No. 19-56408

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORTH AMERICAN MEAT INSTITUTE,
Plaintiff-Appellant,

v.

XAVIER BECERRA, *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court
Central District of California
No. 2:19-cv-8569
Hon. Christina A. Snyder

BRIEF OF INDIANA, ALABAMA, ARKANSAS, KANSAS, LOUISIANA, MISSOURI, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION & INTEREST OF *AMICI* STATES

Amici curiae, the States of Indiana, Alabama, Arkansas, Kansas, Louisiana, Missouri, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia respectfully submit this brief in support of Plaintiff-Appellant North American Meat Institute.

California's Proposition 12, enacted by voters in November 2018, contains two operative provisions. The first provision exercises California's authority over farming in the State by regulating the manner in which California farmers may confine (1) calves raised for veal, (2) breeding pigs, and (3) egg-laying hens. Cal. Health & Safety Code § 25990(a). The second provision, however, unconstitutionally extends California's animal-confinement regulations to every farmer in the United States: It prohibits the sale of any veal, pork, or eggs produced from animals not raised in accordance with California's animal-confinement regulations, regardless of where those animals were raised. *Id.* § 25990(b).

Amici States file this brief to explain that the Constitution's Commerce Clause prohibits California's attempt to usurp other States' authority to adopt their own animal-husbandry policies. California's regulations are a substantial departure from current practices in most States,

including *Amici* States. The Commerce Clause does not permit California to upset those practices by setting a single animal-confinement policy for the entire country.

Furthermore, some of the *Amici* States, including Indiana, operate farms that sell meat on the open market. For example, Purdue University, a body corporate and politic and an arm of the State of Indiana, raises swine and sells them into the national supply chain, likely reaching California customers. As such, the State of Indiana is likely to be one of many States directly affected by Proposition 12.

Because *Amici* States have a sovereign interest in preserving their authority to set policy for their own farmers, they file this brief to explain why this Court should vacate the district court's order and instruct it to enjoin enforcement of Proposition 12.

SUMMARY OF THE ARGUMENT

The Supreme Court has long held that the Commerce Clause "prohibits state laws that unduly restrict interstate commerce" and that this negative aspect of the Commerce Clause "preserves a national market for goods and services." *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. 2449, 2459 (2019). As the Court recently observed, this aspect of its Commerce

Clause jurisprudence reflects a "central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization" present at the time. *Id.* at 2461 (internal quotations omitted). The Framers' central concern, in other words, was to prevent the friction between States caused by the interstate trade barriers prevalent under the Articles of Confederation. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). "The entire Constitution was 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 n.12 (1989) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

The interstate trade barriers prohibited by the Commerce Clause include state regulations imposed on commerce occurring wholly in other States. This prohibition on extraterritorial regulation "reflect[s] the Constitution's special concern both with the maintenance of a national eco-

nomic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335–36.

California's Proposition 12 plainly violates the prohibition of extraterritorial regulation. It forbids the sale of products derived from animals not raised in accordance with California animal-confinement standards, *including animals raised in other States*. It thereby interferes with States' sovereign interests in regulating agriculture as they see fit.

In concluding otherwise, the district court erroneously downplayed the practical effects Proposition 12 will have on farm owners and operators outside of California. Furthermore, by allowing Proposition 12 to be enforced the district court's order promotes economic balkanization and contributes to the growing economic friction between States: Farm owners and operators located outside of California will be forced either to modify their farming operations to comply with California's animal-confinement regulations or to exit California's market.

This is precisely the type of interstate trade friction that the Commerce Clause was designed to prevent. California may serve as a laboratory of state policy experimentation with its animal confinement laws,

but it cannot impose its laws on extraterritorial conduct and thereby prevent *other* States from experimenting with their own animal-confinement policies.

ARGUMENT

I. Proposition 12 Regulates Extraterritorially by Imposing California Policies on Wholly Out-of-State Commerce

In applying the Commerce Clause's prohibition on extraterritorial regulation, the Supreme Court has explained that a state legislature's power to enact laws is similar to a state court's jurisdiction to hear cases—"[i]n either case, any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 n.13 (1989) (internal quotation marks and citation omitted). The Commerce Clause thus precludes "the application of a state statute to commerce that takes places wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 336. In other words, a "state law that has the practical effect of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Id.* at 332 (citation and internal quotation marks omitted).

This prohibition on extraterritorial regulation applies "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336. Determining whether a state regulation constitutes prohibited extraterritorial regulation requires consideration not merely of the bare statutory text, but also of the law's "practical effect," including "the consequences of the statute itself" and how that statute may "interact with the legitimate regulatory regimes of other States." *Id.*; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986) (holding that a state "may not project its legislation into [other states]" (internal quotation omitted)). Furthermore, even a regulation that does not explicitly regulate interstate conduct may do so "nonetheless by its practical effect and design." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 394 (1994).

Accordingly, this Court has specifically held that California cannot use a ban on *in-state sales* as a method to regulate upstream, *out-of-state commercial practices* that California deems objectionable. In *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018), this Court, citing *Healy*, applied the "critical inquiry . . . whether the practical effect of the regulation is to control conduct beyond the boundaries of the state," *id.*

at 614, when it enjoined California from penalizing export of medical waste for destruction as an "attempt[] to regulate waste treatment everywhere in the country," *id.* at 616. And in *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015) (*en banc*), this Court held that the Commerce Clause does not permit California to regulate the terms and conditions of out-of-state art sales merely because the seller resided in California.

The district court, however, disregarded *Christie's* and *Daniels Sharpsmart*, concluding that Ninth Circuit precedents predating those cases had limited the extraterritoriality doctrine to price-setting regulations. Undeniably, tension exists within Ninth Circuit precedents over when and how to apply the prohibition on extraterritorial legislation. In *Rocky Mountain Famers Union v. Corey*, 730 F.3d 1070, 1102 (9th Cir. 2013), the Court declared the extraterritoriality doctrine of *Healy* and *Baldwin* to be limited to price control and affirmation statutes; *see also Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (holding that *Healy* and *Baldwin* did not apply because a ban on foie gras not produced in compliance with California standards did not involve price control or affirmation). Yet in *Chinatown*

Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1146 (9th Cir. 2015), the Court acknowledged, while upholding a law precluding importation of shark fins procured elsewhere, that the Commerce Clause does in fact prohibit state laws that "attempt to regulate transactions conducted wholly out of state." Similarly, even while *Daniels Sharpsmart* and *Christies* both plainly *preclude* state regulation of out-of-state production, *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d. 903, 916–17 (9th Cir. 2018), applied extraterritoriality doctrine to uphold an Oregon regulation governing the greenhouse-gas impact of certain fuels—including fuels produced in other States and imported into Oregon—on the ground that the regulation regulated commerce occurring *inside* Oregon.

In any event, *Christie's* and *Daniels Sharpsmart* more properly treat non-safety regulation of out-of-state production as extraterritorial—and align with other Circuits besides. The Eighth Circuit, for example, invalidated a statute regulating power importation, emphasizing that the Supreme Court has never limited the holding of the extraterritoriality doctrine to price-control and price-affirmation laws. *North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016). The Seventh Circuit

invalidated a law precluding landfill of waste generated in a community lacking an "effective recycling program," holding that *Healy* is not limited to price-affirmation statutes. *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995); *see also Legato Vapors, LLC v. Cook*, 847 F.3d 825, 831 (7th Cir. 2017) (emphasizing that *Healy* stands for the "more general principle that a state may not impose its laws on commerce in and between other states"). And the Sixth Circuit invalidated a law requiring a unique mark on bottles to be recycled in Michigan, on the ground that the law that had an "impermissible extraterritorial effect" because it controlled "conduct beyond the State of Michigan." *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362, 376 (6th Cir. 2013). *See also Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 669 (4th Cir. 2018) (invalidating a law controlling the prices of transactions occurring outside the state and further emphasizing that the Supreme Court has never held that the extraterritoriality doctrine applies exclusively to price-control or price-affirmation laws).

Under these precedents, as under *Christie's and Daniels Sharpsmart,* the only question is whether a state sales prohibition does

in fact regulate out-of-state conduct. Proposition 12 clearly does. By regulating the supply chain of pork and veal into California, Proposition 12 will inevitably have the effect of regulating transactions taking place entirely outside California. Indiana, for example, is the fifth largest pork producer in the United States. State Rankings by Hogs and Pigs Inventory (June 14, 2018) https://www.pork.org/facts/stats/structure-and-productivity/state-rankings-by-hogs-and-pigs-inventory/. And the agricultural supply chain leading from Indiana and other States to California requires multiple transactions occurring wholly in other states, such as farm procurement and production, sale to distributors, and slaughter and packing (followed by sale to California retailers and ultimate sale to consumers). Proposition 12 effectively requires farmers in other states to comply with California's regulations in case their veal or pork is re-sold in California.

What is more, sometimes these transactions are undertaken by States themselves. For example, Purdue University—an instrumentality of the State of Indiana—owns and operates farms through the Animal Sciences Research and Education Center (ASREC) that confine animals,

including swine and poultry, in conditions that do not comply with Proposition 12. Purdue then sells livestock to distributors (including Tyson Foods) who in turn sell to retail customers nationwide. *See generally* Brian Ford, Purdue College of Agriculture, *Swine Unit*, https://ag.purdue.edu/ansc/ASREC/Pages/SwineUnit.aspx. Purdue's commercial transactions with those wholesalers occur wholly outside California, but may nonetheless be regulated by Proposition12 unless the wholesalers choose to forego the California market altogether. That same model of interstate regulation will be replicated over and over as to private and public farms in Indiana and other states. Proposition 12 thus requires other States' farmers either to overhaul their manner of pork production to comply with California's regulations or lose access to the enormous California market.

Proposition 12's sales ban will require farmers in other states to adjust their animal-husbandry practices as the price for maintaining access to California's market and will undermine other States' policies of non-regulation in this area. Because it regulates out-of-state transactions, Proposition 12's sales ban is an archetypal trade restriction which violates the Commerce Clause and should be enjoined.

II. Proposition 12 Threatens State Sovereignty

By downplaying the practical effect of Proposition 12, asserting that the in-state sales ban applies only to in-state conduct, the district court threatens other States' decisions *not* to regulate their own farmers in this manner— a choice that is just as legitimate as California's choice to regulate.

In *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018), this Court correctly recognized that a State cannot insulate a statute from the extraterritoriality doctrine by purporting to regulate solely in-state activity—such as medical waste generation or sales—when that regulation has the direct effect of regulating conduct that takes place wholly outside of the State. If courts allowed States to evade the extraterritoriality doctrine by attaching production regulations to in-state sales, States could adopt numerous mutually contradictory statutes; the inevitable result would render interstate commerce effectively impossible. This is not what the Founders intended. This Court has the opportunity vindicate the Founders' design and reign in the emerging Balkanization of the American agricultural market.

Proposition 12 threatens to interfere with "the legitimate regulatory regimes of other states," *Healy*, 491 U.S. 324, 336 (1989), and threatens to subject farmers across the country to conflicting requirements. The vast majority of States have chosen to permit farmers to raise calves, hogs, and hens in accordance with commercial standards and agricultural best practices rather than impose specific animal-confinement requirements. *See generally*, Elizabeth R. Rumley, The National Agricultural Law Center, *States' Farm Animal Confinement Statutes*, https://nationalaglawcenter.org/state-compilations/farm-animal-welfare/. It is easy to imagine farmers getting caught in the crossfire as other States attempt to impose regulations that differ from California's—a problem that will only get worse as other States attempt to impose their own extraterritorial regulations.

Nor is the concern of balkanization through conflicting laws speculative. Massachusetts, Maine, Michigan, and Rhode Island have enacted animal-confinement laws similar to California's current rules (which require farmers to refrain from "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," Cal. Health & Safety Code

§ 25991(e)(1)). *See* Mass. Gen. Laws ch. S51A, §§ 1–5; Me. Rev. Stat. tit. 7, § 4020(2); Mich. Comp. Laws §287.746(2); 4 R.I. Gen. Laws. § 4-1.1-3. Massachusetts has a sales ban nearly identical to Proposition 12, in effect as of 2017, which applies not only to whole veal meat and whole pork meat but also to shell egg. Mass. Gen. Laws ch. S51A, § 3. It is plausible that, now that Massachusetts and California have enacted sales bans on all agricultural products that do not comply with their animal confinement, other States will follow suit.

The trend of individual States effectively usurping other States' sovereign police powers is not limited to agricultural production methods. For example, Minnesota enacted a statute prohibiting the importation of power from outside the State from any new large energy facility, or entering into any new long-term purchase power agreement, that would contribute to or increase statewide power sector carbon dioxide emissions. *North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016). The Eighth Circuit affirmed an injunction against enforcing the statute, holding that Minnesota's law regulated "activity and transactions taking place *wholly outside* of Minnesota" in violation of the Commerce Clause. *Id.* at 921. Some states and localities also seek to use the common law of

public nuisance and trespass to regulate energy production occurring wholly in other states. *See California v. B.P. et al.*, 3:17-cv-6011 (N.D. Cal.); *King County v. B.P. et al.*, 2:18-cv-758 (W.D. Wash.); and *City of New York v. B.P. et al.*, 18-cv-182 (S.D.N.Y.).

These efforts portend exactly the sorts of economic friction and trade wars the Commerce Clause was designed to prevent. It is not hard to imagine, for example, a state like California obstructing access to its markets for goods produced by labor paid less than $15 per hour—the hypothetical "satisfactory wage scale" dismissed as absurd in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935)—only to face retaliation from other states implementing their own sales bans on goods produced by labor lacking right-to-work protections.

Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, acknowledged that "it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments *without risk to the rest of the country*." 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added). But here, as in other so many other instances arising throughout the Nation, one State's policy experimentation *does* pose risks

for the rest of the country, and in particular for States who have made the legitimate decision not to regulate animal confinement as California has. The Court should refuse to allow California to supersede other States' sovereign policy choices.

CONCLUSION

For the foregoing reasons, the district court's judgment should be vacated and Proposition 12 should be enjoined.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 2,856 words.

Dated: January 10, 2020

/s/ Thomas M. Fisher
Thomas M. Fisher
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CERTIFICATE OF SERVICE

I certify that on January 10, 2020 I caused service of the foregoing brief to be made by electronic filing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all parties with an email address of record, who have appeared and consent to electronic service in this action.

Dated: January 10, 2020

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