

1 HOGAN LOVELLS US LLP
David W. Skaar (SBN 265377)
2 1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
3 Tel: (310) 785-4600
Fax: (310) 785-4601
4 david.skaar@hoganlovells.com

5 *Counsel for Amici Curiae*

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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 NATIONAL PORK PRODUCERS
COUNCIL & AMERICAN FARM
11 BUREAU FEDERATION,

12 *Plaintiffs,*

13 v.

14 KAREN ROSS, in her official capacity as
Secretary of the California Department of
15 Food and Agriculture, SONIA ANGELL,
in her official capacity as Director of the
16 California Department of Public Health,
and XAVIER BECERRA, in his official
17 capacity as Attorney General of
California,

18 *Defendants,*

19 THE HUMANE SOCIETY OF THE
20 UNITED STATES; ANIMAL LEGAL
DEFENSE FUND; ANIMAL
21 EQUALITY; THE HUMANE
LEAGUE; FARM SANCTUARY;
22 COMPASSION IN WORLD
FARMING USA; and COMPASSION
23 OVER KILLING,

24 *Defendants-Intervenors.*

No. 3:19-cv-02324-W-AHG

**AMICUS BRIEF OF THE
NATIONAL ASSOCIATION OF
MANUFACTURERS, CHAMBER
OF COMMERCE OF THE
UNITED STATES OF AMERICA,
FOOD INDUSTRY
ASSOCIATION, NATIONAL
CATTLEMEN'S BEEF
ASSOCIATION, AND NATIONAL
MINING ASSOCIATION IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO MOTIONS TO
DISMISS AND FOR JUDGMENT
ON THE PLEADINGS**

The Honorable Thomas J. Whelan
Date: March 23, 2020
Courtroom: 3C

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IDENTITY AND INTEREST OF *AMICI CURIAE*

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

Founded in 1912, the Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses of every size, in every industry, and from every region of the country. Its membership includes businesses across all segments of the economy, including the agriculture and food sectors.

The Food Industry Association (FMI) works with and on behalf of the entire industry to advance a safer, healthier and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain—from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services—to amplify the collective work of the industry.

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

1 The National Mining Association (NMA) is a trade association representing
 2 over 260 corporations and organizations that produce most of America's coal,
 3 metals, and industrial and agricultural minerals. NMA's members include
 4 manufacturers of mining and mineral processing machinery and supplies,
 5 transporters, financial and engineering firms, and other businesses involved in the
 6 nation's mining industries.

7 *Amici* represent their members' interests in matters before Congress, the
 8 Executive Branch, and the courts. NAM and the Chamber regularly file *amicus*
 9 *curiae* briefs in cases that raise issues of vital concern to the Nation's business
 10 community, including cases involving challenges to state and federal regulations.
 11 Like NAM and the Chamber, FMI, NCBA, and NMA have filed *amicus curiae*
 12 briefs in cases that implicate issues of special concern to its members. In fact,
 13 several of the *amici* are also participating as *amici curiae* in a similar Commerce
 14 Clause challenge to Proposition 12 that is pending in the U.S. Court of Appeals for
 15 the Ninth Circuit. *See* Nat'l Ass'n of Mfrs. et al. Amicus Br., *N. Am. Meat Inst. v.*
 16 *Becerra*, No. 19-56408 (9th Cir. Jan. 10, 2020).

17 *Amici* have a strong interest in this case because Proposition 12 regulates the
 18 conduct of farmers, processors, wholesalers, and retailers nationwide. In addition,
 19 Proposition 12, if allowed to stand, may embolden other States to regulate beyond
 20 their borders, resulting in a complex web of inconsistent and competing
 21 extraterritorial regulations in the agriculture and food industries, and beyond.
 22 Fragmenting these interstate markets will create inefficiencies and could impose
 23 significant costs on industry and consumers.

24 INTRODUCTION AND SUMMARY OF THE ARGUMENT

25 “[T]he Commerce Clause . . . precludes the application of a state statute to
 26 commerce that takes place wholly outside of the State's borders, whether or not the
 27 commerce has effects within the State.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336
 28 (1989) (internal quotation marks omitted). In arguing that Proposition 12—a law

1 that seeks to control the out-of-State production of pork—does not regulate beyond
2 California’s borders, Defendants make a hash of that deeply rooted tradition.

3 State laws violate the Commerce Clause when they regulate extraterritorially
4 or substantially burden out-of-state producers absent a sufficient and legitimate
5 local interest. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476
6 U.S. 573, 578–579 (1986). Proposition 12 violates the Commerce Clause twice
7 over. First, Proposition 12 plainly regulates beyond California’s borders,
8 impinging on other States’ sovereign authority to legislate within their own
9 jurisdictions. Second, Proposition 12’s ostensible purpose—improving
10 confinement conditions for farm animals—is wholly untethered from any
11 California-specific nexus. Because more than 99% of Proposition 12’s effects will
12 take place out-of-state, the substantial and market-distorting compliance costs that
13 will be felt nationwide far outstrip any ancillary benefits that may flow to California
14 consumers.¹

15 Allowing Proposition 12 to stand spells havoc for our national food supply.
16 If California can enact laws controlling the production of out-of-state pork, so too
17 can Texas dictate how avocados and tomatoes are grown in California. States and
18 localities could also rely on the logic underlying this sales ban to justify setting
19 nationwide standards for virtually any geographically favored industry that is
20 elsewhere disfavored. Allowing States to assert their own policy preferences on
21 farmers, processors, wholesalers, and retailers nationwide will fracture national
22 markets into regional and local affairs. But that future is precisely what the framers
23 intended the Commerce Clause to prevent, as the federal courts have recognized in
24 striking down such regulatory overreaches since the Founding. Proposition 12 is no

25 ¹ Although this lawsuit concerns only Proposition 12’s unconstitutional regulation
26 of pork, because Proposition 12’s regulation of veal will have the same negative
27 effects on that industry, it too violates the Commerce Clause. *See Nat’l Ass’n of*
28 *Mfrs. et al. Amicus Br., N. Am. Meat Inst.*, No. 19-56408.

different.

ARGUMENT

I. CALIFORNIA’S EXTRATERRITORIAL AND UNDULY BURDENSOME PROHIBITION OF PORK SALES VIOLATES THE COMMERCE CLAUSE.

The United States Constitution provides that “Congress,” and Congress alone, “shall have Power . . . To regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cls. 1, 3. A core purpose of the Commerce Clause is “to prevent state governments from imposing burdens on unrepresented out-of-state interests merely to assuage the political will of the state’s represented citizens.” *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002) (holding that cap on nonresident hunting designed to increase recreational-hunting opportunities for Arizona citizens is subject to “strict scrutiny” under the Commerce Clause). Although local regulation will often and inevitably have some effects on interstate commerce, that Clause limits States’ and localities’ ability to “erect barriers against interstate trade.” *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (internal quotation marks omitted); *see also Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018) (“The mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions.”). The Commerce Clause thus “prevents the States from adopting protectionist measures” and “preserves a national market for goods and services.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

Federal courts apply a “two-tiered approach to analyzing state economic regulation under the Commerce Clause.” *Brown-Forman*, 476 U.S. at 578–579. The first tier includes state statutes that “directly regulate[] or discriminate[] against interstate commerce.” *Id.* at 579. Such regulations are “virtually *per se* invalid,” *id.*, and will be upheld only if the State proves, “under rigorous scrutiny,” that there are “no other means to advance a legitimate local interest” available,

1 *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *accord*
 2 *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). Statutes that impose “only
 3 indirect effects on interstate commerce and regulate[] evenhandedly” fall into the
 4 second tier. *Brown-Forman*, 476 U.S. at 579. For regulations in this tier, courts
 5 employ a balancing test that asks “whether the State’s interest is legitimate and
 6 whether the burden on interstate commerce clearly exceeds the local benefits.” *Id.*

7 Just as States have long claimed the right to use their general police powers
 8 to regulate interstate commerce in agriculture and food products, the federal courts
 9 have long put those claims to the test and, when appropriate, invalidated those
 10 attempts found constitutionally lacking. *See, e.g., Legato Vapors, LLC v. Cook*,
 11 847 F.3d 825, 830–832 (7th Cir. 2017) (holding invalid restrictions on out-of-state
 12 vaping manufacturers); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323
 13 (9th Cir. 2015) (en banc) (same, for the regulation of out-of-state art sales).
 14 Proposition 12 is no different. This classic extraterritorial regulation seeks to
 15 control the out-of-state production of pork. And, as with virtually all such
 16 regulations, California has not and cannot demonstrate that Proposition 12 survives
 17 the rigorous scrutiny the Constitution compels.

18 Analyzing Proposition 12 as a facially neutral regulation (which it is not)
 19 leads to the same result: Any potential interest California might have in enacting
 20 this regulation is dwarfed by the substantial burdens it will impose on commerce
 21 nationwide. The Defendants’ motions should accordingly be denied.

22 **A. Proposition 12 Regulates Extraterritorially.**

23 Proposition 12 exceeds the Constitution’s limits by seeking to regulate
 24 commerce outside California’s borders. The doctrine of extraterritoriality prohibits
 25 States from “regulating commerce occurring wholly outside [their] borders.”
 26 *Healy*, 491 U.S. at 332. No matter how wise California or New York or Texas or
 27 Vermont may believe a particular policy to be, “[o]ne state cannot be permitted to
 28 dictate what other states must do within their own borders.” *Daniels Sharpsmart*,

1 889 F.3d at 615; *accord BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570–571
 2 (1996).

3 This principle has deep roots in the Constitution’s structure and the Nation’s
 4 history. State sovereignty is a cornerstone of our constitutional compact, and
 5 reflects our Country’s “union of States, equal in power, dignity and authority,”
 6 *Coyle v. Smith*, 221 U.S. 559, 567 (1911). “The sovereignty of each State . . .
 7 implie[s] a limitation on the sovereignty of all of its sister States”—a limitation that
 8 is inherent in “the original scheme of the Constitution.” *World-Wide Volkswagen*
 9 *Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *see also Franchise Tax Bd. of*
 10 *California v. Hyatt*, 139 S. Ct. 1485, 1497–98 (2019). Thus “[n]o State can
 11 legislate except with reference to its own jurisdiction.” *Bonaparte v. Tax Court*,
 12 104 U.S. 592, 594 (1881); *see also New York Life Ins. Co. v. Head*, 234 U.S. 149,
 13 161 (1914) (calling this territorial limit an “obvious[]” and “necessary result of the
 14 Constitution”). When “States pass beyond their own [territorial] limits . . . there
 15 arises a conflict of sovereign power . . . which renders the exercise of such a power
 16 incompatible with the rights of other States, and with the [C]onstitution of the
 17 United States.” *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827) (opinion
 18 of Johnson, J.); *see also Boyle v. Zacharie*, 31 U.S. (6 Pet.) 635, 643 (1832) (Story,
 19 J.) (confirming that Justice Johnson spoke for the *Ogden* majority).

20 Proposition 12’s sales ban ignores these foundational bounds on California’s
 21 authority. That law is the latest—and most consequential—assertion of
 22 California’s authority over its sister States’ regulation of agriculture and food
 23 production to date: It requires out-of-state farmers, producers, and distributors to
 24 spend hundreds of millions of dollars to restructure their operations nationwide,
 25 simply because California voters decided to adopt a particular policy preference.
 26 Pls.’ Opp’n to Mots. to Dismiss & for J. on the Pleadings (Opp’n) at 16–18, ECF
 27 No. 26. One State’s power to regulate beyond its borders, directly or otherwise,
 28 simply does not stretch that far, for “state autonomy over ‘local needs’ does not

1 inhibit ‘the overriding requirement of freedom for the national commerce.’”
 2 *Christies, Inc.*, 784 F.3d at 1323 (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424
 3 U.S. 366, 371 (1976)).

4 Defendants give short shrift to these foundational limits. They recognize—
 5 as they must—that the extraterritoriality doctrine exists, and that it applies to
 6 regulations like Proposition 12. *See* Mot. for J. on the Pleadings (MJP) at 8–9, ECF
 7 No. 19; Mot. to Dismiss (MTD) at 8–9, ECF No. 18-1; Susan Lorde Martin, *The*
 8 *Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100
 9 Marq. L. Rev. 497, 498 (2016) (explaining that this doctrine “still serves well the
 10 dual purposes of promoting interstate commerce and discouraging hostility among
 11 states while each carries out its own policies in its own best interest”). But in their
 12 view, because Proposition 12 facially regulates only the in-state *sale* of whole pork
 13 products, it does not reach beyond California’s borders. MJP at 9; MTD at 8–9.
 14 That argument ignores the teachings of the Supreme Court, the Ninth Circuit, and
 15 other courts of appeals; the realities of the national pork supply chain; and the
 16 substantial evidence marshalled by Plaintiffs demonstrating that Proposition 12
 17 regulates huge swaths of conduct occurring wholly outside the Golden State.

18 “States and localities may not attach restrictions to exports or imports in
 19 order to control commerce in other states.” *C & A Carbone*, 511 U.S. at 393; *see*
 20 *Healy*, 491 U.S. at 336. Proposition 12 does just that. By regulating the manner in
 21 which pork farmers house and breed sows, Proposition 12 effectively controls every
 22 step of the national pork supply chain. As Plaintiffs explain, it is common for a
 23 sow in, say, Iowa to give birth to piglets, which are then sold to a second facility for
 24 “feeding,” and to a third for “finishing.” Compl. ¶¶ 5, 11, ECF No. 1. Once they
 25 reach the appropriate weight, these pigs are sent to a fourth facility, often in another
 26 State—for instance, Illinois—for processing (slaughter and butcher). *Id.* ¶ 12.
 27 That processing facility may divide the butchered pork between various
 28 wholesalers, retailers, and secondary processors. *Id.* ¶ 13. For example, a

1 wholesaler in Kansas might purchase the loin and sell it to a retailer in California, a
 2 retailer in Texas might purchase the pork belly, and a secondary processor in
 3 Wisconsin might purchase the shoulder butt to make sausages. *See id.* ¶¶ 114, 133.

4 As this hypothetical (but possible) supply chain demonstrates, by regulating
 5 the California-based retailer's purchase, Proposition 12 will inevitably affect
 6 multiple wholly out-of-California transactions. That violates the Commerce
 7 Clause. *See* MJP at 8 (acknowledging that laws which have "inevitable effects" in
 8 other States violate the Commerce Clause (internal quotation marks and brackets
 9 omitted)). To comply with Proposition 12, the breeding farm in Iowa must alter
 10 how it houses the sow; the feeding and finishing facilities in Iowa must segregate
 11 Proposition 12-compliant pigs; the processing facility in Illinois must track the
 12 origins of each pig it butchers; and the wholesalers and retailers in Kansas and
 13 California must track the origins of each whole cut of pork. *See* Compl. ¶¶ 297–
 14 301; Opp'n at 12–13. These out-of-state impacts far exceed the kind of incidental
 15 requirements associated with labeling regimes and other facially neutral laws.
 16 Because the "practical effect of th[is] regulation is to control" commercial
 17 transactions that "take[] place wholly outside of the State's borders, whether or not
 18 the commerce has effects within the State," Proposition 12 "exceeds the inherent
 19 limits of the [California's] authority." *Healy*, 491 U.S. at 336 (internal quotation
 20 marks omitted).

21 Not surprisingly, recent decisions from the Ninth Circuit and other courts of
 22 appeals have invalidated similar laws that sought to regulate beyond a State's
 23 borders. For example, in *Christies*, the en banc Court held that California's Resale
 24 Royalty Act violated the Commerce Clause because it regulated sales of fine art
 25 "that take place outside California" with "no necessary connection with the state
 26 other than the residency of the seller." 784 F.3d at 1323 (explaining that this law
 27 would have required a purchaser in New York to pay a royalty to a sculptor in
 28 North Dakota, "even if the sculpture, the artist, and the buyer never traveled to, or

1 had any connection with, California”).

2 Likewise, in *Legato Vapors*, the Seventh Circuit rejected Indiana’s attempt to
 3 “dictate[] how out-of-state manufacturers” of electronic cigarettes and vaping
 4 devices that sold products in Indiana “must build and secure their facilities, operate
 5 assembly lines, clean their equipment, and contract with security providers.” 847
 6 F.3d at 830. That law, like Proposition 12, reflected “direct regulation of out-of-
 7 state facilities and services,” and carried significant and costly consequences by
 8 requiring out-of-state manufacturers to restructure their operations. *Id.* at 834.
 9 Indiana, like California here, argued that the Act was “facially neutral,” regulated
 10 activities “not wholly outside Indiana,” and “applie[d] equally to in-state and out-
 11 of-state manufacturers.” *Id.* at 830. But the Seventh Circuit rejected those
 12 arguments because the practical effects of Indiana’s vaping regulations on out-of-
 13 state entities, like Kentucky-based Legato Vapors, went beyond the “mere
 14 incidental effects of a facially neutral law.” *Id.* at 830, 834. Although “reasonable
 15 and even-handed purity requirements on vaping products sold in Indiana” may well
 16 be constitutionally permissible, the State could “not try to achieve that goal by
 17 direct extraterritorial regulation of the manufacturing processes and facilities of out-
 18 of-state manufacturers.” *Id.* at 834.

19 Similarly, the First Circuit sustained a challenge to a Massachusetts law that
 20 restricted the Commonwealth’s ability to purchase goods or services from
 21 companies that did business with the country of Burma (now Myanmar) in *National*
 22 *Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff’d sub nom.*
 23 *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). The statute was
 24 enacted in response to human-rights violations committed by the Burmese
 25 Government based on “the historic concerns of the citizens of Massachusetts with
 26 supporting the rights of people around the world.” *Id.* at 47 (internal quotation
 27 marks omitted). Though arising under the Foreign Commerce Clause, the Court
 28 recognized—and properly enforced—the same limits on Massachusetts’s assertion

1 of extraterritorial authority as an independent ground for invalidating that sales ban.
 2 Because “both the intention and effect of the statute [was] to change conduct
 3 beyond Massachusetts’s borders,” the Commonwealth ran afoul of the
 4 constitutional principle that a State “may not regulate conduct wholly beyond its
 5 borders.” *Id.* at 69 (citing *Healy*, 491 U.S. at 336). Notably, the First Circuit also
 6 rejected Massachusetts’s argument that “a company doing business with Burma can
 7 simply forgo contracts with Massachusetts,” because allowing “state laws to stand
 8 on this ground” would “read the Commerce Clause out of the Constitution.” *Id.* at
 9 70 (“If Massachusetts can enact a Burma law, so too can California or Texas.”).

10 Proposition 12 also creates a high risk that members of the out-of-state pork
 11 supply chain will face conflicting regulations, which reinforces its impermissibly
 12 extraterritorial effect. *See Healy*, 491 U.S. at 336–337; *Legato Vapors*, 847 F.3d at
 13 834. Massachusetts has a similar sales ban that also applies extraterritorially, *see*
 14 Prevention of Farm Animal Cruelty Act, 2016 Mass. Acts 1052, and Arizona,
 15 Colorado, Florida, Maine, Michigan, Ohio, Oregon, and Rhode Island have enacted
 16 their own sow housing standards, *see* Ariz. Rev. Stat. Ann. § 13-2910.07; Colo.
 17 Rev. Stat. § 35-50.5-102; Fla. Const. art. 10, § 21; Me. Stat. tit. 17, § 1039; Mich.
 18 Comp. Laws § 287.746; Ohio Admin. Code 901:12-8-02; Or. Rev. Stat. § 600.150;
 19 R.I. Gen. Laws § 4-1.1-3; *see also* MJP at 4 (recognizing that after California
 20 enacted the precursor regulation, Proposition 2, “several other states have followed
 21 suit”). A sow can only be housed one way at a given time, so if a farmer, feeder,
 22 finisher, processor, wholesaler, or retailer is located in a State that imposes a
 23 conflicting mandate—perhaps that no pork processed or sold in that State may
 24 come from gilts bred before they are seven-months-old, and that gilts must be
 25 housed in group pens until they are bred—it will be forced to choose between
 26 complying with its home-state regulation or Proposition 12. *Compare* Cal. Health
 27 & Safety Code § 25991(a), Compl. ¶¶ 237–241, *and* Opp’n at 3, 6 (explaining that
 28 to comply with Proposition 12, six-month-old gilts must be housed individually),

1 *with* Compl. ¶¶ 92, 244–249 (farmers typically house gilts in group pens until they
 2 are bred at seven months). *Contra* Amicus Br. of Ass’n of Cal. Egg Farmers at 15–
 3 16, ECF No. 25 (“Pork products are not like a truck that cannot feasibly be
 4 subjected to different regulations by each state it passes through.”). Thus, just as in
 5 *Legato Vapors*, because several other States have already moved to regulate the
 6 same conduct, there is a sufficient “threat of inconsistent regulation . . . to show
 7 why [California] cannot impose these . . . requirements on out-of-state” farmers and
 8 processors. 847 F.3d at 834.

9 California has no more power to regulate beyond its borders than Indiana or
 10 Massachusetts. If it did, California could freely subject people nationwide to
 11 regulations that conflict with the policies adopted by their own States. This Court
 12 should reiterate these straightforward constitutional truths, and deny Defendants’
 13 motions.

14 **B. Proposition 12 Will Substantially And Irreparably Burden Out-of-**
 15 **State Producers, And No Legitimate Local Interest Justifies This**
 16 **Burden.**

17 Proposition 12 also flunks the Commerce Clause’s test for facially neutral
 18 regulations that impose *indirect* effects on interstate commerce. Such regulations
 19 are permissible only if the State has a “legitimate” interest in that regulation, and
 20 “the local benefits” of the regulation “clearly exceed[]” the “burden on interstate
 21 commerce.” *Brown-Forman*, 476 U.S. at 579; *see Pike v. Bruce Church*, 397 U.S.
 22 137, 142 (1970). Setting aside the substantial evidence that Proposition 12
 23 regulates commerce that takes place outside of California and puts the pork supply
 24 chain at risk of conflicting regulations, it still cannot pass muster: California has no
 25 legitimate local interest in regulating the manner in which pork is produced outside
 26 the State’s borders. And even if there were such an interest, any gains to the State
 27 and its citizens are dwarfed by the compliance costs and market distortions that this
 28 law will impose nationwide.

1 Proposition 12 is not California's first foray into America's larder. The past
 2 fifteen years have seen a dramatic uptick in far-reaching food regulation from a
 3 small group of States, California chief among them. Indeed, the regulatory impulse
 4 for "wealthy, powerful states" to exercise their "outsized influence" to adopt
 5 preferred regulatory regimes that are effectively binding not just "within the home
 6 state but also [o]n others who trade with that state" is so linked to the Golden State
 7 that scholars refer to it as the "California Effect." Baylen J. Linnekin, *The*
 8 *"California Effect" & the Future of American Food: How California's Growing*
 9 *Crackdown on Food & Agriculture Harms the State & the Nation*, 13 Chap. L. Rev.
 10 357, 373 (2010). To date, California's increasingly ambitious efforts to reshape the
 11 nation's food chain in the State's own image have had mixed success. *Compare,*
 12 *e.g., Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012) (holding California meat-
 13 processing regulations designed to restructure slaughterhouse operations preempted
 14 by the Federal Meat Inspection Act), *and Nat'l Meat Ass'n v. Brown*, No. CVF-08-
 15 1963 LJO DLB, 2009 WL 426213, at *11 (E.D. Cal. Feb. 19, 2009) (same, and
 16 declining to reach Commerce Clause argument in light of preemption holding), *with*
 17 *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th
 18 Cir. 2013) (rejecting constitutional challenges to force-feeding ban in foie gras
 19 production).

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

25 This Circuit's case law is unambiguous that a State is empowered to regulate
 26 in a manner that burdens interstate commerce only to address "*local* harms," *Rocky*
 27 *Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103–04 (9th Cir. 2013)
 28 (emphasis added), or "minimize the *in-state* harm caused by products sold in-state,"

1 *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 952–953 (9th Cir. 2019)
 2 (emphasis added) (explaining that California is not empowered to regulate fuel
 3 production and use merely because “it thinks that it is the state that knows how best
 4 to protect Iowa’s farms, Maine’s fisheries, or Michigan’s lakes”).

5 As it appeared in the ballot initiative ratified by California voters,²
 6 Proposition 12’s stated purpose is “to prevent animal cruelty by phasing out
 7 extreme methods of farm animal confinement, which also threaten the health and
 8 safety of California consumers, and increase the risk of foodborne illness and
 9 associated negative fiscal impacts on the State of California.” Prevention of
 10 Cruelty to Farm Animals Act, Prop. 12 § 2. Defendants rest solely on the first
 11 rationale—the prevention of animal cruelty. MJP at 14 (acknowledging that the
 12 purpose of Proposition 12 is “to prevent animal cruelty”); MTD at 11–12 (same).
 13 As Plaintiffs explain, Proposition 12 does nothing to advance that goal. Opp’n at
 14 22–23; Compl. ¶¶ 376–388. Nevertheless, that rationale is wholly untethered from
 15 any California nexus when applied to the *out-of-state* production of pork. *See C &*
 16 *A Carbone*, 511 U.S. at 393 (holding a locality’s desire to minimize its own
 17 environmental footprint does not justify the regulation of out-of-state commerce);
 18 *see also N. Am. Meat Inst. v. Becerra (NAMI)*, No. 2:19-CV-08569-CAS (FFMx),
 19 2020 WL 919153, at *8 (C.D. Cal. Feb. 24, 2020) (holding that NAMI adequately
 20 alleged that California lacked a “legitimate local interest in farming conditions in

21
 22 ² The ballot-initiative process is a uniquely Californian governance tool that allows
 23 “California citizens a way to propose laws and constitutional amendments without
 24 the support of the Governor or the Legislature.” Office of the Att’y Gen., *Ballot*
 25 *Initiatives*, State of Cal. Dep’t of Justice, <https://oag.ca.gov/initiatives> (last visited
 26 Mar. 6, 2020). Because ballot initiatives like Proposition 12 are necessarily devoid
 27 of legislative findings “[n]o federal court has deferred to the terms of a state ballot
 28 proposition where the proposition trenches on a federal constitutional right.”
Duncan v. Becerra, 366 F. Supp. 3d 1131, 1167 (S.D. Cal. 2019) (collecting cases),
appeal docketed, No. 19-55376 (9th Cir. Apr. 4, 2019).

1 other states”).

2 As for California’s claim that Proposition 12 also aims to protect the health
3 and welfare of California consumers, that too falls flat. The mere “incantation of a
4 purpose to promote the public health or safety does not insulate a state law from
5 Commerce Clause attack.” *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S.
6 662, 670 (1981) (plurality op.). Thus, even if Proposition 12 was designed for that
7 “purpose”—a claim wholly devoid of any evidentiary support, *see* Compl. ¶¶ 361–
8 388—because there is no evidence that this regulation has incidental health or
9 safety benefits specific to California consumers, “the State’s safety interest [is]
10 illusory,” *Kassel*, 450 U.S. at 671; *NAMI*, 2020 WL 919153, at *8 (finding that
11 NAMI adequately alleged that “there is no scientific data connecting Proposition
12 12’s confinement standard to the prevention of foodborne illness within
13 California”).

14 In any event, the concrete, imminent, and excessive compliance burdens that
15 Proposition 12 would impose on non-California residents subsume any potential
16 cognizable benefit to California consumers. As Plaintiffs explain, California farms
17 house an estimated 1,500 sows for commercial breeding, but to fulfill the State’s
18 demand for pork requires approximately 673,000 breeding sows. Compl. ¶¶ 17, 20,
19 292; *see* MJP at 10 n.6 (acknowledging that “there is little pork production in
20 California”). In other words, *only* 0.22% of sows affected by Proposition 12 are
21 located in California; 99.78% of those sows are located out-of-state. These figures
22 do not account for the numerous other stages of the out-of-state supply chain that
23 Proposition 12 will inevitably affect. *See* Compl. ¶¶ 297–301. For example, even
24 if only one-third of a farmer’s or packer’s products are sold in California, the
25 farmer might decide (on his own, or pursuant to the packer’s demand), to
26 restructure his entire production process to comply with Proposition 12. *See*
27 Compl. Ex. N ¶¶ 17–22, ECF No. 1-5 (explaining that the farmer must ensure all of
28 his sows are housed in compliance with Proposition 12, even though only about

1 one-third will produce pork that is eventually sold in California).

2 It is no surprise that California's law will result in a restructuring of pork
3 supply chains across the nation. That is, after all, the whole point of these
4 paternalist, "California-knows-best" style laws. "The California effect has meant
5 that the state's food regulations and bans extend far beyond its borders, either
6 because its regulations or bans encourage other states or the federal government to
7 adopt them, or because they force producers to change their offerings nationwide,
8 or because they force the regulated industry to seek preemptive
9 nationwide regulation." Linnekin, *supra*, at 384–385. That necessarily disrupts the
10 "natural functioning of the interstate market," *Exxon Corp. v. Governor of*
11 *Maryland*, 437 U.S. 117, 127 (1978) (internal quotation marks omitted), and
12 "impair[s] the free flow of materials and products across state borders," *Nat'l Ass'n*
13 *of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154–55 (9th Cir. 2012).

14 Defendants have no response to these compelling statistics. Instead, they
15 urge this court to overlook this substantial burden on interstate commerce because
16 Proposition 12 merely "precludes a preferred, more profitable method of operating
17 in a retail market." MJP at 11 (internal quotation marks omitted); *see* MTD at 11
18 (internal quotation marks omitted). In other words, because Proposition 12 is
19 directed to *how* meat products are produced, not *where*, Defendants contend that
20 there is no need to perform the balancing test mandated by *Pike*. *See* MJP at 11–12;
21 MTD at 11.

22 Not so. There is no "production method" exception that categorically
23 exempts otherwise-burdensome regulations from *Pike*'s balancing test. *See* 397
24 U.S. at 144–145 (enjoining an order requiring interstate cantaloupe growers to
25 make "a capital expenditure of approximately \$200,000" to pack fruit in Arizona
26 because the law was extremely burdensome and the State had only a "tenuous
27 interest in having the company's cantaloupes identified as originating in Arizona").
28 For good reason. Were States simply permitted to skirt the Constitution's structural

1 limits on regulations affecting interstate commerce by framing away obvious real-
 2 world harms as merely the removal of a potential “production method,” that would
 3 effectively immunize *any* local regulation, regardless of the extent or reach of its
 4 effects, from Commerce Clause scrutiny.

5 As for Defendants’ claim that Proposition 12 might somehow *help* out-of-
 6 state producers by allowing them “to participate in the broader national and
 7 international market for humanely raised meat products,” MJP at 13, that is wholly
 8 speculative, not to mention irrelevant. Unlike Plaintiffs—who provided detailed
 9 declarations demonstrating the harm Proposition 12 will cause, *see* Compl. Ex. A at
 10 4–7; Ex. B at 25–26; Ex. G at 66–71; Ex. H at 78–79; Ex. I at 86–87; Ex. J at 93–
 11 94; Ex. K at 98–99; Ex. M at 112–113; Ex. N at 117–119; Ex. O at 126–130, ECF
 12 Nos. 1-2 to 1-5—Defendants offer no support for their claims. As Defendants
 13 recognize, where a party “provide[s] no evidence” to support its claim that a state
 14 regulation will affect “the ‘flow of goods,’ ” the court cannot rely on that bare
 15 speculation in the Commerce Clause analysis. *Pharm. Research & Mfrs. of Am. v.*
 16 *County of Alameda*, 768 F.3d 1037, 1045 (9th Cir. 2014); *see* MJP at 13 (citing
 17 *Almaeda*). But even if Defendants were correct that complying with Proposition 12
 18 might be good for out-of-state farmers’ bottom lines, that is irrelevant. The
 19 Commerce Clause requires courts to balance the “burden on interstate commerce”
 20 against “the *local* benefits.” *Brown-Forman*, 476 U.S. at 579 (emphasis added).
 21 Individual producers and the States in which they reside are free to make this policy
 22 choice of their own accord. Assuming that California knows best and can make
 23 that choice for them is Golden State paternalism at its finest. *See Rocky Mountain*,
 24 913 F.3d at 953 (California is not empowered to enact out-of-state regulations
 25 simply because “it thinks that it is the State that knows how best to protect Iowa’s
 26 farms, Maine’s fisheries, or Michigan’s lakes”).

27 Applying the proper standard and balancing Proposition 12’s wholly
 28 speculative and at-most-minimal health and safety benefits against these enormous

1 burdens on interstate commerce demonstrates that Defendants’ motions should be
2 denied.

3 **II. ALLOWING PROPOSITION 12 TO TAKE EFFECT WOULD**
4 **GREEN-LIGHT SIMILAR REGULATORY EFFORTS**
5 **NATIONWIDE.**

6 Allowing Proposition 12 to stand will be an invitation to States and localities
7 across the country to engage in similar regulatory efforts in the agriculture and food
8 sectors, and beyond. The resulting regulatory race to the bottom would be harmful
9 to our national economy and leave us “with a constitutional scheme that those who
10 framed and ratified the Constitution would surely find surprising.” *Tennessee Wine*
11 *& Spirits*, 139 S. Ct. at 2460.

12 California has no inherent right to impose its preferred regulatory policies on
13 the rest of the nation. Although the federal government sometimes expressly
14 authorizes the State to adopt its own regulatory standards on certain topics of
15 unique interest, *cf.* 42 U.S.C. § 7543(e)(2)(A) (“authoriz[ing] California to adopt
16 and enforce standards and other requirements relating to the control of emissions
17 from such vehicles or engines” that are more stringent than “Federal standards”),
18 California has no similar authority when it comes to the production of pork. And
19 absent such authority, California—like every other State and locality—is bound by
20 the Commerce Clause, which prohibits the enactment of laws that, like Proposition
21 12, regulate beyond its borders and unduly burden out-of-state producers.

22 That makes sense. If California can assert legal control over out-of-state
23 meat production, then Indiana can do the same when it comes to Kentucky’s e-
24 cigarette manufacturers, and North Dakota can regulate New York’s art
25 transactions. As these examples demonstrate, this impulse is not limited to food.
26 States could rely on a similar theory to regulate supply chains in virtually any
27 industry. Under Defendants’ proposed approach, the Commerce Clause would not
28 stop New Jersey from asserting its say over how Michigan makes cars, simply

1 because some of those cars are eventually sold by Garden State dealerships. Nor
 2 would it prevent Texas from laying claim to how the clothing supply chain must
 3 operate in North Carolina, because some of that clothing is later sold by Lone Star
 4 retailers. Now multiply that disruption by fifty, because if California or New Jersey
 5 or Texas is permitted to impose such a prohibition, so too can every other State.

6 These risks are not hypothetical. Proposition 12 will force out-of-state pork
 7 farmers, feeders, finishers, processors, wholesalers, and retailers to choose between
 8 spending significant sums of money to update their entire supply lines to conform
 9 with California’s view of the appropriate standards, creating separate production
 10 and distribution lines for this one State, or withdrawing from the highly lucrative
 11 California market. Moreover, Arizona, Colorado, Florida, Maine, Massachusetts,
 12 Michigan, Ohio, Oregon, and Rhode Island have already enacted separate sow
 13 housing requirements or sales bans. *See* Ariz. Rev. Stat. Ann. § 13-2910.07; Colo.
 14 Rev. Stat. § 35-50.5-102; Fla. Const. art. 10, § 21; Me. Stat. tit. 17, § 1039;
 15 Prevention of Farm Animal Cruelty Act, 2016 Mass. Acts 1052; Mich. Comp. Laws
 16 § 287.746; Ohio Admin. Code 901:12-8-02; Or. Rev. Stat. § 600.150; R.I. Gen.
 17 Laws § 4-1.1-3. There is a serious risk that other localities will follow suit,
 18 resulting in a patchwork of regulatory requirements that will effectively eliminate
 19 the national pork market. *See* Linnekin, *supra*, at 366–367, 385, 387 (explaining
 20 that, after California banned trans fats, “dozens of discordant state laws” followed);
 21 *see* MJP at 4 (acknowledging that after California enacted Proposition 2, several
 22 other localities followed suit).

23 These are precisely the fears that motivated the creation of the Commerce
 24 Clause. As James Madison explained, allowing States to restrict commerce and
 25 impose requirements on producers and suppliers beyond their borders “tends to
 26 beget retaliating regulations.” *See* James Madison, *Vices of the Political System of*
 27 *the United States*, in 2 Writings of James Madison 361, 363 (Gaillard Hunt ed.,
 28 1901). Alexander Hamilton likewise worried that, if allowed to “multip[y] and

1 extend[],” “[t]he interfering and unneighborly regulations of some States” would
 2 become “serious sources of animosity and discord.” The Federalist No. 22
 3 (Alexander Hamilton); *see also* Barry Friedman & Daniel T. Deacon, *A Course*
 4 *Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97
 5 Va. L. Rev. 1877, 1885–86 & n.29 (2011) (collecting other examples of the
 6 founders’ “references to the nation’s commercial woes, including discord among
 7 the states”); Letter from James Monroe to James Madison (July 26, 1785)
 8 (explaining that allowing the States to pursue separate commercial policies
 9 “establish’d deep-rooted jealousies & enmities between them” which, if allowed to
 10 persist, “will become instrumental in their hands to impede & defeat those of each
 11 other”).³

12 For nearly two hundred years, the Supreme Court and courts of appeals have
 13 heeded the framers’ concerns and prevented States from regulating beyond their
 14 borders, and acting in a way that burdens interstate commerce absent a sufficiently
 15 strong and legitimate local interest. *See Tennessee Wine & Spirits*, 139 S. Ct. at
 16 2459 (summarizing the origins of this Commerce Clause concept); *see also, e.g.,*
 17 *Kassel*, 450 U.S. 662; *Legato Vapors*, 847 F.3d 825; *Christies*, 784 F.3d 1320;
 18 *Natsios*, 181 F.3d 38. Proposition 12 is no different, and it should meet the same
 19 fate.

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27 ³ Available at <https://bit.ly/2SWWhGD>.
28

CONCLUSION

For the foregoing reasons, the motions to dismiss and for judgment on the pleadings should be denied.

Respectfully submitted,

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/s/ David W. Skaar
David W. Skaar (SBN 265377)
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Tel: (310) 785-4600
Fax: (310) 785-4601
david.skaar@hoganlovells.com

Counsel for Amici Curiae

