No. 19-56408

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH AMERICAN MEAT INSTITUTE

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

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

Intervenor-Defendants-Appellees.

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

PETITION FOR REHEARING AND REHEARING EN BANC OF PLAINTIFF-APPELLANT NORTH AMERICAN MEAT INSTITUTE

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

California's Proposition 12 bans the sale of wholesome pork and veal imported into California if farmers in other states and countries do not comply with the unprecedented animal-confinement requirements adopted by California. This trade barrier patently violates the Commerce Clause and interstate federalism because it (1) regulates commerce outside of California's borders, (2) protects California farmers from out-of-state competition, and (3) imposes massive burdens on interstate commerce that vastly exceed any local benefits. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (reaffirming that the Commerce Clause restricts state law and explaining that "removing state trade barriers was a principal reason for the adoption of the Constitution").

The panel's contrary decision warrants review en banc because it disregards controlling Supreme Court precedent and conflicts with decisions of this Circuit and other circuits. *See* Fed. R. App. P. 35(b)(1)(A). With regard to extraterritorial regulation, the Supreme Court has held that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)). The panel's decision renders this bedrock principle a dead letter in this Circuit by holding that it applies only to "price control or price affirmation statute[s]." Op. 3. This arbitrary limitation of the constitutional

prohibition on extraterritorial regulation conflicts with the Supreme Court's decision in *Carbone*—which applied the extraterritoriality doctrine to a law that was not a price regulation—and with decisions of both this Circuit and other circuits that have struck down extraterritorial regulations outside the price-control context. *See Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc); *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018); *see also, e.g.*, *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017); *infra*, at 10–11.

The panel's decision further conflicts with Supreme Court precedent by holding that a state law (1) cannot have a discriminatory effect if it treats in-state producers the same as out-of-state producers, Op. 2; and (2) cannot impermissibly burden interstate commerce if it regulates a production method, "rather than imposing a burden on producers based on their geographical origin." Op. 3. The former holding squarely conflicts with *Baldwin*, 294 U.S. 511, and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The latter nullifies *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), by limiting its protection to discriminatory laws, which already are subject to strict scrutiny.

This case also raises questions of exceptional importance—as shown, not least of all, by the *amicus curiae* briefs filed on appeal by eleven sovereign states, as well as by the National Association of Manufacturers, Chamber of Commerce, and Food Marketing Institute. *See* Fed. R. App. P. 35(b)(1)(B). Proposition 12 will have a

devastating effect on the pork and veal industries and thousands of small farmers throughout the nation, who will have their multi-million dollar investments in existing facilities upended by California's unconstitutional effort to dictate from afar how farm animals must be raised outside its borders.

As discussed below, Proposition 12's Sales Ban is unconstitutional. It will cause irreparable harm throughout the nation to thousands of small out-of-state farmers and out-of-state businesses with no representation in California's political process. A law raising such serious constitutional questions and portending such a significant disruption to interstate and foreign commerce should not be allowed to stand on the strength of a three-page unpublished opinion that rests on propositions of law that demonstrably conflict with binding precedent of the Supreme Court and this Court, and with multiple decisions from other circuits.

Rehearing and rehearing en banc should be granted.

BACKGROUND

California's Proposition 12 is a ballot initiative sponsored by animal-welfare groups and adopted by California voters in November 2018. Proposition 12 prohibits California farmers from confining breeding sows and veal calves "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 id.* § 25990(a). It also sets forth specific square-footage requirements. Effective January

1, 2020, veal calves must have at least 43 square feet of usable floorspace, and, effective January 1, 2022, breeding sows must have at least 24 square feet of usable floorspace. *Id.* § 25991(e)(2)–(3). NAMI does not challenge California's regulation of animal confinement within its own borders.

Section 25990(b), however, extends these animal-confinement requirements to out-of-state farmers through a Sales Ban. The Sales Ban prohibits the in-state sale of pork or veal meat that the seller "knows or should know is the meat of a covered animal" that was not confined in compliance with Proposition 12—even if the animal was raised outside California's borders. *Id.* § 25990(b)(1)–(2). Thus, the Sales Ban prohibits the sale of imported pork and veal *unless* out-of-state farmers comply with California's animal-confinement standards outside of California. Violations are punishable by a fine of up to $1,000 and 180 days' imprisonment. *Id.* § 25993(b).

Plaintiff-appellant North American Meat Institute ("NAMI"), a national trade association representing meat producers and processors, brought this action seeking declaratory and injunctive relief against the Sales Ban, as applied to veal and pork from outside California. NAMI sought a preliminary injunction because the Sales Ban violates the Commerce Clause and interstate federalism by (1) regulating extraterritorially, (2) discriminatorily leveling the playing field to protect California farmers from out-of-state competitors, and (3) imposing excessive burdens on interstate commerce. NAMI further showed that the Sales Ban has no consumer health or

safety justification—a point defendants and intervenors did not dispute—and will severely burden interstate commerce and irreparably harm NAMI's members and thousands of farmers across the nation by requiring them either to abandon the California market or spend hundreds of millions of dollars to build facilities that comply with California's unprecedented animal-confinement requirements.

On November 22, 2019, the district court denied NAMI's motion, holding that NAMI had "fail[ed] to raise any serious questions on the merits of [its] claims." ER8, 11–25. The district court recognized that (1) "complying with Proposition 12 could impose potentially significant costs" on pork and veal producers and processors, (2) "the Eleventh Amendment may prevent the recovery of these costs," and (3) "the Ninth Circuit has held that these potentially noncompensable money damages can constitute irreparable injury," but then declined to address NAMI's irreparable harm showing or the balance of hardships. ER26.

NAMI appealed, supported by eleven states and three national trade associations. The panel held oral argument on June 5, 2020. Over four months later, on October 15, 2020, the panel affirmed the district court in a three-page unpublished opinion. Op. 1–3. With regard to extraterritoriality, the panel held that "[t]he 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. With regard to discrimination, the panel held that "[g]iven the inconsistencies in dormant Commerce Clause jurisprudence, the district court did not abuse its discretion in relying on *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), to hold that Proposition 12 does not have a discriminatory effect because it treats in-state meat producers the same as out-of-state meat producers." Op. 2. And, with regard to the burden on interstate commerce, the panel held "[i]t was not an abuse of discretion to conclude that Proposition 12 does not create a substantial burden because the law precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographical origin." Op. 3.

ARGUMENT

The issues presented in this appeal are purely legal. Although denial of a preliminary injunction is reviewed for abuse of discretion, "[t]he district court's interpretation of the underlying legal principles … is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

The district court denied relief based solely on its conclusion that NAMI "fail[ed] to raise any serious questions on the merits of [its] claims." ER8; *accord* ER18, 23, 25, 26; *cf. Daniels*, 889 F.3d at 615 ("serious questions going to the merits" warrant a preliminary injunction if the other factors are met and the balance of

hardships "tips sharply towards the plaintiff"). Thus, the panel was obligated to determine the governing law *de novo*. *See Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367, 396 & n.1 (9th Cir. 2016) (en banc); *Daniels*, 889 F.3d at 613.

Under the correct legal standards, and based on the undisputed facts, the Sales Ban not only raises serious constitutional questions—it is plainly unconstitutional.

I. The Panel's Erroneous Limitation of the Extraterritoriality Doctrine to Price Regulations Conflicts with Decisions of the Supreme Court, This Court, and Other Courts of Appeals.

The Sales Ban violates the extraterritoriality doctrine, which precludes "application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). This doctrine reflects "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335–36 (footnote omitted). Accordingly, "States … may not attach restrictions to exports or imports in order to control commerce in other States," as this would "extend [their] police power beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393.

The rule applied in *Carbone*—which the district court erroneously dismissed as "dicta," ER22 n.11,[1] and the panel did not cite—controls this case. The Sales Ban

[1] The rule quoted above reflected the Supreme Court's reason for rejecting a justification proffered in defense of the law struck down in *Carbone*, and thus was an essential part of the Court's holding.

attaches restrictions to imported pork and veal by prohibiting their sale unless out-of-state farmers comply with California's confinement standards. And it does so to control the housing of farm animals in other states. *See* Prop. 12 § 2 (Proposition 12's stated purpose is to "phas[e] out" confinement methods). Under the Commerce Clause, California cannot ban imported products from its market because it deems the conditions under which they were produced "cruel" or "inhumane." A contrary rule would have radical implications for the national common market and would allow California to dictate agricultural, manufacturing, and employment standards nationwide by banning imported goods that were produced under conditions to which California objects. California could, for example, ban the sale of imported goods produced by workers who were paid less than California's minimum wage or subjected to any other working conditions of which California disapproves.

The panel rejected NAMI's extraterritoriality claim solely on the ground that Proposition 12 "is not a price control or price affirmation statute." Op. 3. That arbitrary limitation of the extraterritoriality doctrine defies Supreme Court precedent. *Carbone* itself did not involve a price regulation, but a waste-disposal ordinance designed to minimize a town's contribution to environmental harms outside its borders. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1102 (9th Cir. 2013) (recognizing that *Carbone* applied the extraterritoriality doctrine to Clarkstown's attempt to dictate "a minimum standard of environmental protection"). And

the Supreme Court has explained that the doctrine precludes a state from regulating *any* "conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336; *see id.* at 333 n.9 (observing that the plurality's extraterritoriality holding in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)—a non-price control case—"significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation"). The Supreme Court has never limited the extraterritoriality doctrine to price regulations.[2]

The panel's decision also conflicts with Circuit precedent. The en banc Court in *Christies* invalidated, on extraterritoriality grounds, a non-price regulation that required out-of-state art sellers to pay California artists a royalty. *See* 784 F.3d at 1324–25 & n.1. And in *Daniels*, this Court sustained an extraterritoriality challenge to a California law that regulated the out-of-state disposal of California-generated medical waste. *See* 889 F.3d at 615–16. This case is the mirror image of *Daniels*—just as California could not restrict *exports* to control waste disposal outside California, it cannot restrict *imports* to control farming practices outside California. *See Carbone*, 511 U.S. at 393 (applying same rule to "exports or imports").

To be sure, this Court in *Harris* rejected an extraterritoriality challenge to California's ban on the sale of foie gras because the ban was not a price regulation. *See*

[2] It did not do so in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003). *Walsh* involved a challenge *to a price regulation*. It held only that there was no extraterritorial control in that case, and said nothing about the doctrine's application outside the price-control context, an issue that was not before it.

729 F.3d at 951. But that rationale is no longer good law after this Court's intervening en banc decision in *Christies*. *See Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1024 (E.D. Cal. 2017) (after *Christies*, any "contention that the extraterritoriality doctrine is limited to price control or price affirmation statutes is without merit"). But even if there were doubt on that score, it would only provide a further reason to grant en banc review to clarify the law of this Circuit and "to secure or maintain uniformity of th[is] [C]ourt's decisions." Fed. R. App. P. 35(a)(1).

Finally, the panel's decision conflicts with multiple decisions of other circuits that have struck down laws for violating the extraterritoriality doctrine outside the context of price regulation. *See, e.g.*, *Legato Vapors*, 847 F.3d at 829–37; *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 373–76 (6th Cir. 2013); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102–04 (2d Cir. 2003); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69–70 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153–54 (7th Cir. 1999); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657–61 (7th Cir. 1995). Unlike the panel here, these courts correctly held that, while some of the Supreme Court's leading extraterritoriality cases "involved price affirmation statutes, the principles set forth in these decisions are not limited to that context." *Meyer*, 63 F.3d at 659; *accord Ass'n for Accessible Meds.*

v. Frosh, 887 F.3d 664, 670 (4th Cir. 2018) (rejecting argument that the extraterritoriality doctrine is limited to price affirmation statutes), *cert. denied*, 139 S. Ct. 1168 (2019) (mem.); *North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016) (opinion of Loken, J.) ("[T]he Supreme Court has never so limited the doctrine [to price regulations], and indeed has applied it more broadly.").

The conflict with the Seventh Circuit's decision in *Legato Vapors* is particularly stark. That court struck down an Indiana law that banned the in-state sale of vaping products unless the manufacturers' out-of-state production facilities complied with Indiana's specifications. Comparing the law to a hypothetical attempt to regulate conditions in "out-of-state barns where the cows are milked," the court held that the law improperly "regulate[d] the production facilities and processes of out-of-state manufacturers and thus wholly out-of-state commercial transactions." 847 F.3d at 837. "With almost two hundred years of precedents to consider," the court found not "a single appellate case permitting" such "direct regulation of out-of-state manufacturing processes and facilities." *Id.* at 831. Proposition 12 is materially indistinguishable from Indiana's vaping law, and it too regulates extraterritorially.

II. The Panel's Rulings Regarding the Sales Ban's Discriminatory Effect and Excessive Burden Conflict with Supreme Court Precedent and Eliminate Critical Protections for Interstate Commerce.

The panel's rulings with regard to NAMI's other claims also warrant the full Court's review. NAMI showed that the Sales Ban has a discriminatory "leveling"

effect because it eliminates the competitive advantage out-of-state producers would have over in-state producers if they did not have to comply with the same costly confinement requirements that California imposes on its farmers. The Sales Ban thus discriminates by ensuring that California farmers compete on an artificially level playing field with farmers from states that have not adopted the same confinement requirements. This rank protectionism is the prime evil against which the Commerce Clause is directed. *See Tenn. Wine*, 139 S. Ct. at 2461 ("[W]e reiterate that the Commerce Clause by its own force restricts state protectionism.").

The panel rejected NAMI's discriminatory effect claim because Proposition 12 "treats in-state meat producers the same as out-of-state meat producers." Op. 2. That ruling directly conflicts with Supreme Court precedent, which has long held that state laws that impose the same requirements on in-state and out-of-state actors can have a discriminatory effect if they strip away a competitive advantage possessed by out-of-staters. *See Baldwin*, 294 U.S. at 521–28; *Hunt*, 432 U.S. at 350–53; *see also Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 212 (3d Cir. 2002) ("*Baldwin* and [*Hunt*] show that if a state regulation has the effect of protecting in-state businesses by eliminating a competitive advantage possessed by their out-of-state counterparts, heightened scrutiny applies.").

The panel's contrary ruling eliminates any independent protection against laws with discriminatory effects by asking only whether the law is facially discriminatory. *See Rocky Mountain*, 730 F.3d at 1087 (strict scrutiny applies "[i]f a statute discriminates against out-of-state entities on its face, in its purpose, *or in its practical effect*" (emphasis added)). Contrary to the panel's suggestion, moreover, *Harris* does not support that result. As NAMI showed—and as California itself explained to this Court in *Harris*—the foie gras law did not protect in-state foie gras producers from out-of-state competition, *since there were no in-state foie gras producers to protect*. *See* NAMI Op. Br. 22–23; NAMI Reply 8–9. *Harris* is thus irrelevant to NAMI's discriminatory effect claim. But to the extent *Harris* could be read as the district court read it, that too bolsters the need for en banc review.

The panel's ruling also eliminates the Commerce Clause's protection against excessive burdens on interstate commerce. *See Pike*, 397 U.S. at 142 (even a statute that "regulates evenhandedly" violates the Commerce Clause if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits"). The balance of interests here could hardly be more lopsided—the Sales Ban imposes massive burdens on the predominately out-of-state pork and veal industries, without serving *any* legitimate local interest. As NAMI showed—and no one disputed—the Sales Ban serves no consumer-protection interest. And California has no

legitimate local interest in regulating how farm animals are housed outside its borders. *See Carbone*, 511 U.S. at 393. A clearer *Pike* violation is difficult to conceive.

The panel nonetheless rejected NAMI's *Pike* claim because the Sales Ban "precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographical origin." Op. 3. That ruling nullifies *Pike*'s protection against excessive burdens on interstate commerce. If a law burdens producers based on their geographical origin, then it is discriminatory, and hence subject to strict scrutiny. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99–100 (1994). The *Pike* test, by contrast, applies when a law is nondiscriminatory but nonetheless burdens interstate commerce. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440–42 (1978); *Pike*, 397 U.S. at 142. The panel clearly erred in collapsing these distinct inquires and creating an ad hoc "production method" exception to *Pike* that finds no support in Commerce Clause jurisprudence.

III. This Case Presents Issues of Exceptional Importance.

These serious errors, the conflicts they create, and the arbitrary and unjustified limitations they impose on the Commerce Clause's protections are alone sufficient grounds to grant the petition. But the case for en banc review is even more compelling because these issues arise in a case that has enormous practical significance for thousands of businesses and individual farmers throughout the nation.

As NAMI showed through declarations from its members, and as confirmed by the *amicus* briefs filed in support, the Sales Ban will have a devastating effect on the pork and veal industries. It puts pork and veal producers to a Hobson's choice: either abandon the California market and lose the opportunity to serve 39 million consumers, 12% of the U.S. market; or spend hundreds of millions of dollars to remodel their existing facilities and build new ones to comply with Proposition 12's unprecedented requirements. Either way, the Sales Ban will impose substantial costs on thousands of businesses and farmers throughout the country that cannot be recovered from California due to its Eleventh Amendment immunity.

Take the veal industry, which consists of hundreds of small family farms located primarily in the Midwest. ER98 (¶3). These farmers just completed a decade-long, industry-wide transition to group housing, at a cost of $150 million. ER98–99 (¶¶4–7). They built their barns in line with European Union standards, which at the time were the world's most demanding, requiring a maximum of 19.4 square feet per calf. ER99 (¶6). To comply with Proposition 12, these farmers would have to more than *double* their square footage—at a cost that may well be prohibitive, particularly while they are still paying down long-term debt from the last round of improvements. *See* ER99–100 (¶¶6–12), ER132–34 (¶¶5–10), ER136–38 (¶¶4–10).

Proposition 12 will also upend the pork industry. The costs of altering facilities will run into the hundreds of millions of dollars in capital investments and increased operating costs. *See* ER 142 (¶¶5–6), ER147–49 (¶¶9–13), ER153–54 (¶¶4–8), ER158–60 (¶¶9–13), ER 165–66 (¶¶7–12). Many of these costs will be borne by independent farmers who supply NAMI's members. *See id.* Compliance also will increase the cost of processing and distributing meat destined for California, which will require segregated production and distribution lines. *See* ER142–43 (¶¶7–10), ER149 (¶14), ER154–55 (¶¶9–11), ER160–61 (¶14), ER167 (¶¶13–15).

The full Court's intervention is urgently needed to provide relief from these burdens. Proposition 12's square-footage requirement for veal producers is already in effect and causing substantial harm. And the square-footage requirements for pork producers will take effect in just over a year, requiring the pork industry to begin *now* the costly and time-consuming process of redesigning facilities, constructing new barn space, and renegotiating production contracts. *See* ER141–42 (¶¶3–6), ER148–49 (¶¶10–13), ER153–54 (¶¶4–8), ER158–60 (¶¶9–13), ER165–66 (¶¶7–12); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (preliminary relief needed when regulated parties cannot simply "flip a switch" to come into compliance after regulations take effect). The Court should grant review, while there is still time to minimize the irreparable harm caused by California's unconstitutional attempt to export its regulations nationwide.

CONCLUSION

For these reasons, the Court should grant rehearing or rehearing en banc.

Date: November 30, 2020

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, to counsel's knowledge, the only related case pending in this Court is *National Pork Producers Council v. Ross*, No. 20-55631, which involves a similar Commerce Clause challenge to Proposition 12.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,896 words, excluding the portions exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Date: November 30, 2020

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