

No. 20-55631

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM
BUREAU FEDERATION,
Plaintiffs-Appellants,

v.

KAREN ROSS, et al.,
Defendants-Appellees,

&

ANIMAL LEGAL DEFENSE FUND, et al.,
Intervenors-Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for
the Southern District of California,
No. 3:19-cv-02324-W-AHG (Hon. Thomas J. Whelan)

BRIEF OF PLAINTIFFS-APPELLANTS

Dan Himmelfarb
Colleen M. Campbell
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
dhimmelfarb@mayerbrown.com

Timothy S. Bishop
Brett E. Legner
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
tbishop@mayerbrown.com

Attorneys for Plaintiffs-Appellants

*Additional Attorneys for Plaintiffs-Appellants
Listed on Signature Page*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record for Plaintiffs-Appellants the National Pork Producers Council (“NPPC”) and the American Farm Bureau Federation (“AFBF”) certifies the following:

NPPC does not have any parent corporation, and no publicly held corporation owns 10% or more of NPPC.

AFBF does not have any parent corporation, and no publicly held corporation owns 10% or more of AFBF.

/s/ Timothy S. Bishop
Timothy S. Bishop
Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

	Page
RULE 26.1 CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
STATUTORY ADDENDUM.....	2
STATEMENT OF THE CASE.....	2
A. Introduction.....	2
B. Factual Background.....	4
1. Pork Production in the United States.....	4
2. Sow Housing Practices.....	8
C. Legal Background.....	10
1. Proposition 2: Farm Animal Housing in California.....	10
2. Passage of Proposition 12.....	12
3. Proposition 12’s Requirements for Pork Sold in California.....	12
4. Justifications Offered For Proposition 12.....	15
5. Implementation of Proposition 12.....	20
D. Procedural History.....	22
SUMMARY OF ARGUMENT.....	24
STANDARD OF REVIEW.....	29
ARGUMENT.....	29
I. Plaintiffs Have Adequately Alleged That Proposition 12 Is An Impermissible Extraterritorial Regulation.....	32
A. Proposition 12 in practical effect directly regulates wholly out-of-state conduct and transactions.....	35

TABLE OF CONTENTS
(Continued)

	Page
(1) Compliance with Proposition 12 would require costly changes throughout the pork industry.....	36
(2) Because Proposition 12 regulates the whole pig, not just meat cuts sold into California, it disrupts the national market in pork.....	41
(3) The structure of the pork industry makes it inevitable that sow farms nationwide will have to conform to Proposition 12	42
(4) Case law shows that Plaintiffs state a claim that Proposition 12 regulates extraterritorially	46
B. Proposition 12 requires California’s agents to access out-of-state facilities	52
C. Proposition 12 subjects pork producers to potential inconsistent regulation.....	56
D. The authority relied upon by the district court is inapt and distinguishable.....	58
II. Plaintiffs Have Adequately Alleged That Proposition 12 Imposes An Excessive Burden On Interstate Commerce In Relation To The Putative Local Benefits.....	65
A. Proposition 12 imposes a substantial burden on interstate commerce.....	65
B. The burden on interstate commerce is far in excess of the putative local benefits.....	71
CONCLUSION	75
STATEMENT OF RELATED CASES	77
CERTIFICATE OF COMPLIANCE.....	79
CERTIFICATE OF SERVICE.....	80

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	29
<i>Association des Eleveurs de Canards et d'Oies du Quebec v. Harris</i> , 729 F.3d 937 (9th Cir. 2013)	59, 60
<i>Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.</i> , 476 U.S. 573 (1986)	24
<i>C. & A. Carbone, Inc. v. Town of Clarkstown</i> , 511 U.S. 383 (1994)	33
<i>Chinatown Neighborhood Association v. Harris</i> , 794 F.3d 1136 (9th Cir. 2015)	61, 62
<i>Conservation Force, Inc. v. Manning</i> , 301 F.3d 985 (9th Cir. 2002)	29
<i>Daniels Sharpsmart, Inc. v. Smith</i> , 889 F.3d 608 (9th Cir. 2018)	33, 34, 56, 58
<i>Dean Milk Co. v. City of Madison</i> , 340 U.S. 349 (1951)	58
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982)	33
<i>Exxon Corp. v. Governor of Maryland</i> , 437 U.S. 117 (1978)	70
<i>Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network</i> , 742 F.3d 414 (9th Cir. 2014)	48, 49

Gregg v. Hawaii, Dep’t of Pub. Safety,
870 F.3d 883 (9th Cir. 2017) 29

Hass v. Oregon State Bar,
883 F.2d 1453 (9th Cir. 1989) 60

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989)*passim*

Int’l Franchise Ass’n, Inc. v. City of Seattle,
803 F.3d 389 (9th Cir. 2015) 31

Kassel v. Consol. Freightways Corp.,
450 U.S. 662 (1981) 31, 65, 71

Missouri ex rel. Koster v. Harris,
847 F.3d 646 (9th Cir. 2017) 11

Legato Vapors LLC v. Cook,
847 F.3d 825 (7th Cir. 2017)*passim*

Nat’l Ass’n of Optometrists & Opticians v. Harris,
682 F.3d 1144 (9th Cir. 2012)*passim*

NCAA v. Miller,
10 F.3d 633 (9th Cir. 1993)*passim*

Northstar Fin. Advisors, Inc. v. Schwab Invs.,
904 F.3d 821 (9th Cir. 2018) 29

Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.,
511 U.S. 93 (1994) 63

Pac. Merch. Shipping Ass’n v. Goldstene,
639 F.3d 1154 (9th Cir. 2011) 30, 56, 64

Pac. Nw. Venison Prods. v. Smitch,
20 F.3d 1008 (9th Cir. 1994) 64

Pharm. Research & Mfrs. of Am. v. Cty. of Alameda,
768 F.3d 1037 (9th Cir. 2014) 30, 65

Pike v. Bruce Church,
397 U.S. 137 (1970).....*passim*

Raymond Motor Transp., Inc. v. Rice,
434 U.S. 429 (1978) 65

Rocky Mountain Farmers Union v. Corey,
913 F.3d 940 (2019)..... 62

Rosenblatt v. City of Santa Monica,
940 F.3d 439 (9th Cir. 2019) 65, 66

S.D. Myers, Inc. v. City & Cty. of San Francisco,
253 F.3d 461 (9th Cir. 2001) 56

Statutes & Rules

U.S. Const. art. I, § 8, cl. 3*passim*

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

42 U.S.C. § 1983 1

Cal. Health & Saf. Code § 25990(a) 13

Cal. Health & Saf. Code § 25990(b)(2) 13, 14, 36

Cal. Health & Saf. Code § 25991(a) 9, 12

Cal. Health & Saf. Code § 25991(f) 53

Cal. Health & Saf. Code § 25991(k) 13

Cal. Health & Saf. Code § 25991(o)..... 60

Cal. Health & Saf. Code § 25991 (q) 13

Cal. Health & Saf. Code § 25991(s)..... 13

Cal. Health & Saf. Code § 25992(a)-(g) 15

Cal. Health & Saf. Code § 25993(a) 20, 52

Cal. Health & Saf. Code § 25993.1..... 15

Cal. Health & Saf. Code § 25996..... 11

Cal. Bus. & Prof. Code § 17200 15

Circuit Rule 28-2.6 1

Fed. R. App. P. 4(a)..... 1

Fed. R. App. P. 32(a)(5) 3

Fed. R. App. P. 32(a)(6) 3

Fed. R. App. P. 32(a)(7)(B)..... 3

Fed. R. App. P. 32(a)(7)(B)(iii)..... 3

Fed. R. App. P. 32(f)..... 3

Fed. R. Civ. P. 12(b)(6) 29

Fed. R. Civ. P. 12(c) 29

Proposition 2, *Prevention of Farm Animal Cruelty Act*
 (Nov. 4, 2008) 10, 11

Ohio Admin. Code 901:12-8-02(G) 57

Other Authorities

California Department of Food and Agriculture, *Draft*
Rules Article 5, Certification and Accredited Certifiers
 (Dec. 23, 2019),
<https://www.cdfa.ca.gov/ahfss/pdfs/Article5Certification>
 DRAFT 12232019.pdf 20, 21

California Department of Food and Agriculture, *Draft*
Rules Article 3 (July 22, 2020) 53, 55

California Department of Food and Agriculture,
Proposition 12 Implementation (July 22, 2020),
<https://www.cdffa.ca.gov/ahfss/Prop12.html> 20

Colin A. Carter, *et al.*, *Piecemeal Farm Regulation and the U.S. Commerce Clause*, 1 Am. J. Agric. Econ. 1 (May 2020) 25, 26

Legislative Analyst Office for California Attorney General,
Proposition 12: Establishes New Standards for Confinement of Certain Farm Animals; Bans Sale of Certain Non-Complying Products. Initiative Statute,
<https://lao.ca.gov/ballot/2018/prop12-110618.pdf> 18

Nicole Pallotta, *Wins for Animals in the 2018 Midterm Election*, Animal Legal Defense Fund (January 5, 2019),
<https://perma.cc/J7T5-98XP> 12

Proposition 12 Official Voter’s Guide,
<http://vigarchive.sos.ca.gov/2018/general/propositions/12/arguments-rebuttals.htm> 16, 17

Laura Reilly, *A Terrible Pandemic is Killing Pigs Around the World, and U.S. Pork Producers Fear They Could Be Hit Next*, Wash. Post (Oct. 16, 2019) 5

U.S. Department of Agriculture, Economic Research Service, *Livestock and Meat International Trade Data*,
<https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data> 55

STATEMENT OF JURISDICTION

The district court had original subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 because this case presents a federal question arising under the Commerce Clause of the U.S. Constitution and under 42 U.S.C. § 1983. The district court granted Defendants' motion to dismiss and Intervenor-Defendants' motion for judgment on the pleadings on April 27, 2020. Excerpts of Record ("ER") 3-14. The district court entered final judgment dismissing Plaintiffs' Complaint with prejudice on June 16, 2020. ER1. Plaintiffs filed this appeal on June 17, 2020 (ER15), which is timely under Federal Rule of Appellate Procedure 4(a). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing Plaintiffs' Complaint because Plaintiffs adequately alleged that Proposition 12 controls commerce outside of California's borders and therefore violates the extraterritoriality principle of the dormant Commerce Clause of the U.S. Constitution. This argument was raised at Dkt. 26 at 9-20 and was ruled upon at ER7-9.

2. Whether the district court erred in dismissing Plaintiffs' Complaint because Plaintiffs adequately alleged that Proposition 12 unconstitutionally burdens interstate commerce. This argument was raised at Dkt. 26 at 20-23 and ruled upon at ER9-12.

STATUTORY ADDENDUM

Pertinent statutes and rules are included in the addendum to this brief.

STATEMENT OF THE CASE

A. Introduction

California produces hardly any pork. ER61 (¶¶16-19). But California residents consume 13% of all the pork eaten in the U.S. ER61 (¶20). As a result, California imports huge quantities of pork raised in other states. The offspring of around 673,000 sows is required annually to satisfy California consumers' demand for pork—yet only about 1,500 sows are commercially bred in California. ER61 (¶¶18-20). Proposition 12 imposes California's preferred animal husbandry methods—sow housing requirements that almost no farmer in the U.S. uses (for good reason)—on the producers of all these out-of-state raised pigs. Furthermore, because pork is a complex national market, in which most hogs are not bred for a single state's

market and each hog is butchered into many different cuts of meat that are shipped to different buyers all across the country, Proposition 12 in fact regulates the housing of far more sows than that. Proposition 12 substantially interferes with a complex nationwide market served by thousands of farmers, and it effectively regulates farmers who produce no pork that is sold in California and who have no connection to California. ER105-108, 114 (¶¶279-304, 342-347). In addition, policing Proposition 12 inserts California’s regulatory tentacles deep into farms beyond its boundaries. ER68-77, 80-83 (¶¶58, 73-92).

Proposition 12 does all that to serve two “benefits” that were touted to voters by animal-rights activists. ER103-104 (¶268). One—human health—is so illusory that the State and intervenors declined to defend it below. Dkt. 18-1, at 12 n.6; Dkt. 19, at 14-15. The other—preventing animal cruelty—is so unsupported by facts (indeed, contradicted by them) that it cannot justify the enormous burdens Proposition 12 imposes on nationwide commerce in pork.

Plaintiffs’ allegations, considered under the motion to dismiss standard, properly state both of Plaintiffs’ claims that Proposition 12

violates the dormant Commerce Clause: because it regulates pork production extraterritorially; and because its acute burdens on interstate commerce outweigh its domestic benefits. For that reason, the district court's judgment should be reversed.

B. Factual Background

Because this appeal arises from the grant of a motion to dismiss, the Court assumes the truth of the allegations in the Complaint (ER59-129), which here were also supported by the declarations of plaintiff representatives, numerous pork farmers, and an industry economist. ER134-266.¹

1. Pork Production in the United States

Across the United States, some 65,000 farmers market about 125 million hogs per year for gross sales of \$26 billion annually. ER86 (¶111). Commerce in pork is complex and segmented, involving multiple steps, transactions, and actors between the times a piglet is born and a cut of pork reaches the ultimate consumer. ER59, 87, 89 (¶¶7, 127-128, 138). This segmented production model is driven by

¹ Plaintiffs' and their member pork farmers' declarations establish that Plaintiffs have standing to pursue these claims. Neither California nor intervenors challenged Plaintiffs' standing below, nor did the district court question it.

herd health considerations as well as to achieve the economies of scale that enable American farmers to provide consumers with affordable and plentiful proteins. ER59, 89 (¶¶ 7, 138-142).

At the beginning of the supply chain, sow farmers care for the female pigs that give birth to market hogs (piglets bound for the pork market) on sow farms. ER59, 89 (¶¶5, 139-140). These sow farms exist across the country, but are concentrated in the Midwest and North Carolina. ER59 (¶5). After a sow gives birth (“farrows”) and nurses her piglets for about 21 days, farmers typically move the piglets from the sow farm to nursery farms in a separate location. ER89 (¶142). The rapid removal of offspring from sow facilities, and separation of sow farms from other hog facilities, is essential to protect sow herds from disease. *Id.*² At nursery farms, piglets are

² Bio-security is a major concern for hog farmers, because whole herds can be wiped out by diseases like the African swine fever, which has killed hundreds of millions of pigs around the world. *E.g.*, Laura Reilly, *A Terrible Pandemic is Killing Pigs Around the World*, and *U.S. Pork Producers Fear They Could Be Hit Next*, Washington Post (Oct. 16, 2019), <https://tinyurl.com/y66g2pjr>. Diseases can be spread by both pigs and humans and are addressed with strict separation and decontamination measures and by limiting access to farms. ER89, 123 (¶¶ 142, 411-418).

raised for six to eight weeks, until they have grown into “feeder pigs” and weigh 40 to 60 pounds. ER60, 89 (¶¶11, 143).

Further along the supply chain, hog farmers purchase feeder pigs and raise them for 16 to 17 weeks at finishing farms. ER60, 87 (¶¶11, 121). Once they have grown to 240 to 280 pounds, farmers sell the resulting market hogs to packer-slaughter facilities, often through years-long supply agreements that specify the number and timing of hogs to be delivered to the packer. ER87, 89 (¶¶126, 144).³

Packers operate slaughterhouses, where they slaughter market hogs—thousands or even tens of thousands daily—to process and pack cuts of pork. ER59-60, 87 (¶¶13, 124). Some vertically integrated companies breed, raise, slaughter, and process hogs for pork meat, but packers commonly receive hogs from many different farms, including affiliated and independent farms, under multi-year contracts, as well as acquiring hogs on the spot-market. ER60, 87, (¶¶11-12, 125-26).

³ Few farms operate as “wean to finish,” meaning that pigs are farmed throughout their development before sale to a packer. ER89 (¶145). Although some farming operations are vertically integrated, meaning that they handle several stages of production, most farmers care for pigs only at one or several stages of production. ER87 (¶121).

Because market hogs are serially transferred between different farming operations as they grow, it is not always clear upon their arrival at a packing facility which sow farm they came from, let alone the housing conditions after the age of six months of the sow that gave birth to them. ER87-88, 101 (¶¶125, 130-131, 244-249).

It is even more difficult to determine the origin of pork products after they come out of a packing facility. That is because packers process hogs received from different sources into different cuts of pork meat destined for different markets, with pork products often combining meat from different pigs. ER60, 68-77, 83, 87-88 (¶¶12, 58, 96, 130-133). A single hog provides pork cuts that will likely be sold into many different states and abroad. ER60-61, 83 (¶¶13, 19, 96).

Packers sell their pork products to wholesale and large retail customers. ER60-61, 87 (¶¶13, 124). Retailers in turn distribute pork to consumers. *Id.* The number of actors a pork cut is transferred among before it reaches an end-consumer depends on the ultimate purchaser as well as the type of pork product. ER87 (¶127).

California residents consume 13 percent of the total U.S. market for pork, or the offspring of about 673,000 sows. ER61 (¶20).

But California’s in-state production of pork is minimal. ER61 (¶¶18-20). There are estimated to be only 8,000 breeding sows in California, most of which are in family-focused “4-H” and other county fair and similar show-pig programs, with only about 1,500 sows in commercial production. ER61 (¶¶16, 18). Thus, almost all of the pork consumed in California comes from hogs born to sows housed outside of the State. ER61 (¶20).

2. Sow Housing Practices

Determining how to house sows is a critical farm management decision that is informed by numerous animal-welfare and production considerations. ER89-90 (¶¶146-149). Sow housing is either individual or group or some combination of the two. ER90, 93 (¶¶150, 181).

Most sow farmers—an estimated 72%—care for their sows in individual pens throughout gestation. ER106 (¶286). These pens usually provide around 14 square feet of space to the sow and—for hygiene, safety, animal welfare, and caretaking reasons—do not allow the sow to turn around. ER62, 90 (¶¶24, 155).

Individual pens provide a sow with individual access to water and feed without competition or aggression from other sows. ER90 (¶¶156-57). This reduces sow stress, injury, and mortality rates on farms during the critical gestation period; it also protects farm hands. ER80-82, 91, 121 (¶¶74-90, 159, 394-395).

The remainder of sow farmers, roughly 28%, keep their sows together most of the time in group pens, which generally provide 16 to 18 square feet per sow. ER91, 106 (¶¶162, 284).⁴ Group housing poses complex management challenges to farmers in dealing with nutrition, medical care, sow safety and productivity, and employee safety. ER91-93 (¶¶163-177).

Almost universally, farmers who use group pens move their sows into individual breeding pens for the 30 to 40 days between the time a sow finishes weaning a litter through the time she enters estrus (that is, has capacity to breed), is re-bred, and pregnancy is

⁴ Most sow farmers keep young, unbred female pigs, called “gilts,” separate, most commonly in group pens with less space per pig, because gilts are smaller than mature sows. ER82-83 (¶¶91-92). These younger, smaller pigs are kept separate until they are ready to breed, usually at seven or eight months. ER82, 101 (¶¶92, 244-249). Proposition 12 also covers the housing of gilts, however, once they reach six months of age. Cal. Health & Saf. Code § 25991(a).

confirmed. ER80-81, 106 (¶¶77-82, 287). Farmers rely on individual breeding pens during this time-period to assist with animal husbandry, provide sows with individualized nutrition to recover after weaning, and to protect sows against death, injury, pregnancy loss, or a drop in litter size due to aggression from other sows. ER81-82, 93-95 (¶¶79-90, 181-206). The use of individual breeding pens is considered by many farmers to be vital to keeping sows healthy and successfully breeding piglets. ER68-77 (¶58(a)-(l)); *see also* ER168 (¶25), 185 (¶23), 193-94 (¶¶16-17), 219 (¶14), 226 (¶¶12-13), 232-33 (¶16), 243-44 (¶11).

C. Legal Background

1. Proposition 2: Farm Animal Housing in California

In 2008, California citizens voted into place a ballot initiative regulating animal housing requirements, referred to as Proposition 2. Proposition 2, *Prevention of Farm Animal Cruelty Act* (Nov. 4, 2008). Sponsored by the United States Humane Society and other animal-rights activists (collectively, “HSUS”), Proposition 2 required that egg-laying hens, breeding pigs (sows), and veal calves *raised in California* must be housed in a manner that allows the animals to “turn around

freely, lie down, stand up, and fully extend their limbs,” subject to limited exceptions (the “stand-up, turn-around” requirement). *Id.*; ER96-97 (¶¶211-215).

California legislators quickly realized that Proposition 2 placed compliance costs on producers within the State that put them at a disadvantage vis-à-vis their out-of-state counterparts, and passed Assembly Bill 1437 (“AB 1437”) as a quick fix for egg production (which, unlike raising pigs, is a major industry in California, which produces five billion eggs a year). *See* Cal. Health & Saf. Code § 25996; ER97 (¶¶216-218). The Bill Analysis explained that “[t]he intent of this legislation is to level the playing field so that in-state [egg] producers are not disadvantaged” by Proposition 2’s requirements. Assemb. Comm. on Appropriations, Bill Analysis of AB 1437 (May 13, 2009). AB 1437 exported Proposition 2’s requirements to apply to all sales of eggs in California, even if the eggs were produced entirely outside of the State.⁵

⁵ AB 1437 was challenged by six states as a violation of the Commerce Clause, but that lawsuit was dismissed for lack of *parens patriae* standing. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017).

2. Passage of Proposition 12

In 2018, HSUS and other animal rights activists embarked on a campaign to pass a new ballot initiative, Proposition 12. See Statutory Addendum (“ADD”) 10-17. Proposition 12 adds stricter animal housing requirements to Proposition 2 and requires *all* pork, veal, and egg farmers to comply with those requirements for their product to be sold in California. ER96-98 (¶¶207-210, 220-227).

Proposition 12 passed with the approval of 62.66% of participating California voters. ER99 (¶236). After it passed, animal rights activists lauded Proposition 12 as “the World’s Highest Farm Animal Welfare Law” and “the strongest law of its kind in the world.” ER98 (¶226), citing, *e.g.*, Nicole Pallotta, *Wins for Animals in the 2018 Midterm Election*, Animal Legal Defense Fund (January 5, 2019), <https://perma.cc/J7T5-98XP>.

3. Proposition 12’s Requirements for Pork Sold in California

Proposition 12 governs housing standards for sows kept for commercial breeding purposes that are “six months or older or pregnant.” Cal. Health & Saf. Code § 25991(a) (ADD 1-9). It defines confining a sow “in a cruel manner” as

- “Confining [a sow] in a manner that prevents the animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely”;⁶ and,
- after December 31, 2021, “confining a breeding pig with less than 24 square feet of usable floorspace per pig.”⁷

Id. § 22951(e).

Proposition 12 forbids farm owners or operators within California from confining a sow in a “cruel manner.” Cal. Health & Saf. Code § 25990(a). And, as relevant here, it bans all sales of covered pork in California when the seller knows or should know that the meat came from a sow confined in a manner that Proposition 12 prohibits or from the offspring of such a sow. *Id.* § 25990(b)(2).

⁶ “Fully extending the animal’s limbs’ means fully extending all limbs without touching the side of an enclosure”; and “[t]urning around freely’ means turning in a complete circle without any impediment, including a tether, and without touching the side of an enclosure or another animal.” Cal. Health & Saf. Code § 25991(k), (q). This restriction in practice means that farmers must house sows in group pens rather than in individual pens, because individual pens hold one sow apiece and do not allow sows to turn around, for reasons of hygiene, safety, and caretaking. ER61, 62 (¶¶15, 24).

⁷ “Usable floorspace” is “calculated by dividing the total square footage of floorspace provided to the animals in an enclosure by the number of animals in that enclosure.” Cal. Health & Saf. Code § 25991(s).

Proposition 12 covers uncooked “whole pork meat,” which means any uncooked cut of pork that is composed entirely of pork meat, or of pork meat with basic additives, such as seasoning, curing agents, coloring, and preservatives. *Id.* § 25991(u). Proposition 12 excludes cooked, processed, and combination products. *Id.*

Essentially all of the pork covered by Proposition 12 derives from the offspring of sows, *i.e.*, market hogs. Sows themselves make up only a very small portion of pigs slaughtered for meat—and most sow meat is sold cooked, processed, or in combination products and therefore is not covered by Proposition 12. ER60 (¶10).⁸

Proposition 12’s specifies a few narrow exceptions to its restrictive sow housing requirements:

- five days before a sow gives birth (or “farrows”);
- the time when a sow nurses piglets (about 21 days);
- for animal husbandry during very limited time intervals;
- for veterinary purposes;

⁸ About 125 million market hogs are slaughtered each year, compared to about 2 million sows. Almost all of the product derived from sows becomes sausage, a processed product not covered by Proposition 12. ER86 (¶118).

- for medical research; or
- during transportation, shows, or slaughter.

Cal. Health & Saf. Code § 25992(a)-(g).

Every sale of pork in California that does not comply with Proposition 12 is a criminal offense punishable by a \$1,000 fine and 180 days in prison. *Id.* § 25993(b). A violation also subjects a seller to a civil action for damages and injunctive relief under California Business & Professional Code Section 17200. *Id.*

It is a defense to an action for violation of Proposition 12 that a business owner or operator selling pork meat in California “relied in good faith upon a written certification by the supplier” that the “whole pork meat * * * was not derived from a covered animal who was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner.” Cal. Health & Saf. Code § 25993.1.

4. Justifications Offered For Proposition 12

Two justifications for Proposition 12’s sow housing requirements are offered in the Proposition itself: first, to “prevent animal cruelty by phasing out extreme methods of farm animal confinement”; and

second, to protect the “health and safety of California consumers” from the “risk of foodborne illness and associated negative fiscal impacts on the State of California.” Prevention of Cruelty to Farm Animals Act, Prop. 12 § 1.

Regarding food safety, the Proposition 12 Official Voter’s Guide, <http://vigarchive.sos.ca.gov/2018/general/propositions/12/arguments-rebuttals.htm>, did not explain how Proposition 12 has anything to do with the safety of pork for human consumption. ER104 (¶269). There is no evidence that the square footage provided to a sow has any bearing at all on the safety of the food product derived from her offspring. ER124-25 (¶¶423-435). Both the State Defendants and HSUS have tacitly conceded that Proposition 12 does not advance food safety interests by declining to defend that rationale before the district court.

Regarding supposed animal cruelty, the statements of proponents of Proposition 12 in the Official Voter’s Guide did not explain why providing 24 square feet per sow either advances animal welfare or prevents animal cruelty. ER104 (¶269). Instead, the Voter’s Guide contained misstatements about industry practices. ER104

(¶273). The requirement of 24 square feet per sow is an arbitrary number that has not been scientifically shown to improve sow welfare. ER119 (¶¶376-377). If anything, based on their experience many farmers believe that providing too large an area may decrease sow welfare. ER244 (¶13). For example, it leads to sows defecating in the lying area, rather than the dunging area, thus compromising hygiene. *Id.* Dictating one prescriptive number also limits the ability of farm management to make housing adaptations to best address the welfare of the sows. ER119 (¶386).

By preventing the use of breeding stalls during the 30- to 40-day period between weaning and confirmation of pregnancy, Proposition 12 exposes sows to aggression that leads to injury and stress during the vulnerable stages of breeding and gestation. ER120 (¶390). Sows fight to establish dominance. They tear at each other's vulvas and ears, which can lead to serious injuries or death. ER183-84 (¶12); ER218 (¶9); ER252 (¶33). These fights occur regardless of the number of sows held in a group pen. ER194 (¶18). Aggression in the group pen, and the stress it causes, also increases the chances that a sow's

embryo will fail to attach following implantation and that a sow will lose a pregnancy or drop a litter size. ER121 (§400).

Keeping sows in individual stalls protects them from this aggression. As one family farmer who has used both group and individual housing observed, switching from group pens to individual stalls throughout gestation led to far fewer injuries and deaths, to calmer and less stressed sows, and to larger litters, is more sanitary and protects sows from disease, and is safer for his employees. ER166-68 (§§15-25); *see also* ER237 (§9) (one farmer noticed sow mortality “skyrocketed” when sows were moved to group pens). Proposition 12 also prevents producers from keeping sows in individual stalls to allow them to recover peacefully from their pregnancies and gain back needed weight after weaning. ER122 (§405).

The pre-ballot report that accompanied Proposition 12, prepared by the Legislative Analyst Office for California Attorney General (“LAO Report”), analyzed the fiscal impacts of Proposition 12, though only within California. *See Proposition 12: Establishes New Standards for Confinement of Certain Farm Animals; Bans Sale of*

Certain Non-Complying Products. Initiative Statute, <https://lao.ca.gov/ballot/2018/prop12-110618.pdf>. The LAO Report predicted that consumer prices for pork would likely increase as a result of Proposition 12. ER99 (¶230). It explained that Proposition 12’s requirements would likely cause some California farmers to reduce or entirely cease their production, potentially causing a decrease of millions of dollars of state tax revenue. ER99 (¶233).

The LAO Report recognized that Proposition 12 will require many producers—including those “in * * * other states”—to remodel existing housing or build new housing for animals to satisfy the new definition of “cruel” animal confinement, which could take several years. ER99 (¶231). The LAO Report did not quantify the costs that Proposition 12 imposes outside of California. ER99 (¶234). Plaintiffs have alleged, however, based on the conclusions of their expert economist, that compliance with Proposition 12 will increase production costs by over \$13 dollars per pig, a 9.2 per cent cost increase at the farm level. ER114 ¶343. Further, Proposition 12-compliant producers will need to spend “an estimated \$293,894,455 to \$347,733,205 of additional capital in order to reconstruct their sow

housing and overcome the productivity loss that Proposition 12 imposes.” ER114 ¶342. The majority of those costs will be borne by out-of-state producers, given both that California’s production of sows is dwarfed by its consumption and that selling a cut from a pig to California requires a producer to have raised the entire pig to meet Proposition 12’s requirements, regardless of where other cuts from that same pig are sold. ER101 ¶¶245-246.

5. Implementation of Proposition 12

Proposition 12 directs the California Department of Food and Agriculture (“CDFA”) and Department of Public Health (“CDPH”) to produce final implementing regulations by September 1, 2019. Cal. Health & Saf. Code § 25993(a). The agencies missed that deadline, but CDFA has explained that it is considering verifying compliance with Proposition 12 through audits and certification of farms. ER108 (¶302).

After the district court dismissed Plaintiffs’ suit, CDFA published for informal comment “pre-proposal” draft rules for the implementation of Proposition 12, including its requirements for sow housing. CDFA, *Proposition 12 Implementation* (July 22, 2020),

<https://www.cdfa.ca.gov/ahfss/Prop12.html>. These include proposals to certify “California compliant operation[s].” CDFA, *Draft Article 5. Certification and Accredited Certifiers* § 1326(d) (July 22, 2020), <https://www.cdfa.ca.gov/ahfss/pdfs/Article5CertificationDRAFT07222020.pdf> (ADD 40-87). Article 5 contemplates intrusive inspections and certification of out-of-state farms by agents of the State of California, detailed verification and traceability requirements that entail significant paperwork, and new labeling. *Id.* at ADD 41.⁹

Specifically, Section 1326.1 would require that “authorized representatives of [CDFA]” be given inspection “access to the production and/or handling operation,” “offices,” and “pastures, fields, equipment, structures, and houses where covered animals and covered animal products may be kept, produced, processed, handled, stored or transported, including * * * all enclosures for covered animals,” and be allowed “to examine all covered products that are

⁹ Article 5’s certification provisions closely resemble those published for egg-production facilities prior to the district court’s decision in this case, which Plaintiffs relied upon in their brief opposing dismissal. Dkt. 26 at 4, 13-14, discussing CDFA, *Draft Article 5. Certification and Accredited Certifiers* (Dec. 23, 2019), <https://www.cdfa.ca.gov/ahfss/pdfs/Article5CertificationDRAFT12232019.pdf>.

sold or intended, held, segregated, stored, packaged, labeled, or represented for sale or distribution,” and all “containers, labels, labeling, invoices, and bills of lading used in the handling, storage, packaging, sale, transportation or distribution of covered products,” as well as be given access “for review and copying of records.” ADD 45. Section 1326.2 would mandate that out-of-state farmers keep detailed operations and transaction records to facilitate California’s inspection and certification of their operations. ADD 46–47. And Section 1322.4 requires that all sale and shipping documents identify pork as either “California 24+ compliant” or “Not for California Consumption.” ADD 29.

D. Procedural History

Plaintiffs NPPC and AFBF filed this lawsuit on December 5, 2019. NPPC is the global voice of the U.S. pork industry. Its members include U.S. pork producers along with other industry stakeholders such as packers, processors, companies that serve the pork industry, and veterinarians. ER64-65 (¶38). AFBF is America’s largest general farm organization. It represents the people who grow and raise virtually every agricultural product in the U.S. with the mission to

work with farm and ranch families to build a sustainable future of safe and abundant food, fiber, and renewable fuel. ER65 (¶39).

Plaintiffs' Complaint seeks to enjoin the enforcement of Proposition 12 as applied to pork raised outside of California and to obtain a declaration that it violates the dormant Commerce Clause of the U.S. Constitution. ER129. Plaintiffs have alleged that Proposition 12 violates the extraterritoriality principle of the dormant Commerce Clause by controlling commerce outside of California's borders, including policing and controlling the production of pork that is not sold into the State. ER59-129. Plaintiffs have further alleged that Proposition 12 violates the dormant Commerce Clause by placing an excessive burden on interstate commerce while providing dubious local benefit, if any at all. *Id.*

Animal-rights activists led by the Humane Society of the United States were granted intervention as Defendants on January 9, 2020. ER268. On April 27, 2020, the district court granted California's Motion to Dismiss and HSUS's Motion for Judgment on the Pleadings. ER270. The district court first rejected the argument that Proposition 12 applies extraterritorially, reasoning that Proposition

12's requirements apply to in-state and out-of-state hog producers equally and that California may lawfully seek to influence which hog products reach its borders. ER9-11. The court did not address Plaintiffs' argument that Proposition 12 in effect regulates sales of pork between non-California parties. *Id.* The district court next rejected Plaintiffs' argument that Proposition 12 imposes an excessive burden on interstate commerce, believing that Proposition 12 does not impair the free flow of materials and products across state borders or require a uniform system of regulation. ER11-12. The court did not address Proposition 12's illusory justifications. ER9-12.

On June 16, 2020, the district court dismissed the Complaint with prejudice. ER270. Plaintiffs timely filed this appeal.

SUMMARY OF ARGUMENT

I. Plaintiffs have stated a claim that Proposition 12 violates the extraterritoriality principle of the dormant Commerce Clause because they have alleged that it has the practical effect of regulating commerce occurring only in other states. Proposition 12 has the sort of breathtaking extra-territorial reach, controlling "the design and operation of out-of-state production facilities," that led the Seventh

Circuit to strike down an Indiana law in *Legato Vapors LLC v. Cook*, 847 F.3d 825, 827 (7th Cir. 2017). And it interferes far more directly with interstate commerce than laws previously upheld by this Court. A statute that directly regulates interstate commerce is “generally struck down.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). Proposition 12’s extraterritorial reach takes three forms.

A. Plaintiffs allege that Proposition 12 regulates extraterritorially because it controls, as a practical matter, transactions that occur entirely out-of-state. That is true for two reasons.

First, because it imposes sow-housing requirements, any market hog born of a Proposition 12-compliant sow bears the substantial capital and operational costs of those housing arrangements, which Plaintiffs have alleged amount to about \$13 per pig. But market hogs are not sold whole to California, such that those costs can be directed solely to California consumers. To the contrary, a market hog is butchered into many different cuts, which are sold throughout the country as market demand dictates. Inevitably, then, the cost of Proposition 12 compliance falls more on buyers in the

entirely non-California-related transactions that make up 87% of the pork market.¹⁰

Second, the huge national pork market, worth \$26 billion per year, is vertically segmented to serve herd-health and efficiency goals. Between the sow farmer and the ultimate consumer of a cut of pork lie a series of transactions—from sow farmer to nursery to finisher to packer to distributor to retailer to consumer. And a packer receives thousands or tens of thousands of pigs a day from numerous different farms, each with its own such chain of prior transactions, and processes them into many different cuts destined for many different markets. In that complex production process, segregation and tracing of a cut of whole pork meat back to a sow raised in particular housing conditions is not practicable, and certainly is not economical. As a

¹⁰ This nationwide price effect has been documented with regard to AB 1437's regulation of housing for egg-producing hens. Economists determined that those requirements "generated short- and long-run egg price increases across the U.S.," with "the largest share" of costs of compliance "borne by out-of-state consumers." Colin A. Carter, *et al.*, *Piecemeal Farm Regulation and the U.S. Commerce Clause*, 1 Am. J. Agric. Econ. 1, 1 (May 2020). AB 1437 was followed by "dramatic" short-term increases in egg prices nationwide, followed by long-term price increases of 4% to 6% across the country and "more concentrated interstate trade" as smaller farmers were forced out of the California market. *Id.* at 2.

result, packers and large scale buyers who sell any product in California will demand—and already have begun to demand—that all sows in their production chain be housed in compliance with Proposition 12. For this reason too, Proposition 12 controls as a practical matter the housing of sows whose offspring will be sold partially or completely outside of California.

B. Plaintiffs allege that the audit and inspection procedures to enforce Proposition 12 will occur outside of California and will directly command farmers' out-of-state conduct. California intends to police Proposition 12 through an elaborate certification system in which agents of the State must be allowed to physically enter and inspect all aspects of out-of-state facilities to ensure compliance with California law. And it mandates burdensome recordkeeping for all transactions, not just those that related to sales in California. That intrusive scheme operates extraterritorially and applies to wholly out-of-state transactions and conduct.

C. Plaintiffs have alleged Proposition 12 threatens to conflict with the regulatory regimes of other states. Fifteen States opposed California's position in an *amicus curiae* brief below (ER269),

explaining that Proposition 12 impinges on their turf, and Ohio has expressly provided that its sow farmers may use the breeding pens that Proposition 12 bars. The possibility of conflicting state regulations over a key element of a large nationwide market risks the kind of Balkanization the Framers sought to avoid and by itself is enough to require that Proposition 12 be struck down under the Commerce Clause.

II. Proposition 12 also fails the balancing test of *Pike v. Bruce Church*, 397 U.S. 137 (1970). On the one hand, it imposes an enormous and costly burden on interstate commercial transactions, requiring wholesale rebuilding of tens of thousands of sow farm facilities and massive operational changes in how farmers care for their sows. On the other hand, it achieves no consumer-health benefit at all—though that was touted to voters as one of its goals—and far exceeds any right of California to determine what its own citizens eat by regulating as a practical matter how pork is produced nationwide.

In any event, the animal-welfare goal asserted by Proposition 12's backers is, we have alleged, illusory. In fact, denying sows the protection of individual pens post-weaning affirmatively harms them.

It leaves them open to aggression by dominant sows and makes them hard to feed and care for them effectively. And providing too large a space within a group pen exacerbates health and safety risks to sows and their caretakers alike.

A more one-sided *Pike* balance is hard to imagine. For that reason too, Plaintiffs have adequately alleged a dormant Commerce Clause claim.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's order granting California's motion to dismiss and HSUS's motion for judgment on the pleadings. *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 904 F.3d 821, 828 (9th Cir. 2018). California's motion under Rule 12(b)(6) and HSUS's motion under Rule 12(c) are "functionally identical." *Gregg v. Hawaii, Dep't of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017). To withstand either motion, Plaintiffs' Complaint need only "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

ARGUMENT

The Commerce Clause "was included in the Constitution to prevent state governments from imposing burdens on unrepresented

out-of-state interests merely to assuage the political will of the state's represented citizens." *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002). The Clause states that "Congress shall have Power * * * [t]o regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. The provision has a "negative" aspect, known as the dormant Commerce Clause, *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014), which is "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012).

As relevant here, the dormant Commerce Clause bars two types of state laws. First, state laws violate the Commerce Clause if they have the "practical effect" of governing "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (internal quotation marks omitted). A state law with the practical effect of regulating extraterritorially is unconstitutional

“regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Id.*

Second, statutes that “burden interstate transactions * * * incidentally”, *Pac. Merch. Shipping Ass’n v. Goldstene*, 639 F.3d 1154, 1177 (9th Cir. 2011), violate the Commerce Clause if they fail the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970). Under that test, a state law is unconstitutional when “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142. A law that significantly impairs interstate commerce to serve a state interest that is illegitimate or illusory “cannot be harmonized with the Commerce Clause.” *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality opinion).

While this Court has recognized that “decisions interpreting the dormant Commerce Clause appear somewhat difficult to reconcile,” *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389, 403 (9th Cir. 2015), Plaintiffs’ Complaint alleges a plausible claim under both the extraterritoriality and *Pike* balancing standards.

Holding otherwise would seriously challenge our Nation’s federalist principles. If California can condition pork sales in the State on a farm in Iowa raising its sows a particular way, it also can condition the sale of any product imported into California from any other state on the employees who made it having been paid certain hourly wages or having certain employment benefits that satisfy Californians’ moral preferences. Exporting one state’s preferences into other states in that way threatens Balkanization and inter-state discord—witness the 15 States that argued against California as *amici* below. If Californians want to eat only pork produced in a certain way, they can raise their own pork in-state and insist on those conditions (and pay more for pork as a result). But the dormant Commerce Clause does not permit them to force their preferences on the industry nationwide and worldwide or, as also results from Proposition 12, on consumers outside California.

I. Plaintiffs Have Adequately Alleged That Proposition 12 Is An Impermissible Extraterritorial Regulation

A “special concern” of the Constitution is “the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce.” *Healy*, 491 U.S. at 335-36. To address this

concern, the Commerce Clause bars the “projection of one state’s regulatory regime into the jurisdiction of another State.” *Id.* at 337. While States retain “autonomy * * * within their respective spheres,” the Constitution forbids them from regulating extraterritorially. *Id.* at 336. Specifically, a state may not “attach restrictions to * * * imports” that “control commerce in other States,” because that “would extend the [state’s] police power beyond its jurisdictional bounds.” *C. & A. Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). When the practical effect of a law is to “regulate directly * * * interstate commerce, including commerce wholly outside the State, it must be held invalid.” *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality op.).

Under the extraterritoriality doctrine, this Court has explained, forbidden “[d]irect regulation occurs when a state law directly affects transactions that take place across state lines or entirely outside of the state’s borders.” *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 614 (9th Cir. 2018) (internal quotation omitted). Regulation of “commerce that takes place wholly outside of the State’s borders” is

prohibited “whether or not the commerce has effects within the [regulating] State.” *Healy*, 491 U.S. at 336.

To determine whether a State has impermissibly regulated extraterritorially, 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 336 (emphasis added). And “practical effect * * * must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States.” *Id.* “The mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions.” *Daniels Sharpsmart*, 889 F.3d at 615.

Plaintiffs’ Complaint alleges that the practical effect of Proposition 12 is direct extraterritorial regulation of out-of-state transactions and conduct. Proposition 12 regulates extraterritorially in three ways that we address in turn below:

(1) its practical effect is to control the operations of out-of-state pork producers even for transactions occurring wholly outside

California, which results in out-of-state consumers bearing the costs of California's regulation;

(2) it interjects California regulators and inspectors into the physical operations of out-of-state sow farms and commands farmers to engage in out-of-state conduct, such as comprehensive recordkeeping, that has nothing to do with California if they are to comply with California's certification requirements; and

(3) it subjects pork producers to the risk of inconsistent regulation by other states.

A. Proposition 12 in practical effect directly regulates wholly out-of-state conduct and transactions

Proposition 12 regulates conduct and transactions outside California because its sow housing requirements will need to be met by the entire industry, not just sow farmers whose product is sold into California. Because the pork production process is highly segmented—for herd-health as well as efficiency reasons—and because of the way the pork packing and distribution process operates, sow farmers will be forced to comply with Proposition 12 even if none of the pork they produce reaches California. And because farmers raise a whole hog—not merely the cut of pork meat that might reach a California

consumer—Proposition 12 inevitably imposes its housing requirements and their attendant costs on pork sold to non-California businesses and consumers. These extraterritorial effects are plausibly alleged in the Complaint, they would prove a Commerce Clause violation if borne out at trial, and they are sufficient to survive a motion to dismiss.

(1) Compliance with Proposition 12 would require costly changes throughout the pork industry.

To understand how extensively Proposition 12 reaches beyond California, as explained below, it is first necessary to appreciate the massive disruptions and expense involved in complying with California’s requirements.

Proposition 12 forbids the sale within California of whole pork meat from a sow or its offspring if the sow “was confined in a cruel manner.” Cal. Health & Saf. Code § 25990(b)(2). A sow is “confined in a cruel manner” if she is housed in a way that prevents her “from lying down standing up, fully extending [her] limbs, or turning around freely” (which bars use of individual pens), or if the pig is housed “with less than 24 square feet of usable floorspace per pig,”

except for the period five days before farrowing or during weaning and certain other narrow exceptions. *Id.* § 25991(e)(1), (3), § 25992(f).

The practices of the vast majority of pork producers nationwide are not in compliance with Proposition 12. ER109 (¶305). Proposition 12 bars the use of individual pens during the 30 to 40 day period when a sow is in estrus, a sow is bred, and pregnancy is confirmed—a practice that is almost universal throughout the industry. ER105-06 (¶¶279, 286-287); *supra*, pp. 8-10 (explaining health and safety reasons for use of breeding pens). This practice is followed by both the 72% of the Nation’s pork producers that house sows in individual stalls throughout gestation, and by the 28% that use group housing at other times. Furthermore, those farmers who use group housing usually provide 16-18 square feet per sow, and less for gilts, not the minimum 24 square feet mandated by Proposition 12. ER91, 101, 106 (¶¶162, 244-249, 284-285). Accordingly, pork producers nationwide, whether they use group or individual sow housing, fail to meet California’s requirements. ER106 (¶289).

Coming into compliance with Proposition 12 is enormously costly. To comply, producers must expend millions of dollars in capital

costs to abandon their current housing systems and install pens built to California's specifications. ER109-11 (§§311-321).¹¹ At the same time, farmers will suffer productivity losses from the radically altered, less efficient, and less safe animal husbandry practices that Proposition 12 demands. ER111-13 (§§322-336). Farmers' other option will be to dramatically reduce their sow populations to achieve Proposition 12's 24-square-feet-per-sow mandate, thereby significantly damaging their productivity (for example, by 33 percent for a farmer currently at 16 square feet per sow). ER79 (§§68-70). Sow farmers who reduce their output so starkly face monetary penalties if they miss shipment targets for hogs, as well as significantly reduced income. ER79 (§71). As for farms that raise market hogs, they will receive fewer piglets from sow farms and will in turn be required to find a new source of supply or deliver fewer hogs to packers than their contracts require. Many sow farmers will be unable to meet the costs of compliance, and thus will be completely barred from California's market or even forced out of business. ER83-

¹¹ These costs are accelerated given the expedited time period to come into compliance (ER164-65 (§10)), compared with the six years that California egg producers were granted to comply with Proposition 2.

84, 113 (¶¶97, 336); *see also* ER70, 74-77 (¶58 (c), (h), (j), (l) (summarizing farmer declarations)).

In the district court, California and HSUS downplayed the impact that Proposition 12 has on interstate commerce by characterizing these burdens as “[f]acilities adjustments” limited to some private companies. Dkt. 19, at 11; Dkt. 18-1, at 11. But Proposition 12 requires the entire pork-production industry—in which virtually no participants currently meet Proposition 12 standards—to completely transform at enormous capital and operational cost. California and HSUS trivialize the crushing nature of these costs on producers, which will travel down the supply chain to disrupt transactions throughout the U.S. and “impair the free flow of materials and products across state borders.” *Nat’l Ass’n of Optometrists*, 682 F.3d at 1155. Plaintiffs’ statements about these costs and their effects are supported by fact allegations, member, economist, and trade-group declarations, and research, including that:

- Compliance with Proposition 12 is not feasible for many farmers across the Nation and will drive them out of the industry. ER83 (¶¶94-96).
- For farmers who comply, pork production will decrease as a result of increased sow fatalities, pregnancy terminations, and culling due to increased injuries, and from the need to significantly diminish sow herds. ER80-82 (¶¶74-84). Smaller sow herds will mean reduced shipments of hogs to finishing farms and packers—hogs that supply pork nationwide. ER114 (¶¶346-347).
- Sow farmers will have to expend millions in upfront capital costs and adopt a more labor-intensive method of production. ER109-11 (¶¶309-316).
- Sow farmers will incur increased production costs, estimated at about \$13 per head, which is about a 9.2 per cent increase. ER114 (¶343).

As we explain below, this cost and disruption from Proposition 12 is not confined to pork sold in California. Proposition 12's effects will be spread throughout the Nation.

(2) *Because Proposition 12 regulates the whole pig, not just meat cuts sold into California, it disrupts the national market in pork*

For the most part, wholesalers and retailers in California sell, and Californians buy, individual cuts of pork, not whole hogs. Market hogs are butchered at out-of-state packing plants into pork cuts of many different types—both Proposition 12-covered whole cuts and other cuts that are processed or sold in “combination food products” and so are not covered. ER102 (¶¶254-257). Those cuts are then distributed throughout the country. ER83 (¶96). If *any* covered meat at all from a hog is sold into California, the sow it comes from must have been raised in conformity with Proposition 12. ER114 (¶346). As a result, all non-California buyers of any pork from offspring of that sow necessarily buy Proposition 12-compliant pork—whether there is any demand for it in those states or not (ER114 (¶347))—with the additional cost that entails for farmers, packers, and consumers.

As described above, those capital and operational costs are substantial. ER109-14 (¶¶305-342). Plaintiffs’ economist calculated that, as a result of Proposition 12, per pig production costs will increase by 9.2 percent or \$13 a head. ER114 (¶343). Because there is

no possibility that all cuts from all Proposition 12-compliant pigs will be sold into California—though it is California’s regulations that increase those costs—the entire national market, including countless sellers and buyers entirely outside California, will in fact be adversely affected by Proposition 12, and wholly out-of-state markets and pricing will be disrupted. This direct effect on millions of transactions occurring wholly outside of California is forbidden by the Commerce Clause’s bar on extraterritorial regulation.

(3) The structure of the pork industry makes it inevitable that sow farms nationwide will have to conform to Proposition 12

In addition, because of the unique attributes of pork production, the practical effect of Proposition 12’s requirements is that California’s rules for the housing of breeding pigs will directly regulate out-of-state conduct, including countless transactions that are wholly unconnected to California.

In the vast majority of cases, it is not the farmers caring for sows that directly sell pork into California. Many other actors and transactions are involved in a complex, nationwide, multi-step supply chain. ER87 (¶127). Retailers and wholesalers who sell pork in

California usually receive it from packers and slaughterhouses (ER87 (¶¶126-127)), which in turn receive hogs from finishing farms (ER87, 89 (¶¶130, 144)), which in turn may receive feeder pigs from nurseries (ER89 (¶142)), which in turn may receive piglets from sow farms. ER89 (¶143). These segmented steps are necessary to realize economies of scale that provide consumers with plentiful and inexpensive pork protein; to maintain the bio-security of sow farms by separating them from other stages of production; and to ensure that pigs can be grouped into herds with a similar age, diet, and health status. ER88-89 (¶¶137-140). Proposition 12 impacts all of these out-of-state transactions, as up-stream actors force farmers at the different stages of production to segment their supply (a requirement that many producers will not be able to meet), or to produce all their pigs to Proposition 12's specifications, or simply end the business relationship. ER107-08, 113 (¶¶297-300, 336-339).

For example, compliance with Proposition 12 would mean tracking pork meat back to a particular sow's housing, which in turn would mean—if it were practical—tracing and segregating Proposition 12-compliant market hogs throughout the stages

described above. ER107 (¶297); *see* ER87 (¶¶128-29) (explaining that pork is particularly difficult to trace and that in-plant federal inspection for wholesomeness has made tracing of commodity pork product unnecessary). It would also require segregating product lines at packing plants and throughout distribution to enable the tracing of each cut of meat back to a particular sow housed in a particular way. ER88 (¶¶132-134). That tracking and segregating will be necessary regardless of what portion of the meat from a hog eventually is sold in California, and even if most of it is sold elsewhere.

Alternatively, to avoid complex and largely impracticable tracing and segregation—and in recognition of the fact that a farmer is almost always uncertain at the time a piglet is farrowed where its meat will eventually be sold—packers and food distributors will demand that farmers produce all of their hogs in compliance with Proposition 12. ER115 (¶349). Again, that means that farmers will need to comply with Proposition 12 for hogs only partially or not at all destined for California markets. ER107 (¶¶298-299). This extra-territorial effect is not hypothetical: some buyers have already

demanded that their hog suppliers meet California's specifications for all the pork products they buy. ER108, 115-16 (¶¶300, 350, 357).

The result is that Proposition 12 will, as a practical matter, regulate transactions occurring wholly outside of California. California unquestionably consumes a lot of the Nation's pork output, but 87% of the Nation's pork is consumed elsewhere and essentially none of it is produced in California. ER61 (¶¶17-18, 20). That means that the vast majority of transactions between pork producers along the supply chain, as well as between pork distributors and retailers, have no connection to California. For instance, an Illinois farmer who runs a sow farm may sell recently weaned pigs to a nursery farm in Wisconsin which may then raise those pigs and sell them as feeder pigs to a finishing farm in Iowa, which may then sell the pigs to a packer in Minnesota. The whole pork cuts sold by the packer may then go to any number of states other than California. None of those transactions, which are common occurrences in the nationwide pork production chain, involve California; but all of them will in practical effect be regulated by Proposition 12. That is a textbook case of extraterritoriality.

(4) Case law shows that Plaintiffs state a claim that Proposition 12 regulates extraterritorially

The Seventh Circuit’s recent decision in *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017), is instructive. There the court examined an Indiana law that imposed substantive requirements on the manufacture and distribution of vapor pens and the liquids used in e-cigarettes. Among other things, the law required manufacturers to comply with rules governing the design and operation of their facilities as a condition of obtaining a certificate to sell their products in Indiana. *Id.* at 828. The manufacturers were also required to submit to audits and inspections by Indiana agents. *Id.* In other words, the law looked a lot like Proposition 12.

The court held that the Indiana provisions “directly regulate the physical plants of out-of-state manufacturers” and, therefore, were “invalid as extraterritorial laws.” *Id.* at 835. The Indiana statute “control[s] conduct beyond the boundaries of the state and tell[s] out-of-state companies how to operate their businesses.” *Id.* at 834. And it did so in a way that is different than state-specific labelling laws because those laws require only “minor adjustments to [the company’s] production processes.” *Id.* The court also explained that

the Indiana law impermissibly operated extraterritorially because it applied to sales transactions occurring wholly outside Indiana. *Id.* For instance, the law applied to a sale by an out-of-state manufacturer to an out-of-state distributor if the distributor re-sold the products in Indiana. *Id.*

Proposition 12 bears the same characteristics that required invalidation of the Indiana e-cigarette law as improper extraterritorial regulation. Like the Indiana law, Proposition 12 directly regulates the physical facilities of out-of-state pork producers. Despite the fact that virtually all pork producers are outside of California, Proposition 12 requires out-of-state farmers and pork producers to reconfigure their facilities to provide group housing with certain per-pig usable space, as the State's LAO Report acknowledged. ER99 (¶231). Proposition 12 also controls how out-of-state pork producers operate their business by restricting the use of individual breeding pens beyond what most producers consider to be best practices or good for their sows. ER93-95 (¶¶181-206).

And similar to the Indiana law, Proposition 12 regulates transactions occurring wholly outside of California. *See Legato*

Vapors, 847 F.3d at 836. First, pork sold outside of the State will inevitably be raised Proposition 12-compliant, and bear the costs of that compliance, because Proposition 12 mandates that a sow be housed in a particular way and the meat from offspring of that sow will be sold across the country, not just in California. Proposition 12 effectively regulates the whole hog, not just those cuts that reach California. Out-of-state transactions will thus be affected by the increased expenses associated with complying with the Proposition 12 mandates.

Second, even for pork that is ultimately sold in California, there are transactions along the product chain—for instance, an Iowa packer buying pigs from a finishing farm in Illinois—that do not involve California. Those wholly out-of-state transactions are analogous to the sales between out-of-state manufacturers and out-of-state distributors that were a characteristic of the Indiana law’s extraterritorial application. *See Legato Vapors*, 847 F.3d at 834.

Consistent with the distinction *Legato Vapors* drew between the impermissible burdens imposed by Indiana’s law and permissible labelling requirements, this Court has examined the difficulty of

making adjustments to meet a specific state's requirements in determining whether a statute operates extraterritorially. In *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network*, 742 F.3d 414 (9th Cir. 2014) ("*GLAAD*"), this Court upheld a California law that required news outlets to provide captioning on videos posted on their websites. In relevant part, the Court explained that, "[e]ven though CNN.com is a single website, the record before us shows that CNN could enable a captioning option for California visitors to its site, leave the remainder unchanged, and thereby avoid the potential for extraterritorial application of the [law]." *Id.* at 433.

The allegations of Plaintiffs' Complaint, by contrast, state that, due to the highly segmented pork production system, it is not feasible to trace pork cuts back to a California-compliant sow or to segregate California-compliant pigs and pork from non-compliant animals and meat. ER85, 87-88, 107 (¶¶104, 128-32, 297). And they state that cuts of pork sold into other states must come from Proposition 12-compliant pigs if any part of the pig is sold into California. (ER114 (¶¶346-47)). Thus, pork farmers cannot implement a simple adjustment to their facilities and methods of production to comply

with the law, leaving their other operations unaffected, as was possible with the website captioning in *GLAAD*. Instead, pork producers will have to change their facilities and operations substantially and at great cost so that all pork products comply with Proposition 12's strictures. ER85, 107-08 (¶¶105, 298-301).

This Court's decision in *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), further establishes that the Complaint alleges a plausible claim under the extraterritoriality doctrine. Nevada enacted a law that specified procedural protections that the NCAA must afford Nevada students, employees, institutions, or boosters during an enforcement proceeding for rules violations. *Id.* at 637. This Court held that the law violated the dormant Commerce Clause because the NCAA would be required to apply the Nevada rules to all institutions in all States if it wanted to enforce its rules uniformly across the country. *Id.* at 639. Because the Nevada law thus "could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders," the law was impermissibly extraterritorial in effect. *Id.* This was so even though the Nevada law on its face governed only in-state conduct.

The parallel to Proposition 12 is clear. Proposition 12, like the Nevada statute, only purports to apply to in-state sales on its face. But the practical effect of Proposition 12 will be to cause California's rules to be applied, and its costs to be spread, throughout the Nation, just as the practical effect of Nevada's procedural rules was that they would be applied in all NCAA disciplinary proceedings. The practical result of the Nevada law would be that an NCAA disciplinary proceeding involving an institution in, for example, Vermont, with no nexus to Nevada, would be governed by Nevada's procedural rules. Likewise, after Proposition 12, pork production in states with no connection to California will be in accordance with California's rules, and non-California consumers will have to pay for Proposition 12 compliance.

In its decision, the district court attempted to distinguish *NCAA* on the ground that "Proposition 12 does not call for uniform procedures and practices throughout the entire country." ER11. But the district court could reach this conclusion only by ignoring the well-pleaded allegations of the Complaint, which stated that in practical effect Proposition 12 will result in pork producers

nationwide being forced to adopt California's rules. *E.g.*, ER85, 107-08 (¶¶105, 298-301).

B. Proposition 12 requires California's agents to access out-of-state facilities

The audit and inspection requirements that will accompany Proposition 12 directly regulate out-of-state conduct in the same way as the similar provisions of the Indiana e-cigarette law. In *Legato Vapors*, the court found “that audits and on-site inspections of out-of-state manufacturers are invalid direct regulations of interstate commerce insofar as they relate to enforcement of Indiana's requirements for facility design and production operations.” 847 F.3d at 836.

Proposition 12 imposes even greater extraterritorial burdens. It requires the CDFA to promulgate rules for implementation of its requirements. Cal. Health & Saf. Code § 25993(a). While CDFA has not yet promulgated final versions of those rules, its July 22, 2020 draft rules contain detailed provisions proposing the steps necessary to certify a production or handling operation as compliant with Proposition 12's mandates. *See* CDFA Draft Rules Article 5, 40—87 (“Article 5”). After January 1, 2023, “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 must hold a valid certification” as “a certified operation.” CDFA, Draft Rules Article 3 (July 22, 2020) (“Article 3”), § 1322.1(b) (ADD 18-39).

Among other things, the draft rules require any person seeking certification to permit at least annual on-site inspections by a “certifying agent and authorized representatives of the Department.”¹² California’s inspectors must be allowed access to “pastures, fields, equipment, structures, and houses where covered animals”—*i.e.*, “any * * * breeding pig”, Cal. Health & Saf. Code § 25991(f)—“and covered animal products may be kept, processed, handled, store or transported, including the inspection of all enclosures for covered animals.” Article 5, §§ 1326.1(b)-(e), 1326.5 (ADD 45-46, ADD 51-53).

¹² CDFA’s requirement that, to be accredited, no inspector have provided the producer with “consulting services” during the previous year (Article 5, § 1326.10(a)(8) (ADD 61–62)) means that California will have to establish new inspection programs, because the professionals who might be qualified for accreditation routinely consult with sow farms, for example by providing auditing services.

Additionally, the draft rules spell out recordkeeping requirements for certified operators. Article 5, § 1326.2 (ADD 46–48). A pork handler’s records must establish an “audit trail” of “records that are in sufficient detail to document the identification, source, supplier, transfer of ownership, transportation, storage, segregation, handling, packaging, distribution and sale of whole pork meat that was derived from a breeding pig confined in compliance with” proposition 12. Article 3, § 1322(a) (ADD 18-19); *see also* Article 5, § 1326.2(b)(2) (ADD 47). And certified operators must keep records “of all covered animal and/or covered product transactions for the preceding two-year period” and “must indicate” in the records “the date, quantity, and identity of the purchaser and seller.” Article 5, § 1326.2(b)(5) (ADD 47). A certified operator must keep these records even if the transactions do not involve a sale of pork in California. And all shipping and sale documents for pork entering California—even if only for trans-shipment elsewhere—must be labeled as Proposition 12 compliant or non-complaint. Article 3 § 1322.4 (ADD 29-30).

The draft rules also require any person seeking certification to allow a certifying agent or CDFA representatives to access a facility to review and copy records. Article 5, §§ 1326.1(f), 1326.2(c) (ADD 46, 48).

Thus, California contemplates that in implementing Proposition 12, a CDFA employee or agent must be allowed to physically enter and inspect all aspects of out-of-state facilities to ensure compliance with California law. And it requires recordkeeping for transactions relating to all covered animals, including all breeding pigs, not just those relating to sales in California. In these respects too, California's intrusive scheme for certifying producers operates extraterritorially and applies to wholly out-of-state transactions.¹³

¹³ Proposition 12's requirements also apply to pigs and pork imported from abroad. See Article 5, § 1326.9(a) (CDFA "may accredit" a "foreign applicant to certify a * * * foreign production or handling operation") (ADD 59). USDA trade data shows that more than 5 million live pigs are imported each year from Canada for finishing in the U.S, and around \$1.5 billion of pork is imported each year from dozens of foreign countries. USDA, Economic Research Service, *Livestock and Meat International Trade Data*, <https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data>. The foreign sow farms that produce those pigs and pork cuts are apparently subject to Proposition 12's complex verification and

C. Proposition 12 subjects pork producers to potential inconsistent regulation

Proposition 12's extraterritorial overreach is also reflected in its intrusion into the ability of other states to regulate animal husbandry within their own borders. When determining whether a statute operates extraterritorially, courts consider "how the challenged statute may interact with the legitimate regulatory regimes of other States" and "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. A state law has an impermissible extraterritorial effect when it places out-of-state businesses at risk of inconsistent regulation. *Id.* "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37. "[T]he threat of inconsistent regulation, not inconsistent regulation in fact, is enough to show" unlawful extraterritoriality. *Legato Vapors*, 847 F.3d at 834. Thus, in *NCAA* this Court invalidated a Nevada statute that "could have had the baleful effect of subjecting businesses to conflicting

traceability provisions that require inspections and significant paperwork.

requirements.” *Daniels Sharpsmart*, 889 F.3d at 616 (discussing *NCAA*, 10 F.3d at 639).

A real threat of inconsistent regulation is present here. *See S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 470 (9th Cir. 2001) (“the threat of additional conflicting legislation” must be “real and not speculative”); *Pac. Merch.*, 639 F.3d at 1178 (“the court must * * * tak[e] into account the *possibility* that other states may adopt similar extraterritorial schemes and thereby impose inconsistent obligations”) (emphasis added). In the aftermath of Proposition 12, other states could express their views on proper animal husbandry practices through legislation and impose competing frameworks that give rise to different or conflicting sow housing standards. For instance, a state might require the use of an individual breeding pen to promote animal welfare in circumstances where breeding stalls could not be used under Proposition 12. Indeed, Ohio has passed regulations that expressly authorize the use of breeding pens to promote animal welfare in circumstances where Proposition 12 would not allow them. *See Ohio Admin. Code 901:12-8-02(G)(4), (5)* (permitting use of breeding pens during post-weaning “to maximize

embryonic welfare and allow[] for the confirmation of pregnancy”). Other states might recognize 24 square feet as too much space for optimum sow welfare and prescribe a smaller standard. ER119-20 (¶¶382-388).¹⁴

A mosaic of state standards would inhibit a well-functioning interstate market and “create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.” *Healy*, 491 U.S. at 337. The resulting “multiplication of preferential trade areas” would be “destructive of the very purpose of the Commerce Clause.” *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

D. The authority relied upon by the district court is inapt and distinguishable.

The district court rejected Plaintiffs’ extraterritoriality argument because “Proposition 12 applies both to California entities and out-of-state entities.” ER9. According to the court, Proposition 12 is agnostic as to where the pigs are raised and “therefore does not

¹⁴ Indeed, the participation of 15 States as *amici* below, objecting to California’s attempt to impose its views of acceptable sow housing on the amici States’ citizens within those States’ borders, suggests that counter-regulation is likely.

regulate wholly out-of-state conduct.” ER9-10. That reasoning is incorrect. It cannot be squared with the allegations of the Complaint that numerous transactions taking place within the production chain that have nothing to do with California will be affected by Proposition 12. The court’s reasoning also ignores decisions such as *Healy*, *NCAA*, *Daniels Sharpsmart*, and *Legato Vapors*, where courts struck down laws as impermissibly extraterritorial even though they also applied to some in-state transactions. The relevant question is not whether the law applies only to out-of-state conduct or transactions; it is whether the law applies to some conduct or transactions that occur wholly out-of-state. *See Healy*, 491 U.S. at 336 (“The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State”).

The district court’s reasoning was based on a misapplication of this Court’s decision in *Association des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013). The district court misunderstood that decision to stand for the proposition that “[a] statute that applies both to California entities and out-of-state entities does not target wholly extraterritorial activity” and therefore

cannot violate the prohibition on extraterritoriality. ER9 (citing *Eleveurs*, 729 F.3d at 949). The statute at issue in *Eleveurs* was California’s ban on the sale of force-fed birds in the State. The plaintiffs in that case argued that the law applied only to out-of-state producers, which this Court rejected because California producers were also prohibited from selling force-fed birds in the State. 729 F.3d at 949. *Eleveurs*, then, answered a question not posed by this case. Plaintiffs do not argue that Proposition 12 applies *only* to out-of-state pork producers, but rather that it applies to many pork transactions that occur wholly outside of California. And, again, a statute does not have to apply *only* to out-of-state producers to be impermissibly extraterritorial. *E.g.*, *NCAA*, 10 F.3d at 638.¹⁵

The district court (ER10) also cited *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), in support of its decision. *Hass* also

¹⁵ The district court subsequently interpreted the statute at issue in *Eleveurs* “to prevent force-feeding in California, not to create a total ban,” and not to apply to sales of foie gras outside of California where the product was then shipped into the State. *Eleveurs*, 2020 WL 5049182, at *4 (C.D. Cal. July 14, 2020), *appeal filed*, No. 20-55944 (9th Cir. Sept. 10, 2020). By contrast, as the district court in *Eleveurs* observed, Proposition 12 defines a “sale” more broadly to take place where the buyer takes possession of pork. *Id.*; Cal. Health & Saf. Code § 25991(o).

answered a different question. The challenged rule in that case required all members of the Oregon bar in private practice in Oregon to obtain professional-liability insurance through the Oregon State Bar Professional Liability Fund. Because the law regulated in-state and out-of-state insurance companies even-handedly—none could compete with the State Bar’s own company—the Court held that “[t]his is *not* a case in which the challenged regulation operates to place out-of-state providers at a competitive disadvantage.” *Id.* at 1462. The court, however, did not expressly address whether the Oregon insurance rule regulated in an extraterritorial manner. Indeed, there would have been no reason for the Court to do so, because the Oregon rule clearly did not: it had no effect, direct or incidental, on transactions occurring wholly outside of Oregon. The same is not true of Proposition 12.

The district court also relied (ER10) on *Chinatown Neighborhood Association v. Harris*, 794 F.3d 1136 (9th Cir. 2015), in which this Court upheld California’s ban on the possession, sale, trade, or distribution of detached shark fins in the State. This Court held that the shark-fin statute did not operate in an impermissibly

extraterritorial manner because the State “may regulate commercial relationships in which at least one party is located in California” and “significant extraterritorial effects” are allowed “when, as here, those effects result from the regulation of in-state conduct.” *Id.* at 1145 (quotation marks omitted). But there was no indication that any shark-fin transactions not involving California were impacted by the law—sales of shark fins by Washington dealers to Colorado consumers, for instance, were entirely untouched by the statute. Those are the opposite of the facts alleged in the Complaint here, which state that the practical effect of Proposition 12 is to require pork producers to change their operations even for transactions that have no relationship to California, and to mean that out-of-state consumers buy Proposition 12-compliant pork. *Chinatown* is thus distinguishable too.

The district court’s citation (ER10) of *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (2019), is similarly inapt. There this Court held that carbon-emission-based regulation of in-state sales of fuel may have “upstream effects on how sellers who sell to California buyers produce their goods,” but that this does not make the law

“necessarily extraterritorial.” *Id.* at 952. While such a law may not be *necessarily* extraterritorial, that does not mean the law *cannot* be extraterritorial in effect, as illustrated by *Legato Vapors*. And here, the Complaint brings this case within the scope of *Legato Vapors* by alleging that Proposition 12 will in practical effect regulate wholly out-of-state sales. *See Healy*, 491 U.S. at 336.

In sum, Plaintiffs’ Complaint alleges a plausible claim that Proposition 12 operates extraterritorially in violation of the dormant Commerce Clause. The Supreme Court directs courts to examine the “practical effect” of the law, and the well-pleaded allegations state that the practical effect of Proposition 12 is that pork producers up and down the production and distribution chain must change their operations because of California’s law and that sales of pork to non-California consumers will bear costs of Proposition 12 compliance. Nearly all pork farmers are located outside of California, and countless transactions involving those producers that have no connection to California will be affected by Proposition 12. That plainly is an extraterritorial regulation of a significant amount of

conduct that occurs wholly outside of California, as the proponents of Proposition 12 intended.

But Proposition 12 does not stop there. It requires any out-of-state producer to allow the CFDA or its agents to enter its premises and inspect all aspects of the operation. Further, out-of-state producers must keep detailed records even for transactions that do not involve pork products sold into California.

And Proposition 12 creates a significant risk that other states will respond with different and conflicting regulations, creating the very Balkanization of this important nationwide market that the Framers sought to avoid. *See Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 98 (1994) (Framers' designed Congress's "plenary authority over interstate commerce" to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation") (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

II. Plaintiffs Have Adequately Alleged That Proposition 12 Imposes An Excessive Burden On Interstate Commerce In Relation To The Putative Local Benefits

Laws that incidentally burden commerce are reviewed under the *Pike* balancing test. *Pac. Merch.*, 639 F.3d at 1177. Under that test, a law that applies evenhandedly to in-state and out-of-state entities and only incidentally burdens interstate commerce is invalid if it burdens commerce in a way that is “clearly excessive in relation to the putative local benefits” of the law. *Pike*, 397 U.S. at 142. Relevant burdens include “impacts on commerce beyond the borders of the defendant State” and “impacts that fall more heavily on out-of-state interests.” *Pac. Nw. Venison Prods. v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994). State laws that substantially burden interstate commerce but “cannot be said to make more than the most speculative contribution to [the state’s interest]” are invalid. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978). That is the case here.

A. Proposition 12 imposes a substantial burden on interstate commerce

Under *Pike*, “a plaintiff must first show that the statute imposes a substantial burden before the court will determine whether the

benefits of the challenged law are illusory.” *Pharm. Research & Mfrs.*, 768 F.3d at 1044. This analysis “turns on the interstate flow of goods.” *Id.* at 1044-45 (alteration and internal emphasis omitted). An undue burden may be found when a nondiscriminatory law regulates activities “that are inherently national or require a uniform system of regulation.” *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019).

The Complaint alleges that the burden imposed by Proposition 12 will fall almost entirely on out-of-state pork producers because almost all pork is produced outside California. Under *Pike* balancing, a court may consider the degree to which a statute’s burdens fall “on out-of-state residents and businesses.” *Kassel*, 450 U.S. at 675-76. While California’s consumption accounts for 13 per cent of the national pork market, and it takes the offspring of 673,000 sows to fulfill the State’s annual demand, only 1,500 sows are commercially bred by California farmers. ER61 (¶¶18, 20). Assuming that all commercially bred pork produced in California remains in-state, 99.8 per cent of the pork consumed in California comes from farmers outside the State. Therefore, Plaintiffs plausibly allege an undue

burden from disproportionate impact. *See Rosenblatt*, 940 F.3d at 452 (explaining that, to survive a motion to dismiss, plaintiffs “needed to plead specific facts to support a plausible claim that the ordinance has a discriminatory effect on interstate commerce,” such as where the burden of the law “will fall disproportionately on out-of-state” businesses) (quotations omitted).

That disproportionate impact is substantial and impedes the free flow of goods across state lines. Plaintiffs allege that Proposition 12 results in the increased costs of compliance being born by out-of-state consumers of pork, because those costs apply to the whole pig, not just those cuts sold in California. *See* Part I.A.1.b, *supra*. And Plaintiffs allege that structural health- and efficiency-driven factors in the industry mean that pork farmers nationwide will be forced by packers and other buyers to adopt California’s preferred practices—and that those farmers who cannot comply will lose their businesses. *See* Part I.A.1.c, *supra*. Those consequences are obviously a substantial burden on out-of-state farmers, and the resulting decrease in pork supply and increase in cost just as obviously impede the flow of goods in interstate commerce.

Farmers who comply with the Proposition 12 requirements will see decreased pork production due to increased sow fatalities, pregnancy terminations, culling due to increased injuries, and the need to significantly diminish sow herd size. ER80-81 (¶¶77-84). Smaller sow herds will mean reduced shipments of hogs to finishing farms and packers, resulting in fewer pork meat cuts available nationwide. ER114 (¶¶346-347).

Proposition 12 will require pork producers to alter their practices for all of the pork they raise or process if they wish to remain in the industry. ER114-15 (¶¶346-347, 349-350). To do so, producers will have to expend millions in upfront capital costs and adopt a more labor-intensive method of production. ER109-11 (¶¶309-316). Production costs will therefore increase by 9.2%. ER114 (¶343).

The district court held that “while Proposition 12 might result in barriers to the production of pork, there are no barriers to the flow of pork across state lines.” ER13. But that ignores the well-pleaded allegations that Proposition 12 will cause supply problems resulting in the flow of less—and more expensive—pork across state lines, and will affect wholly non-California transactions between farmers at

different stages of production, between farmers and packers, and among packers and distributors, retailers, and consumers. *See* p. 35-44, *supra*. In support of its holding, the court cited *National Association of Optometrists*, but that decision held—at the summary judgment stage—that the plaintiffs there did “not produce[] evidence that the challenged laws interfere with the flow of eyewear into California.” 682 F.3d at 1155. Here, at the pleading stage, Plaintiffs have alleged that Proposition 12 will “interfere with the flow of [pork] into California” and every other state because of its inevitable effect on production methods and costs nationwide.

The district court also discounted the possibility that “Proposition 12 has the effect of requiring a uniform system of regulation.” ER13. But that is *exactly* what the Complaint alleges. ER114-15 (¶¶346-347, 349-350).

The district court minimized the importance of the increased costs to pork producers on the ground that “there is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating.” ER13 (quoting *Nat’l Ass’n of Optometrists*, 682 F.3d at

1154). But the decision the court quoted continues: “Where such a regulation does not regulate activities that inherently require a uniform system of regulation and does not otherwise impair the free flow of materials and products across state borders, there is not a significant burden on interstate commerce.” 682 F.3d at 1154-55. Here, as Plaintiffs have explained, the national pork market would be severely damaged by state-specific rules and Balkanization. Further, Plaintiffs have alleged that Proposition 12 will impair the free flow of pork across state lines by decreasing supply and increasing costs. Simply, Plaintiffs do not contend that Proposition 12 unduly burdens interstate commerce “merely because” the law requires an alternative production method.

Along these lines, the district court’s reliance (ER13-14) on *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), is misplaced. In *Exxon*, the Court upheld a Maryland law that regulated the structure of that State’s gas station market and concluded that the dormant Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.” *Id.* at 127-28. This Court has explained that “the *Exxon*

Court's decision turned on the interstate *flow of goods*." *Nat'l Ass'n of Optometrists*, 682 F.3d at 1153. Here, Plaintiffs have alleged that Proposition 12 will alter the national pork market in a way that will burden the flow of goods.

B. The burden on interstate commerce is far in excess of the putative local benefits.

The next step of the *Pike* analysis is to weigh Proposition 12's burden on interstate commerce against its local benefits. Having incorrectly held that Plaintiffs do not allege a burden on interstate commerce, the district court did not address or weigh the asserted benefits of the law. ER14. On *de novo* review of the sufficiency of the allegations in the Complaint, there is no need for this Court to remand for the district court to conduct the necessary balancing in the first instance. On its face, the Complaint adequately alleges that Proposition 12's burdens on commerce outweigh any local benefits.

This weighing requires "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Kassel*, 450 U.S. at 670-71. Incantation of a legitimate public purpose does not

suffice to justify the burden on commerce if the purpose is illusory or marginally furthered by the law. *Id.* at 670.

Proponents of Proposition 12 offered two justifications: prevention of foodborne illness and prevention of animal cruelty. *Supra*, pp. 15-17. The Complaint explains that Proposition 12 has nothing to do with foodborne illnesses or human health. ER123-27 (¶¶419-453). Indeed, Proposition 12 is unnecessary because, under the Federal Meat Inspection Act, the U.S. Department of Agriculture's Food Safety and Inspection Service inspects meat shipped into California to ensure that the product is safe (and has exclusive jurisdiction over inspections for wholesomeness). ER123-24 (¶420). Proposition 12 does not add more protection against foodborne illnesses because it affects only the housing of sows, not their offspring, which will become market hogs butchered for whole pork cuts. ER124 (¶¶423-424). There is no connection between the square footage available to a sow and the safety of meat products from their offspring. ER124, 126 (¶¶425, 438). Even if a sow had salmonella and passed it on to her piglets, there is essentially zero likelihood of the piglets carrying the salmonella to market. ER124-25 (¶¶426-434).

The animal-cruelty rationale also cannot justify the law's burden on commerce. First, the vast majority of the animals Proposition 12 affects are not in California, which has hardly any commercially bred pigs. Thus, California is seeking to push its conception of animal cruelty on other states where animals are raised. Prevention of perceived cruelty to animals in other states is not a *local* benefit. Because the *Pike* balance weighs putative *local* benefits, the animal-cruelty justification cannot be considered. *See* 397 U.S. at 142. And given the small number of sows in California, the local benefit would at best be miniscule and easily outweighed by the interstate burden.

The district court held instead that California is entitled to “create incentives for less harmful farming practices.” ER10. But California does not merely offer incentives to farmers in other states. Instead, as we have explained, it commands that any pork cut sold in California be derived from a Proposition 12 compliant sow, regardless of the facts that (1) other cuts are sold in other states but will have to incorporate the cost of raising a compliant sow, and (2) the segmented structure of the industry means that in practice many sow farmers

will be forced to comply with Proposition 12 for all of their sows, with costs that will reverberate nationwide. It may be permissible for California to offer marketplace incentives to farmers in other states, but it crosses the constitutional line for California to erect a scheme that forces farmers everywhere to adhere to Proposition 12 for pigs and meat that have no connection to California.

Undermining any claim that Proposition 12 prevents animal cruelty, the housing requirements it imposes make it more likely that a sow will be injured or get sick. ER126-27 (¶¶443-452). Additionally, Plaintiffs have alleged that the 24-square-foot requirement is an arbitrary number that does not improve sow welfare. ER119 (¶¶376-381). To the contrary, too large an area may decrease sow welfare by compromising sow hygiene, creating space for more fighting, and increasing stress on the animals. ER119 (¶¶382-383).

Furthermore, banning the use of breeding stalls hurts—rather than helps—sow welfare. ER120-22 (¶¶389-410). Sows held in individual stalls are calmer, healthier, and suffer fewer deaths and injuries than sows in the group pens required by Proposition 12. ER120-21 (¶¶391-399). And it is more difficult to provide sows with

critical individualized nutrition appropriate to their body condition and stage of pregnancy in a group setting. ER122 (¶¶404-405). Proposition 12 mandates the cruel practice of moving a sow into a group setting directly after weaning when she is weak and vulnerable. ER122 (¶406).

For these reasons, Plaintiffs have adequately alleged that Proposition 12 burdens interstate commerce by disproportionately affecting out-of-state businesses and impeding the flow of goods. Balanced against that burden, the human-health justification is illusory and the animal cruelty rationale is either insignificant or else actually subverted by the law's requirements.

CONCLUSION

The district court's order granting Defendants' Motion to Dismiss and Intervenor-Defendants' Motion for Judgment on the Pleadings should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted,

Daniel Himmelfarb
Colleen M. Campbell
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
dhimmelfarb@mayerbrown.com

/s/ Timothy S. Bishop
Timothy S. Bishop
Brett E. Legner
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
tbishop@mayerbrown.com

Travis Cushman
AMERICAN FARM BUREAU
FEDERATION
600 Maryland Avenue SW
Ste. 1000W
Washington, D.C. 20024
Telephone: (202) 484-3600
Facsimile: (202) 406-3606
travisc@fb.org

Michael C. Formica
NATIONAL PORK PRODUCERS
COUNCIL
122 C. St. NW
Ste. 875
Washington, D.C. 20001
Telephone: (202) 347-3600
Facsimile: (202) 347-5265
formicam@nppc.org

Attorneys for Plaintiffs-Appellants

September 23, 2020

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Plaintiffs-Appellants provides notice of the following related case pending before the United States Court of Appeals for the Ninth Circuit. The North American Meat Institute (“NAMI”) appealed an Order denying a preliminary injunction against Proposition 12 in a separate challenge pending before the Central District of California. *NAMI v. Becerra*, 19-56408 (9th Cir. Dec. 3, 2019); *NAMI v. Becerra*, 2:19-cv-8569 (C.D. Cal. Oct. 4, 2019). Although the complaints in this case and NAMI overlap, the cases are in different procedural postures, are brought by different segments of the industry, and raise different legal and factual arguments.

The NAMI case, which arises at the preliminary injunction stage, challenges Proposition 12 on the grounds that it violates the dormant Commerce Clause of the U.S. Constitution because it intentionally discriminates against and has an extraterritorial effect on out-of-state packers and processors of veal and pork, and imposes burdens on those market participants that outweigh any in-California benefits.

By contrast, the present challenge, which arises at the summary judgment stage, alleges that Proposition 12 violates the dormant Commerce Clause because it extraterritorially regulates the pork market and pork farmers outside of California, imposes burdens on interstate commerce that outweigh any in-California benefits, and interferes with the authority of States in which those farmers are located.

/s/ Timothy S. Bishop
Timothy S. Bishop
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-1 because:
 - this brief contains 13,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), *or*
 - this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook, *or*
 - this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)* _____
_____.

/s/ Timothy S. Bishop
Timothy S. Bishop
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2020, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

September 23, 2020

MAYER BROWN LLP

/s/ Timothy S. Bishop
Timothy S. Bishop
Attorney for Plaintiffs-Appellants