No. 19-56408

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH AMERICAN MEAT INSTITUTE,

Plaintiff-Appellant,

v.

XAVIER BECERRA, 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

BRIEF FOR THE UNITED STATES IN SUPPORT OF THE PETITION FOR REHEARING

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INTRODUCTION AND INTEREST OF THE UNITED STATES

The Constitution takes "special concern" with "the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). Thus, "[n]o State can legislate except with reference to its own jurisdiction," *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881), and no State can "impose its own policy choice on neighboring States," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996). The Commerce Clause helps enforce these limitations by precluding "the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336. The "critical inquiry" in evaluating such a statute is to determine whether its "practical effect . . . is to control conduct beyond the boundaries of the State." *Id.*

In 2018, California voters adopted Proposition 12, a ballot initiative that establishes standards for the confinement of veal calves and pigs within the State and prohibits the sale of meat—including meat produced entirely outside the State—from animals not raised in conformity with the requirements imposed on California farmers. The only interest advanced by the State to justify Proposition 12 is a desire to prevent animal cruelty. A panel of this Court held that the district court did not commit legal error in concluding that "Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute." Op. 3.

This ruling disregards Supreme Court precedent establishing that a State may not regulate extraterritorial conduct in order to prevent a harm—here, animal cruelty—that occurs entirely outside its borders. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935). This Court has previously applied this doctrine outside the context of price regulations, *see, e.g.*, *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), and several other courts of appeals have done the same. Many of these courts have expressly rejected the rule applied by the panel in this case. En banc review is warranted to secure conformity with these decisions.

Proposition 12 is likely to have several adverse effects on functions and programs of the U.S. Department of Agriculture (USDA). For example, Proposition 12 would frustrate USDA policy not to buy products that are specialized or geographic in nature for the Emergency Food Assistance Program. Any price increases in food products attributable to the new law would make such assistance programs more expensive and reduce the buying power of benefits under the Supplemental Nutrition Assistance Program. *See* 2-ER-176 (noting the conclusion of the California Legislative Analyst's Office that Proposition 12 would likely lead to price increases).

California's efforts to enforce compliance with Proposition 12 could also create biosecurity concerns. Inspections by state officials, as contemplated by draft regulations implementing Proposition 12, Cal. Dep't of Food & Agric., Draft Article

5, § 1326.5(a)(2) (July 22, 2020), https://go.usa.gov/xGwd2, could increase the risk of transmission of disease among farms. Such increased risk in turn threatens additional burdens on USDA's Animal Plant and Health Inspection Service, whose Veterinary Services program supports farmers by responding to animal disease emergencies. And finally, USDA's Agricultural Marketing Service would need to adjust the price formulas that are used to price most hogs sold today, a resource-intensive task given the number of market participants who must respond to the law's requirements, the short time frame available to achieve compliance, and uncertainty as to how producers will respond to any categorization decisions. These various burdens on USDA programs would only increase if other States attempted to adopt similar legislation.

For these reasons, the United States files this amicus brief in support of the petition for rehearing en banc pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(b).

STATEMENT OF THE CASE

A. Statutory Background

In November 2018, California voters enacted Proposition 12, the ballot initiative at issue here. The stated purpose of Proposition 12 is "to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers." Proposition 12, § 2, https://go.usa.gov/xGpXH. In this litigation, though, the State has forsaken any

reliance on consumer health and safety. *See* Dkt No. 24, at 18 & n.6; CA Br. 34 n.7. The only interest relied on by the State in this litigation is "preventing animal cruelty." CA Br. 1, 33.

Proposition 12 attempts to prevent animal cruelty in two ways. First, it forbids farmers in the State to knowingly cause any covered animal (*i.e.*, a breeding pig, veal calf, or egg-laying hen) to be "confined in a cruel manner." Cal. Health & Safety Code § 25990(a). The definition of "confined in a cruel manner" requires that animals be able to stand up, turn around, and fully extend their limbs, and it specifies the minimum "usable floorspace" that each animal must have. *Id.* § 25991(e)(1)-(5). Second, Proposition 12 prohibits a business owner from selling whole veal or whole pork meat that the owner "knows or should know is the meat of a covered animal who was confined in a cruel manner," or in the case of pork, "is the meat of immediate offspring of a covered animal who was confined in a cruel manner." *Id.* § 25990(b)(1), (2); *see also id.* § 25991(u)-(v) (defining whole veal and whole pork meat). This part of Proposition 12 extends the in-state confinement requirements to out-of-state farmers whose products are sold in California.

Any violation of Proposition 12 is a misdemeanor. Cal. Health & Safety Code § 25993(b). Proposition 12 also enables private enforcement by designating a violation of the sales ban as unfair competition under California Business & Professions Code § 17200. Cal. Health & Safety Code § 25993(b); *see Cort v. St. Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 987 (9th Cir. 2002).

Proposition 12 requires the California Department of Food and Agriculture to issue regulations implementing the new law. The State has posted draft regulations for "informal comment." Cal. Dep't of Food & Agric., *Proposition 12 Implementation* (2020), https://go.usa.gov/x7STv.

B. Prior Proceedings

1. Plaintiff North American Meat Institute (NAMI) claims that "Proposition 12 violates the Commerce Clause of the United States Constitution by: (1) discriminating against out of state producers, distributors, and sellers of pork and veal; (2) impermissibly regulating extraterritorial activities beyond California's borders; and (3) substantially burdening interstate commerce in a manner that exceeds any legitimate local benefits." 1-ER-1. The district court denied a motion for preliminary injunction on the ground that NAMI had "fail[ed] to raise any serious questions on the merits of [its] claims." 1-ER-8.

With respect to the second claim, the district court asserted that "the extraterritoriality doctrine's application is essentially limited to cases involving the sorts of price-setting statutes" at issue in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and *Healy v. Beer Institute*, 491 U.S. 324 (1989). 1-ER-19. The court understood this limitation to follow from the Supreme Court's statement in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), that "[t]he rule that was applied in *Baldwin* and *Healy*" was "not applicable" in that case because "unlike price control or price affirmation statutes, the Maine Act does not

regulate the price of any out-of-state transaction." *Id.* at 669 (quotation marks omitted); *see* 1-ER-19.

2. In an unpublished opinion, a panel of this Court addressed the claim of improper extraterritorial regulation as follows: "The district court did not abuse its discretion in concluding that Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669-70 (2003)." Op. 3.

3. In the meantime, the district court granted the State's motion to dismiss the extraterritorial regulation claim. *NAMI v. Becerra*, No. 2:19-cv-08569, 2020 WL 919153, at *8 (C.D. Cal. Feb. 24, 2020). NAMI filed an amended complaint, supplementing its second claim with assertions that Proposition 12's sales ban would have the practical effect of regulating commerce in other States because portions of animals raised in compliance with Proposition 12 will be sold outside of California, thus imposing the burdens of compliance on actors and consumers outside the State. Dkt. No. 73, ¶¶ 6, 71-75. The district court stayed further proceedings pending resolution of this appeal.

ARGUMENT

PROPOSITION 12 VIOLATES THE COMMERCE CLAUSE.

A. A State Law Improperly Regulates Extraterritorial Conduct When Its Practical Effect Is To Control Conduct Outside State Borders.

The Supreme Court has identified "two primary principles that mark the boundaries of a State's authority to regulate interstate commerce." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018). The first is that "state regulations may not discriminate against interstate commerce." *Id.* at 2091. The second is that "States may not impose undue burdens on interstate commerce." *Id.* While these "two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause," they are "subject to exceptions and variations." *Wayfair*, 138 S. Ct. at 2091; *see also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (noting that "there is no clear line separating" the two categories of improper regulation). "[T]he critical consideration," no matter how the challenged regulation is characterized, "is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 476 U.S. at 579.

The Commerce Clause takes "special concern" in both "the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) (footnote omitted). In this way, the Clause reinforces the "principles of interstate federalism embodied"

throughout the Constitution. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). Among these are the principles that "the States retain many essential attributes of sovereignty," and that "[t]he sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States." *Id.* This means that "[n]o State can legislate except with reference to its own jurisdiction," *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881), and no State can "impose its own policy choice on neighboring States," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996).

Accordingly, the Supreme Court has demonstrated special concern with "the extraterritorial effects of state economic regulation." *Healy*, 491 U.S. at 335-36. By prohibiting extraterritorial state regulation, the Commerce Clause protects "against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 337. Therefore, "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." *Id.* at 336. But a state regulation may be impermissibly extraterritorial even if, in a narrow sense, it addresses conduct that occurs within the State. *See Brown-Forman*, 476 U.S. at 580 (explaining that the "mere fact that the effects" of a law "are triggered only by [in-state] sales . . . does not validate the law if it regulates . . . out-of-state transactions"). The "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 580.

B. The Purpose And Practical Effects Of Proposition 12 Are To Control Methods Of Production Outside California.

Two Supreme Court cases are especially instructive in guiding the inquiry into extraterritorial effects in this case. First, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935), the Supreme Court held unconstitutional a New York law that set minimum prices for milk sold by in-state producers and then prohibited dealers from selling milk purchased outside the State for less. The Court explained that, just as "New York has no power to project its legislation into Vermont" to directly control "the price to be paid in that state for milk acquired there," the State could not "regulat[e] by indirection" to achieve the same goal. *Id.* at 521, 524. New York could not ban the local sales of milk produced in other States to promote the "economic welfare" of farmers or manufacturers there because "[o]ne state may not put pressure of that sort upon others to reform their economic standards." *Id.* at 524.

The Supreme Court emphasized that a State could properly regulate to prevent harms from occurring *within* its borders, provided a reasonable relationship exist between the local harm sought to be avoided and the restriction on commerce. Thus, a State could properly "exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets." *Baldwin,* 294 U.S. at 528; *see also id.* at 525 (approving laws that ban the importation of dangerous or unhealthy items, prohibit fraud, and guard against environmental nuisance). By contrast, a State could not "condition importation upon proof of a

satisfactory wage scale" paid to farmers who produce those products. 294 U.S. at 524 (finding the relation "between earnings and sanitation" "too remote and indirect to justify obstructions to the normal flow" of interstate commerce).

In the second case, *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), the Supreme Court held that one State could not compel others to adopt its preferred standards of environmental protection. That case did not involve price controls or import restrictions, but rather a municipal flow control ordinance that required all solid waste to be processed at a particular transfer station before leaving the municipality. The Court held that the ordinance could not be justified "as a way to steer solid waste away from out-of-town disposal sites" that the town might view as more harmful to the environment because the town lacked authority to regulate such sites. *Id.* at 393. Citing *Baldwin*, the Court explained that States "may not attach restrictions to exports or imports to control commerce in other States." *Id.*

Together, these two cases mark the parameters of a State's ability to affect the production of goods outside its borders. A State may restrict sales of a product to protect the health and safety of consumers within the State, but may not do so to promote welfare or avoid harm outside the State. This line respects the sovereignty of other States, avoids inconsistent regulation, and reflects traditional understandings of the police power. "Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens." *Medtronic v. Lohr*, 518 U.S. 470, 475 (1996). But when a State attempts to address harms occurring

elsewhere, it improperly attempts to "extend [its] police power beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393.

That is precisely what California has done here. The sales ban dictates to out-of-state farmers how they must confine animals before meat from those animals (or, in the case of pigs, meat from those animals' offspring) is sold in California. By forcing them to comply with California's preferred farming methods, Proposition 12 prevents out-of-state pork producers from employing more efficient and cost-effective farming practices made possible by the legal regimes in their home States. In other words, the law's ban on the sale of meat from an animal not confined in accordance with its requirements "regulates by indirection" the production methods used by out-of-state farmers. *Baldwin*, 294 U.S. at 524; *see also id.* at 527 (disapproving of restrictions that "neutralize advantages belonging to the place of origin").[1]

Such regulation cannot be justified by reference to a legitimate in-state harm. The objective of Proposition 12 is "to prevent animal cruelty by phasing out" what California considers "extreme methods of farm animal confinement." Proposition 12, § 2. To the extent out-of-state farming practices cause cruelty to animals, that harm is inflicted outside California and suffered by animals outside the State. Indeed, there

[1] Declarations provided by NAMI in support of its motion for preliminary injunction explain that Proposition 12 would result in significant changes to the production of veal and pork outside California and would require producers to segregate compliant products throughout a nationwide supply chain, effectively resulting in the creation of a separate product line and distribution system. *See* Dkt No. 15, at 20-21 (summarizing evidence).

can be no plausible argument that the sales ban promotes the welfare of animals within California—that objective is accomplished by the prohibition on the use of "cruel" confinement methods by California farmers. Cal. Health & Safety Code § 25990(a). Nor does California argue that Proposition 12 protects the health and safety of California consumers. *See* Dkt No. 24, at 18 n.6; CA Br. 34 n.7. The only interest California relies on to justify its regulation of meat produced in other States is protecting the welfare of animals outside its jurisdiction. *See* CA Br. 33.[2]

Because Proposition 12 has the practical effect of controlling conduct outside California and does not regulate to promote a legitimate in-state interest, it violates the Commerce Clause.

C. The Rule Applied By The Panel Is Inconsistent With Supreme Court Precedent, The Case Law Of This Court, And The Decisions Of Several Other Courts of Appeals

Citing the Supreme Court's decisions in *Healy* and *Walsh*, the panel held that the district court "did not abuse its discretion in concluding that Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute." Op. 3. The panel's holding rested on an error of law.

[2] In *Indiana v. Massachusetts*, No. 22O149 (S. Ct.), and *Missouri v. California*, No. 22O148 (S. Ct.), the United States filed briefs at the Supreme Court's invitation addressing laws that, like Proposition 12, prohibited the sale of animal products produced outside a State under conditions that were prohibited within the State. In those cases, the defendant States argued that the challenged measures were directed at protecting the health and safety of residents.

The Supreme Court has never limited its review of extraterritorial regulation to price control or affirmation statutes, and the cases cited by the panel do not support such a crabbed view of the doctrine. The test laid out in *Healy* is "whether the practical effect of the regulation is to control *conduct*"—not just prices—"beyond the boundaries of the State." 491 U.S. 336 (emphasis added). Further, *Healy* described the plurality opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), as "significantly illuminat[ing] the contours of the constitutional prohibition on extraterritorial legislation." 491 U.S. at 333 n.9. The law invalidated in *MITE Corp.* regulated corporate takeovers, not prices. The limitation articulated by the panel is therefore inconsistent with *Healy*'s rule and reasoning.

In *Walsh*, the Supreme Court rejected an argument that a Maine statute designed to reduce prescription drug prices through rebate agreements constituted impermissible extraterritorial regulation. The Court distinguished *Baldwin* and *Healy* on the ground that the challenged Maine law, "unlike price control or price affirmation statutes, . . . does not regulate the price of any out-of-state transaction." 538 U.S. at 669 (quotation marks omitted). But the Court's focus on price regulation simply reflected the framing of the case before it: the plaintiff had argued that the statute was unconstitutional because it regulated prices paid out of state, *see* Petitioner's Br. at 29, *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, No. 01-188, 2002 WL 31120844, at *29 (U.S. Sept. 20, 2002), and the district court had enjoined the statute on that ground, *see* 538 U.S. at 658. The *Walsh* Court was not presented with

the question whether a State could regulate extraterritorial conduct for the purpose of preventing a harm occurring outside its jurisdiction, nor did it undermine the Court's prior holdings that such regulation is unconstitutional. The panel's rule is inconsistent with those prior cases, including *Baldwin* and *Carbone*.

The panel's holding is also inconsistent with this Court's case law. For example, in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), the Court recognized that *Healy's* extraterritoriality rule applied "to cases where the 'price' floor being imposed on another jurisdiction was not monetary but rather a minimum standard of environmental protection." *Id.* at 1102 (citing *Carbone*, 511 U.S. at 393). More importantly, the en banc decision in *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), invalidated a statute having nothing to do with price controls or affirmations based on its extraterritorial effects. *See id.* at 1324 ("Under *Healy*, the Act's clause regulating out-of-state art sales where 'the seller resides in California,' . . . violates the dormant Commerce Clause as an impermissible regulation of wholly out-of-state conduct."). And in *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615-16 (9th Cir. 2018), the Court held that a Commerce Clause challenge was likely to succeed against a California statute that "attempted to regulate waste treatment everywhere in the country."[3]

[3] This Court had previously held that a statutory ban on the sale of foie gras created by force-feeding ducks was not an impermissible extraterritorial regulation because the law was "not a price fixing statute." *Association des Eleveurs de Canards et*

Finally, the panel's holding that extraterritorial regulations do not violate the Commerce Clause unless they involve price controls is inconsistent with decisions from several other courts of appeals. For example, in *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017), the Seventh Circuit considered an Indiana law that regulated e-liquid solutions (used in electronic cigarettes) by dictating "how out-of-state manufacturers must build and secure their facilities, operate assembly lines, clean their equipment, and contract with security providers, if any of their products are sold" in-state. *Id.* at 830. The court held that the statute was unconstitutional because it "directly regulate[d] the production facilities and processes of out-of-state manufacturers and thus wholly out-of-state commercial transactions." *Id.* at 837.

In *National Foreign Trade Council v. Natsios*, the First Circuit considered a challenge to a law that restricted the ability of Massachusetts agencies to purchase goods or services with companies that do business with Burma. 181 F.3d 38, 45 (1st Cir. 1999), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Like Proposition 12, the Massachusetts law was intended to express "disapproval" of conduct committed elsewhere and "apply indirect economic pressure . . . for reform." *Id.* at 46-47. The First Circuit held that "by conditioning state procurement decisions on conduct that occurs" in Burma, the "practical effect" of the Massachusetts law was

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d'Oies du Quebec v. Harris, 729 F.3d 937, 950-51 (9th Cir. 2013). This reasoning is fundamentally inconsistent with the application of the doctrine in *Christies* and conflicts with Supreme Court precedent for the reasons described above.

to "control conduct beyond the boundaries of the State." *Id.* at 69 (quotation marks omitted).

Other courts of appeals have similarly recognized that the Commerce Clause prohibits extraterritorial regulation outside of the price-fixing context. *See, e.g.*, *Association for Accessible Meds. v. Frosh*, 887 F.3d 664, 670 (4th Cir. 2018) (rejecting the argument that "*Walsh* limited the extraterritoriality principle only to price affirmation statutes"); *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016) (rejecting the argument "that only price-control and price-affirmation laws can violate the extraterritoriality doctrine"); *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 376 (6th Cir. 2013) (holding that a statute that required beverage containers to possess a unique-to-Michigan mark "forc[es] states to comply with its legislation in order to conduct business within its state" and "creates an impermissible extraterritorial effect" under *Healy*); *American Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (holding "Vermont has projected its legislation into other States, and directly regulated commerce therein, in violation of the dormant Commerce Clause" by adopting a statute regulating speech on the internet (emphasis and quotation marks omitted)).[4]

[4] The Tenth Circuit in *Energy & Environment Legal Institute v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015), invoked *Walsh* to support its conclusion that "the *Baldwin* line of cases concerns only 'price control or price affirmation statutes' that involve 'tying the price of . . . in-state products to out-of-state prices.'" *Id.* at 1174 (omission in original) (quoting *Walsh,* 538 U.S. at 669). That opinion did not engage with the

En banc rehearing in this case is warranted to ensure consistency with all of these decisions.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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reasoning in *Baldwin* or the discussion of that case in *Carbone*, both of which made clear that a State cannot regulate extraterritorial conduct to prevent harms occurring outside its jurisdiction. It is not clear that the law challenged in *Epel*—a requirement that utilities in Colorado supply a limited percentage of their retail electricity sales from renewable energy—would actually have the practical effect of controlling extraterritorial conduct. In any event, the analysis in *Epel* is, at a minimum, "somewhat contrary" to the approach taken by the Supreme Court and other courts of appeals. *See Heydinger*, 825 F.3d at 920 (collecting cases).

CERTIFICATE OF COMPLIANCE

This brief complies with the length limit of Circuit Rule 29-2(c) because it contains 4,191 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Thomas Pulham
Thomas Pulham