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

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
Hon. Christina A. Snyder

BRIEF OF INDIANA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IOWA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION AND INTEREST OF *AMICI* STATES

Amici curiae, the States of Indiana, Alabama, Alaska, Arkansas, Georgia, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief in support of Plaintiff-Appellant North American Meat Institute pursuant to Federal Rule of Appellate Procedure 29(b)(2) and Ninth Circuit Rule 29-2(a).

California's Proposition 12, enacted by voters in November 2018, contains two operative provisions. The first exercises California's sovereign authority over farming in the State by regulating how California farmers confine calves raised for veal, breeding pigs, and egg-laying hens. Cal. Health & Safety Code § 25990(a).

The second provision, however, unconstitutionally purports to extend 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 rules, regardless of where those animals were raised. *Id.* § 25990(b). Worse, California has proposed regulations that would permit its officials to conduct on-site in-

spections in other States and would impose onerous record-keeping requirements on out-of-state farmers. *See* Cal. Dep't of Food and Agric., Draft Art. 5 (Jul. 22, 2020), https://www.cdfa.ca.gov/ahfss/pdfs/Article5CertificationDRAFT07222020.pdf. This includes some of the *Amici* States, including Indiana, which directly own and operate farms that sell meat on the open market.

California's rules are a substantial departure from current practices in most States, including *Amici* States. The Supreme Court's and this Court's Commerce Clause precedents do not permit California to upset those practices by setting a single, nationwide animal-confinement policy. Because *Amici* States have a sovereign interest in preserving their authority to establish policy for their own farmers, they file this brief to explain why the Court should rehear this case en banc.

SUMMARY OF THE ARGUMENT

En banc review of the panel's decision is urgently needed. The panel's decision risks frustrating other States' policies on animal husbandry and, ultimately, destroying the integrated nationwide market for veal, pork, and eggs. More broadly, the panel's decision conflicts with

binding precedent and threatens to permit the sort of protectionism and balkanization the Commerce Clause was meant to prohibit.

First, the panel affirmed the district court's conclusion that "Proposition 12 does not directly regulate extraterritorial conduct" *solely* on the ground that "it is not a price control or price affirmation statute." Slip op. 3. This conclusion disregards precedents of both the Supreme Court and this Court, which have applied the extraterritoriality doctrine outside the narrow price-affirmation context. There is no reason to limit arbitrarily the prohibition on extraterritorial regulation to price-affirmation statutes: The Commerce Clause prohibits state laws that regulate wholly extraterritorial conduct—precisely as California's Proposition 12 does by requiring all farmers to raise their veal calves, hogs, and hens according to California's animal-confinement standards on pain of exclusion from the California market.

Second, the panel failed to appreciate Proposition 12's practical effects on farm owners and operators outside California. Proposition 12 causes the sort of single-state coercion and interstate trade friction that the Commerce Clause was designed to prevent. Although California may

serve as a laboratory of state policy experimentation by applying its animal-confinement laws to *California* farmers, it may not impose those policies on *out-of-state* farmers and thereby prevent other States from experimenting with policies of their own.

The panel's opinion undermines States' sovereign authority to make policy within their borders. Rehearing en banc is necessary to correct the panel's error and secure States' authority to make their own policy choices.

ARGUMENT

I. The Panel Disregarded Precedent and Thereby Permitted California to Impose Its Policies on Out-of-State Conduct

1. 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: "In 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 (internal quotation marks and citation omitted).

The prohibition on extraterritorial regulation applies "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336. And 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). For this reason, determining whether a state regulation constitutes prohibited extraterritorial regulation requires consideration of "the consequences of the statute itself" and how that statute may "interact with the legitimate regulatory regimes of the other States." *Id.* at 406 (O'Connor, J., concurring in the judgment) (internal quotation marks and citation omitted); *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 marks and citation omitted)).

In *Carbone*, for example, the Court held that an ordinance requiring all local solid waste to be processed at a local transfer station violated the Commerce Clause because it deprived out-of-state competitors of access to a market. *Id.* at 386. Though the ordinance did not regulate extraterritorially on its face, the Court held that "its economic effects" were impermissibly "interstate in reach," because it "prevent[ed] everyone except the favored local operator" from processing solid waste and "thus deprive[d] out-of-state businesses of access to a local market." *Id.* at 389. The town argued that it adopted the ordinance to minimize its own environmental footprint, but the Court held that the town's motivation did not permit it to "attach restrictions to exports or imports in order to control commerce in other States" and thereby "extend the town's police power beyond its jurisdictional bounds." *Id.* at 393 (citing *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935)).

Accordingly, this Court has 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. *Daniels Sharpsmart,*

Inc. v. Smith, 889 F.3d 608 (9th Cir. 2018), for example, involved a California statute that required the incineration of all biohazardous medical waste originating in California, even if the laws of another State permitted an alternative method of disposal. *Id.* at 613. This Court examined "whether the practical effect of the regulation is to control conduct beyond the boundaries of the state," *id.* at 614 (quoting *Healy*, 491 U.S. at 336), and specifically noted that "the mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions." *Id.* at 615. This Court thus concluded that the statute was an "attempt[] to regulate waste treatment everywhere in the country," *id.* at 616 and held that the California law therefore violated the Commerce Clause.

Similarly, in *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), this Court considered an extraterritoriality challenge to a law that required sellers of fine art to pay the artist a royalty if the seller resided in California—regardless of where the sale itself took place. This Court reasoned that the royalty requirement would apply to transactions in which the sale, the art, the artist, *and* the buyer had no connection with California. *See id.* at 1323. Because the statute

attempted to use the seller's residence as a hook to regulate "a commercial transaction that 'takes place wholly outside of the State's borders,' this Court "easily conclude[d] that the royalty requirement, as applied to out-of-state sales by California residents, violates the dormant Commerce Clause." *Id.* (quoting *Healy*, 491 U.S. at 336).

California's Proposition 12 plainly violates the rule announced in these decisions. It forbids the sale of products derived from animals not raised in accordance with California animal-confinement standards, *including animals raised in other States*. The law thus purports to regulate a vast swath of conduct that occurs entirely outside California. This Court's opinions in *Daniels Sharpsmart* and *Christies*—along with the Supreme Court's decision in *Carbone*—foreclose such extraterritorial regulation.

Indeed, Proposition 12 even purports to regulate transactions undertaken by States themselves. For example, Purdue University, an instrumentality of the State of Indiana, owns and operates farms through its Animal Sciences Research and Education Center: These farms confine animals, including swine and poultry, in conditions that do not comply with Proposition 12, and Purdue then sells livestock to distributors 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. While Purdue's transactions with those wholesalers occur wholly outside of California, they will, nonetheless, be regulated by Proposition 12 unless those wholesalers choose to forego the California market altogether.

There can be no doubt that Proposition 12 regulates "a commercial transaction that 'takes place wholly outside of the State's borders,'" *Christies*, 784 F.3d at 1323 (quoting *Healy*, 491 U.S. at 336), and that "the practical effect of the regulation is to control conduct beyond the boundaries of the state." *Daniels Sharpsmart*, 889 F.3d at 614 (quoting *Healy*, 491 U.S. at 336). The Commerce Clause prohibits this attempt at regulating animal confinement "everywhere in the country." *Id.* at 616.

2. Notwithstanding this Court's clear statements in *Daniels Sharpsmart* and *Christies*, the panel ignored these decisions and rejected the application of the extraterritoriality doctrine *solely* on the ground that Proposition 12 "is not a price control or price affirmation statute." Slip op. 3. The panel was wrong to do so, and its error requires correction by the en banc Court.

As a preliminary matter, the panel's abuse-of-discretion review of the district court's conclusion on this score was improper. While a district court's balancing of the equitable factors is reviewed for abuse of discretion, "[t]he legal issues underlying the injunction are reviewed de novo, because a 'district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law.'" *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000) (quoting *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 (9th Cir.1999)). Accordingly, this Court reviews *de novo* the disputed legal question here—whether Proposition 12 violates the Commerce Clause's extraterritoriality doctrine.

More importantly, the panel's conclusion that the extraterritoriality doctrine is limited to price-affirmations statutes is completely at odds with *Daniels Sharpsmart* and *Christies*, neither of which involved price-affirmation statutes. The panel did not even attempt to address these decisions, and its failure to do so calls for this Court's en banc review.

The district court ignored these decisions as well, which led it mistakenly to conclude that this Court's earlier decisions predating *Daniels Sharpsmart* and *Christies* had limited the extraterritoriality doctrine to

price-setting regulations. The district court's confusion exemplifies the uncertainty this Court's decisions have caused, and it is time for the en banc Court to resolve that uncertainty.

After all, there is no avoiding the inconsistencies among this Court's precedents concerning 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 suggested that the extra-territoriality doctrine of *Healy* and *Baldwin* may 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), rejected an extraterritoriality challenge to 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, the panel's and the district court's interpretation of this Court's decisions—that States may impose *any* regulations on *any* out-of-state conduct so long as such regulations are nondiscriminatory and are somehow connected to in-state sales—also contradicts the approach taken by judges in five other circuits. *See Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), *cert. denied* 139 S. Ct. 1168 (2019); *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017); *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016) (opinion of Loken, J.); *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds sub nom.*

In *North Dakota v. Heydinger*, for example, the Eighth Circuit invalidated a statute regulating power importation, with Chief Judge

Loken emphasizing that the Supreme Court has never limited the holding of the extraterritoriality doctrine to price-control and price-affirmation laws. 825 F.3d at 920 (opinion of Loken, J.). Similarly, the Seventh Circuit invalidated a Wisconsin law barring from the State's landfills any 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*, 847 F.3d at 831 (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*, 735 F.3d at 376; *see also Ass'n for Accessible Meds.*, 887 F.3d at 669 (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).

In short, by affirming the district court's refusal to grant a preliminary injunction, the panel's decision poses a significant threat to other State's interests and breaks with this Court's and other Circuits' precedent. En banc review is necessary to clear up this confusion and reaffirm what the Supreme Court has long held—that "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.

II. The Panel's Decision Threatens State Sovereignty

That this case presents an opportunity to clear up confusion in the Court's caselaw is reason enough for en banc review. *See, e.g., Complaint of McLinn*, 744 F.2d 677, 680 (9th Cir. 1984) (noting that the panel had successfully requested en banc consideration to resolve "confusion in this court's prior decisions"). But en banc consideration is especially appropriate here in light of this case's extensive practical significance: The district court's interpretation of the Commerce Clause permits States to impose *any* regulation on *any* out-of-state conduct, so long as such regulations are nondiscriminatory and are somehow connected to in-state sales. By affirming this conclusion, the panel's decision threatens other

States' decisions *not* to impose burdensome animal-confinement requirements on their farmers—a determination just as legitimate as California's. The Commerce Clause prevents such usurpation of other States' policy choices, and the en banc Court should intervene to protect States' sovereign policymaking autonomy within their borders.

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 when that regulation has the effect of regulating conduct 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 requirements, which would in turn inevitably render interstate commerce effectively impossible.

Proposition 12 interferes with "the legitimate regulatory regimes of other states," *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989), and threatens to subject farmers across the country to conflicting requirements. California's animal-confinement rules depart from the rules of the vast majority of States, which 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 well within *California's* policymaking authority to impose these animal-confinement requirements on *California* farmers. But the Commerce Clause does not allow California to undermine *other States'* policymaking authority by imposing its requirements on *other States'* farmers.

Making matters worse, Proposition 12 requires the California Department of Food and Agriculture to promulgate rules to implement the statutory requirements. Cal. Health & Saf. Code § 25993(a). While the Department has yet not promulgated the final version of these rules, its draft rules would require "any out-of-state pork producer that is keeping, maintaining, confining, and/or housing a breeding pig for purposes of producing whole pork meat for human food use in California [to] hold a valid certification" as "a certified operation." Cal. Dep't of Food & Agric., Draft Art. 3, § 1322.1(b) (Jul. 22, 2020), https://www.cdfa.ca.gov/ahfss/pdfs/Article3PorkMeatDRAFT07222020.pdf. To obtain a certification, a

farmer would be forced to permit inspections by a "certifying agent, and authorized representatives of the Department." Cal. Dep't of Food & Agric., Draft Art. 5, § 1326.1(b) (Jul. 22, 2020), https://www.cdfa.ca.gov/ahfss/pdfs/Article5CertificationDRAFT07222020.pdf. And these on-site inspections would "be conducted at least once every 12 months thereafter." *Id.* § 1326.5(a)(1).

Thus, to sell their products in the California market, States and their farmers not only would need to comply with California's regulatory scheme but would also need to permit annual, on-site inspections by California officials at farms operated outside California. And, notably, these proposed regulations would require all certified operators to maintain Proposition 12 compliance records for two years and to disclose them to California auditors upon request. *See id.* § 1326.2.

It is easy to imagine farmers getting caught in the crossfire should other States attempt to impose regulations that differ from California's. Massachusetts, Maine, Michigan, and Rhode Island have enacted similarly exacting animal-confinement laws with a market-exclusion enforcement mechanism. *See* Mass. Gen. Laws ch. S51A, §§ 1–5; Me. Rev. Stat. tit. 7, § 4020(2); Mich. Comp. Laws § 287.746(2); R.I. Gen. Laws

§ 4-1.1-3. If these and potentially other States impose inconsistent obligations, producers will inevitably lose access to national markets.

More broadly, the panel's and the district court's opinion would encourage economic balkanization in other markets as well. In the energy sector, for example, Minnesota has 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 agreement, that would increase statewide power-sector carbon dioxide emissions. *North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016) (opinion of Loken, J.). 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. The panel and district court, however, would permit enforcement of such regulation, with geographically segmented energy markets the inevitable result—precisely the sort of outcome the Commerce Clause was designed to prevent.

The labor market present is area that could soon be the site of state economic antagonism. Under the panel's approach, a State could close its

markets to 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). Such a State could then face retaliation from other states implementing their own sales bans, such as barring goods produced by labor lacking right-to-work protections. If left uncorrected, the panel's error will have serious consequences for the open markets the Commerce Clause is meant to promote and protect.

Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, observed 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, one State's policy experimentation *does* pose clear risks for the rest of the country; indeed, it *prevents* other States from engaging in policy experimentation of their own. En banc review is needed to correct the panel's error and to ensure that state sovereignty is respected.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Ninth Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,537 words.

Dated: December 10, 2020

/s/ Thomas M. Fisher
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CERTIFICATE OF SERVICE

I certify that on December 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: December 10, 2020

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