 "upset[s] these investment-backed expectations" by requiring veal farmers to more than *double* their square footage per calf, without any evidence that doing so will improve either calf welfare or food safety. ER99 (¶8).[17]

[17] Many veal farmers constructed their barns in line with European Union standards, which before Proposition 12 were the world's most demanding, and which impose square-footage requirements that vary depending on the calf's weight, maxing out at 19.4 square feet per calf. ER99 (¶6). In requiring 43 square feet per calf, Proposition 12 mandates that veal farmers provide *all* their calves with more than *twice* as much floorspace as the EU requires for even the largest calves. ER99 (¶8).

Because it was impossible to construct the necessary additional barn space by January 1, 2020, veal farmers now have two choices: either radically cut production or exit the California market. Either way, they will suffer significant unrecoverable losses. *See* ER99–100 (¶¶9–12), ER133–34 (¶¶8–10), ER137–38 (¶¶6–10). For NAMI member Marcho Farms, which derives nearly 20% of its business from California, either alternative will likely require the company to implement layoffs. ER137–38 (¶¶6–10). For NAMI member Catelli Brothers, the only economically viable path is to abandon the California market, losing millions of dollars in annual sales and suffering reputational harm and loss of customer goodwill. ER134 (¶10). In the longer term, to restore pre-Proposition 12 production levels, veal farmers would have to make expensive new investments to reconstruct their existing barns and construct new ones—*if*, that is, they can obtain the necessary financing, which is doubtful given that they are still paying down the debt from their last round of capital improvements, and it is unclear whether supplying the California market will be economically viable under Proposition 12. ER100–01 (¶¶13–15), ER138–39 (¶¶11–14). As a result, the financial viability of many veal farms—primarily small family farms like those in Pennsylvania Amish country—is being jeopardized. *Id.*

The situation is likewise dire for pork producers: they must either come into compliance with Proposition 12 or exit the California market, and either alternative entails significant unrecoverable costs. To comply with the "turnaround" standard—

which may currently be in effect—pork producers and the independent farmers with whom they contract would have to make extensive changes to their facilities and operations. *See* ER141–42 (¶¶4–5), ER147–49 (¶¶9–13), ER153 (¶¶5–6), ER158–60 (¶¶9–11), ER165–66 (¶¶7–8, 10). At a minimum, they would have to eliminate the "gestation stalls" in which many sows are housed throughout their pregnancies. *See id.* And they may also have to eliminate the "breeding stalls" in which sows are housed from insemination until confirmation of pregnancy. *See id.*[18]

Furthermore, to continue serving the California market at current production levels when the square-footage requirement for breeding sows takes effect in January 2022, suppliers immediately would have to begin the costly and time-consuming process of redesigning facilities and constructing new barn space, as well as persuading independent pig farmers who supply them to do the same by renegotiating production contracts. ER141–42 (¶¶4–6), ER148–49 (¶¶10–13), ER153–54 (¶¶4–8), ER158–60 (¶¶9–13), ER165–66 (¶¶8–12). These multi-layered efforts to satisfy Proposition 12's requirements would need to begin immediately because producers cannot "simply flip a switch" and come into compliance. *Id.*; *see Am. Trucking*, 559 F.3d at 1058. And they would be enormously expensive. Smithfield estimates that

[18] Proposition 12 exempts animals from its confinement requirements "[d]uring examination, testing, individual treatment, or operation for veterinary purposes." Cal. Health & Safety Code § 25992(b). It is unclear whether "breeding stalls" as currently used in the pork industry would fall within this statutory exception.

the costs to alter its facilities to comply with Proposition 12's square-footage requirement "would exceed $100 million in capital investments and increased operating costs." ER148 (¶10); *see also* ER160 (¶12) ("Restructuring Clemens' and its suppliers' existing sow farms would require an exceptionally large capital investment in excess of $45 million."). Compliance also would impose substantial costs on the processing and distribution of meat destined for California, which would require segregated production and distribution lines. ER142–43 (¶¶7–10), ER149 (¶14), ER154–55 (¶¶9–11), ER160–61 (¶14), ER167 (¶¶13–15).

Alternatively, Proposition 12 will force pork suppliers from the California market in whole or in part, which will likewise cause irreparable harm to NAMI's members by denying them the ability to generate revenue from the California market and harming their goodwill among customers. ER143 (¶¶11–12), ER149–50 (¶15), ER155 (¶¶12–13), ER161 (¶¶15–16), ER167–68 (¶¶16–17). California is an important market for pork products, with more than 39 million consumers, or 12% of the U.S. market. ER149–50 (¶15). Exclusion from California would thus be a significant lost opportunity. Clemens estimates that its cumulative net revenue financial impact from exiting California "could be in excess of $150 million per year." ER161 (¶16); *see also* ER155 (¶12) (exiting California would cause Tyson to "los[e] millions of dollars in annual sales"); ER143 (¶11) ("If Hormel were driven from the California market, it would lose tens of millions of dollars in annual sales.").

In sum, NAMI's members and thousands of independent veal and pork farmers throughout the nation are caught on the horns of a dilemma. Whichever alternative they select—comply with Proposition 12 or exit the California market—will inflict significant financial and other injuries, none of which are compensable through a damages action because of California's sovereign immunity. These irreparable harms weigh heavily in favor of preliminary injunctive relief.

III. The Public Interest And Equities Favor An Injunction.

Finally, the public interest and balance of equities strongly favor a preliminary injunction. Where, as here, governmental action is challenged, these inquiries merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Both factors require compliance with the Constitution. *See Cal. Pharmacists Ass'n*, 563 F.3d at 852–53 ("[I]t is clear that it would not be equitable or in the public's interest to allow the state to continue to violate the requirements of federal law, especially when there are no adequate remedies available to compensate [plaintiffs] for the irreparable harm that would be caused by the continuing violation."); *Melendres*, 695 F.3d at 1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights").

Moreover, NAMI's members will suffer severe irreparable harm without a preliminary injunction, *see supra*, Part II, whereas California will suffer no harm if the Sales Ban is put on hold pending the lawsuit, since the ban serves no legitimate

local interest, *see supra*, Parts I.A.3, I.C.2. As a result, the balance of hardships "tips sharply" in NAMI's favor, making injunctive relief appropriate where, as here, NAMI has raised "serious questions going to the merits." *Daniels*, 889 F.3d at 615; *see also hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019).

CONCLUSION

For these reasons, the Court should reverse and remand for entry of a preliminary injunction against implementation and enforcement of the Sales Ban as applied to imported pork and veal produced outside California.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiff hereby states that it does not know of any related cases pending in this Court.

Date: January 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 12,925 words, excluding the portions exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

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STATUTORY ADDENDUM

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PROPOSITION 12

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends and adds sections to the Health and Safety Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

The people of the State of California do enact as follows:

SECTION 1. This act shall be known, and may be cited, as the Prevention of Cruelty to Farm Animals Act.

SEC. 2. The purpose of this act 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.

SEC. 3. Section 25990 of the Health and Safety Code is amended to read:

25990. PROHIBITIONS. In addition to other applicable provisions of law~~,~~*:*

(a) ~~a person~~ *A farm owner or operator within the state* shall not ~~tether or confine~~ *knowingly cause* any covered animal~~,~~ *to be confined in a cruel manner*. ~~on a farm, for all or the majority of any day, in a manner that prevents such animal from:~~

~~(a) Lying down, standing up, and fully extending his or her limbs; and~~

~~(b) Turning around freely.~~

(b) A business owner or operator shall not knowingly engage in the sale within the state of any of the following:

(1) 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.

(2) 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.

(3) Shell egg that the business owner or operator knows or should know is the product of a covered animal who was confined in a cruel manner.

(4) Liquid eggs that the business owner or operator knows or should know are the product of a covered animal who was confined in a cruel manner.

SEC. 4. Section 25991 of the Health and Safety Code is amended to read:

25991. DEFINITIONS. For the purposes of this chapter, the following terms have the following meanings:

(a) "Breeding pig" means any female pig of the porcine species kept for the purpose of commercial breeding who is six months or older or pregnant.

(b) "Business owner or operator" means any person who owns or controls the operations of a business.

(c) "Cage-free housing system" means an indoor or outdoor controlled environment for egg-laying hens within which hens are free to roam unrestricted; are provided enrichments that allow them to exhibit natural behaviors, including, at a minimum, scratch areas, perches, nest boxes, and dust bathing areas; and within which farm employees can provide care while standing within the hens' usable floorspace. Cage-free housing systems include, to the extent they comply with the requirements of this subdivision, the following:

(1) Multitiered aviaries, in which hens have access to multiple elevated platforms that provide hens with usable floorspace both on top of and underneath the platforms.

(2) Partially slatted systems, in which hens have access to elevated flat platforms under which manure drops through the flooring to a pit or litter removal belt below.

(3) Single-level all-litter floor systems bedded with litter, in which hens have limited or no access to elevated flat platforms.

(4) Any future systems that comply with the requirements of this subdivision.

~~(a)~~*(d)* "Calf raised for veal" means any calf of the bovine species kept for the purpose of producing the food product described as veal.

(e) "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.

(4) After December 31, 2019, confining an egg-laying hen with less than 144 square inches of usable floorspace per hen.

(5) After December 31, 2021, confining an egg-laying hen with less than the amount of usable floorspace per hen required by the 2017 edition of the United Egg Producers' Animal Husbandry Guidelines for U.S. Egg-Laying Flocks: Guidelines for Cage-Free Housing or in an enclosure other than a cage-free housing system.

~~(b)~~*(f)* "Covered animal" means any ~~pig during pregnancy,~~ calf raised for veal, *breeding pig,* or egg-laying hen who is kept on a farm.

~~(c)~~*(g)* "Egg-laying hen" means any female domesticated chicken, turkey, duck, goose, or ~~guinea fowl~~ *guineafowl* kept for the purpose of egg production.

~~(d)~~*(h)* "Enclosure" means ~~any cage, crate, or other~~ *a* structure ~~(including what is commonly described as a "gestation crate" for pigs; a "veal crate" for calves; or a "battery cage" for egg-laying hens)~~ used to confine a covered animal *or animals*.

~~(e)~~*(i)* "Farm" means the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber; and does not include live animal markets~~.~~*, establishments at which mandatory inspection is provided under the Federal Meat Inspection Act (21 U.S.C. Sec. 601 et seq.), or official*

plants at which mandatory inspection is maintained under the federal Egg Products Inspection Act (21 U.S.C. Sec. 1031 et seq.).

(j) "Farm owner or operator" means any person who owns or controls the operations of a farm.

~~(f)~~*(k)* "Fully extending ~~his or her~~ *the animal's* limbs" means fully extending all limbs without touching the side of an enclosure, ~~including, in the case of egg-laying hens, fully spreading both wings without touching the side of an enclosure or other egg-laying hens~~ *or another animal*.

(l) "Liquid eggs" means eggs of an egg-laying hen broken from the shells, intended for human food, with the yolks and whites in their natural proportions, or with the yolks and whites separated, mixed, or mixed and strained. Liquid eggs do not include combination food products, including pancake mixes, cake mixes, cookies, pizzas, cookie dough, ice cream, or similar processed or prepared food products, that are comprised of more than liquid eggs, sugar, salt, water, seasoning, coloring, flavoring, preservatives, stabilizers, and similar food additives.

~~(g)~~*(m)* "Person" means any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate.

~~(h) "Pig during pregnancy" means any pregnant pig of the porcine species kept for the primary purpose of breeding.~~*(n) "Pork meat" means meat, as defined in Section 900 of Title 3 of the California Code of Regulations as of August 2017, of a pig of the porcine species, intended for use as human food.*

(o) "Sale" means a commercial sale by a business that sells any item covered by this chapter, but does not include any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act (21 U.S.C. Sec. 601 et seq.), or any sale undertaken at an official plant at which mandatory inspection is maintained under the federal Egg Products Inspection Act (21 U.S.C. Sec. 1031 et seq.). For purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 25990.

(p) "Shell egg" means a whole egg of an egg-laying hen in its shell form, intended for use as human food.

~~(i)~~*(q)* "Turning around freely" means turning in a complete circle without any impediment, including a tether, and without touching the side of an enclosure *or another animal*.

(r) "Uncooked" means requiring cooking prior to human consumption.

(s) "Usable floorspace" means the total square footage of floorspace provided to each covered animal, as calculated by dividing the total square footage of floorspace provided to the animals in an enclosure by the number of animals in that enclosure. In the case of egg-laying hens, usable floorspace shall include both groundspace and elevated level flat platforms upon which hens can roost, but shall not include perches or ramps.

(t) "Veal meat" means meat, as defined in Section 900 of Title 3 of the California Code of Regulations as of August 2017, of a calf raised for veal intended for use as human food.

(u) "Whole pork meat" means any uncooked cut of pork, including bacon, ham, chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin, or cutlet, that is comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives. Whole pork meat does not include combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products, that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.

(v) "Whole veal meat" means any uncooked cut of veal, including chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin, or cutlet, that is comprised entirely of veal meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives. Whole veal meat does not include combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products, that are comprised of more than veal meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.

SEC. 5. Section 25992 of the Health and Safety Code is amended to read:

25992. EXCEPTIONS. This chapter shall not apply:

(a) During ~~scientific or agricultural~~ *medical* research.

(b) During examination, testing, individual treatment, or operation for veterinary purposes.

(c) During transportation.

(d) During rodeo exhibitions, state or county fair exhibitions, 4-H programs, and similar exhibitions.

(e) During the slaughter of a covered animal in accordance with the provisions of Chapter 6 (commencing with Section 19501) of Part 3 of Division 9 of the Food and Agricultural Code, relating to humane methods of slaughter, and other applicable law and regulations.

(f) To a *breeding* pig during the ~~seven-day~~ *five-day* period prior to the *breeding* pig's expected date of giving birth, *and any day that the breeding pig is nursing piglets.*

(g) During temporary periods for animal husbandry purposes for no more than six hours in any 24-hour period, and no more than 24 hours total in any 30-day period.

SEC. 6. Section 25993 of the Health and Safety Code is amended to read:

25993. ENFORCEMENT. *(a) The Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019.*

(b) Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment. *In addition, a violation of subdivision (b) of Section 25990 constitutes unfair competition, as defined in Section 17200 of the Business and Professions Code, and is punishable as prescribed in Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code.*

(c) The provisions of this chapter relating to cruel confinement of covered animals and sale of products shall supersede any conflicting regulations, including conflicting regulations in Chapter 6 (commencing with Section 40601) of Subdivision 6 of Division 2 of Title 22 of the California Code of Regulations.

SEC. 7. Section 25993.1 is added to the Health and Safety Code, to read:

25993.1. It shall be a defense to any action to enforce subdivision (b) of Section 25990 that a business owner or operator relied in good faith upon a written certification by the supplier that the whole veal meat, whole pork meat, shell egg, or liquid eggs at issue was not derived from a covered animal who was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner.

SEC. 8. This act shall be amended only by a statute approved by a vote of four-fifths of the members of both houses of the Legislature. Any amendment of this act shall be consistent with and further the purposes of this act.

SEC. 9. If any provision of this act, or the application thereof to any person or circumstances, is held invalid or unconstitutional, that invalidity or unconstitutionality shall not affect other provisions or applications of this act that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this act are severable.