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)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs' 470-paragraph complaint plausibly alleges that Proposition 12 regulates wholly out-of-state commerce and also fails the *Pike* balancing test. *Amici* the United States and its Department of Agriculture, 20 States that produce most of the Nation's pork, and the largest business trade groups in the country agree that these claims should not have been dismissed and that Proposition 12 violates the dormant Commerce Clause.

The Supreme Court has repeatedly directed that the focus must be on the law's practical effect, and Proposition 12's extraterritorial effects on commerce are serious. Essentially all—99.8%—of the pork Californians consume is imported from out of state. Hundreds of thousands of out-of-state pigs are needed to supply that pork every year. And *every pig* from which *any cut of pork* reaches California necessarily bears Proposition 12's substantial costs, meaning that farmers and consumers everywhere pay for California's preferred animal-housing methods. In addition, because segregation and tracing throughout the complex pork-production chain is not possible, even pigs whose meat is sold *entirely* outside California will have to come from Proposition 12-compliant facilities and will carry those

same costs. Inevitably, the per-pig costs of complying with Proposition 12 are borne by the suppliers and consumers of pork sold nationwide.

Although the complaint lays out these facts, Defendants largely ignore them, pretending that Plaintiffs allege only that farmers will have to pay to alter their sow facilities if meat from their pigs is sold into California. The blow to out-of-state farmers will be severe, with some certainly going out of business, but Plaintiffs allege more: that the costs those farmers bear apply to huge quantities of pork sold outside California, will reduce the supply of pork in interstate commerce, and will increase pork prices nationwide.

Plaintiffs also allege that these significant burdens on interstate commerce vastly outweigh Proposition 12's minimal "benefit" to sow welfare (the only benefit California asserts). Hardly any sows are commercially farmed in California, so any welfare effects of the law—which are illusory anyway, because the law harms rather than helps sows—are felt almost entirely out-of-state.

The legal standards that apply at this preliminary stage of the litigation are clear. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to survive dismissal, a complaint need contain only "sufficient factual

matter … to 'state a claim to relief that is plausible on its face'") (citation omitted); *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012) (Rule 12(b)(6) and 12(c) motions should be denied when the complaint pleads sufficient facts to draw a reasonable inference of a claim). Plaintiffs and *amici* have shown that the complaint easily satisfies those requirements and should not have been dismissed. Yet despite these standards, Defendants—in particular intervenors Humane Society of the United States, Animal Legal Defense Fund, and others (collectively, "HSUS")—insist on referring to "facts" outside the four corners of the complaint. Those irrelevant or disputed "facts" would be an appropriate matter for inquiry on the merits but have no place at the pleading stage.

Plaintiffs explain below why Defendants have not rebutted their showing that the district court's ruling should be reversed and Plaintiffs given the opportunity to address the merits. Plaintiffs explain in particular that none of the case law on which Defendants rely supports dismissal here. To begin with, however, an observation about the way Defendants seek to characterize this case and the Plaintiffs is necessary.

Throughout their briefs, the Defendants try to lump the Plaintiffs here in with the plaintiffs and claims in *North American Meat Institute v. Becerra*, 420 F. Supp. 3d 1014 (C.D. Cal. Nov. 22, 2019) ("*NAMI*"), in which this Court recently affirmed the denial of a motion to preliminarily enjoin Proposition 12. *N. Am. Meat Inst. v. Becerra,* 825 Fed. App'x 518 (9th Cir. 2020), *rhg. denied* (Dec. 23, 2020). But *NAMI* was a challenge to Proposition 12 in its entirety and not, as here, solely its provisions addressing pork. It arose at the preliminary-injunction stage, where the legal standards are entirely different. And the plaintiff organization there ("NAMI") did not plead a key basis of Plaintiffs' claims here, which is that Proposition 12 imposes costs on every cut of pork from every pig, most of which will never be sold in California.[1]

This Court's decision in *NAMI* is a two-page, unpublished, non-precedential memorandum. And this Court's holding was that the district court "did not abuse its discretion" in ruling that, based on

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[1] NAMI subsequently amended its complaint to reflect this point, but not at the preliminary-injunction stage. *See* First Amended Complaint ¶¶73-75, *NAMI v. Becerra*, 2:19-cv-08569 (C.D. Cal. Mar. 9, 2020) (Dkt. 73).

the preliminary-injunction record, the plaintiff was "unlikely to succeed on the merits." The issue here is whether, on *de novo* review, the allegations in the Plaintiffs' complaint state a claim for relief.

In addition, NAMI represents primarily packers, which are slaughterhouse operators who purchase market hogs from farmers and then process them into cuts of meat that are sold to retail. Plaintiffs here, the National Pork Producers Council and American Farm Bureau Federation, mainly represent the farmers who operate sow farms. It is Plaintiffs' member farmers who will bear the costs of retrofitting or building new Proposition 12-compliant farms and implementing Proposition 12-compliant farming methods; whose sows and workers will be endangered by the law's requirements; whose herd sizes will be reduced as a practical result of the law; and who are being told by packers that, because of the impossibility of tracing and segregating California-bound pork, all of their sows must be Proposition 12-compliant. It is the reduction of these farmers' productivity—from the increased space-per-sow requirement, the increased sow mortality that comes with it, and pregnancy losses because Proposition 12 bans the use of individual breeding stalls—

that will disrupt the national pork market, reduce the supply of pork, and drive up consumer prices.

Declarant Phil Borgic, for example, an Illinois sow farmer, explained that his options under Proposition 12 are cost-prohibitive: to spend $3 million retrofitting his farm or reduce his herd size by a third, destroying his farm's productivity and making him unable to meet his contractual commitments to deliver hogs. ER69 (¶58.b). Moving from individual stalls to group pens also would harm the welfare of his sows. *Id.* Greg Maher, a sow farmer in Missouri, explained that his inability to bear the construction costs and productivity losses from complying with Proposition 12 means that he may have to exit the business. ER75 (¶58.i). Maher had converted to group housing with 16 square feet per sow, using individual stalls only during breeding and gestation, but is in the process of going back to individual housing because his sow-mortality rate skyrocketed along with his production costs. *Id.* It is Proposition 12's impact on farmers like these, not on the packers who make up the *NAMI* plaintiffs, that disrupts nationwide commerce in pork—however much California and HSUS confuse packers and the farmers who

supply them with hogs. Plaintiffs' detailed allegations of Proposition 12's practical effect on these farmers and the nationwide pork market, including countless transactions occurring wholly outside California, more than satisfy the pleading standard.

ARGUMENT

I. PLAINTIFFS HAVE ADEQUATELY ALLEGED THAT PROPOSITION 12 IS AN IMPERMISSIBLE EXTRATERRITORIAL REGULATION.

We explained in our opening brief that Proposition 12 regulates extraterritorially in three ways. First, it controls transactions that occur entirely outside California. Second, the audit and inspection procedures necessary to enforce the law require intrusive out-of-state inspections by California agents. Third, Proposition 12 threatens conflict with regulatory regimes of other states. The *amicus* brief submitted by Indiana and 19 other States confirms that the risk of Balkanization of the Nation's pork market through enactment of conflicting state laws is not mere speculation. States' Am. Br. 16-19.

Because any one of these reasons, let alone the extraordinary confluence of all three, is sufficient to find that Proposition 12 is impermissibly extraterritorial, Plaintiffs have stated a claim that Proposition 12 violates the dormant Commerce Clause. If California

can condition pork sales in the state on out-of-state farmers housing sows in a particular way, it also can require that any goods sold in the State have been made by workers paid a certain minimum wage or provided with certain benefits. That is not, however, something the dormant Commerce Clause allows.

A. Proposition 12 regulates wholly out-of-state conduct.

Like the district court, Defendants largely ignore the well-pleaded allegations of the complaint.[2] Plaintiffs' complaint describes the unique features of raising pigs for pork, in which a market hog typically moves through different farms at different stages of life before being processed into numerous cuts of pork destined for different markets. This complex sequence includes numerous

[2] Even worse, throughout its brief intervenor HSUS improperly challenges the veracity of Plaintiffs' well-pleaded facts, while advancing its own set of contrary facts, which are often based on nothing more than HSUS's speculation. These new "facts"—which Plaintiffs would certainly dispute—may not be considered in reviewing the sufficiency of Plaintiffs' complaint. *See Herrera v. Zumiez*, 953 F.3d 1063, 1068 (9th Cir. 2020). Indeed, submission of matters outside the pleadings typically requires a motion challenging the pleadings to be treated as a motion for summary judgment, *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1496 (9th Cir. 1995), which in turn requires remand for Plaintiffs to conduct discovery.

transactions—among farmers, packing plants, and distributors—that occur entirely outside California but will nonetheless effectively be regulated by Proposition 12.

Plaintiffs allege that Californians consume a large proportion of the Nation's pork—about 13%—but that California farmers produce only a miniscule fraction of that meat. ER61 (¶¶16-20). Nearly all pork sold in California comes from pigs raised outside the State. Commercial pork production in this country consists of a complex, segmented process in which pigs pass through several different types of farms before they go to a different facility for slaughter and packing. ER59, 87, 89 (¶¶7, 127-128, 138). This vertically segmented production model is not random: it evolved to protect herd health, and also to achieve the economies of scale necessary to provide consumers with affordable pork products. ER59, 89 (¶¶7, 138-142).

Proposition 12 mandates that farmers provide each sow with 24 square feet of usable floor space and largely prohibits the use of individual stalls, even during the critical period between weaning and confirmation of pregnancy, when sows recover from the stress of giving birth, are bred, and then wait for the embryos to attach

themselves to the uterine wall. ER100-101 (¶¶240, 243). Both the square-feet requirement and the ban on breeding stalls are contrary to the practices of the vast majority of farmers and, many experienced farmers believe, are affirmatively harmful to sow health. ER105-06, 120-22 (¶¶279-288, 389-410). Yet because of the impracticality of tracing a single cut of pork back to a particular sow housed in a particular manner from six months of age on, farmers everywhere will be required to conform their operations to comply with Proposition 12 for all of their sows. ER107-108 (¶¶297-301). That will impose hundreds of millions of dollars of upfront costs on sow farmers, increasing production costs by about 9.2% across the industry (and far more for many small family farmers); it will decrease herd sizes; and it will result in the flow of less—and more costly—pork in the nationwide market, not only in California. ER109-115 (¶¶305-350). Those allegations plausibly allege a claim that Proposition 12 regulates extraterritorially in violation of the Commerce Clause.[3]

[3] HSUS states that one diversified food company with a very small hog operation, Hormel Foods, issued a statement saying that it

As we explained in our opening brief, the Commerce Clause forbids the application of a state statute to commerce that occurs wholly outside the state. *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 614 (9th Cir. 2018). In determining whether a state law has an exterritorial reach, "[t]he critical inquiry is whether the practical

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will comply with Proposition 12 and will not face "material losses" in doing so. HSUS Br. 11 n.3. That reference is improper and irrelevant.

It is improper because HSUS may not interject new facts at the motion-to-dismiss stage. *See Jacobson*, 50 F.3d at 1496. The Court should disregard HSUS's attempt to rebut Plaintiffs' well-pleaded allegations, which include detailed accounts of the financial hardships that Plaintiffs' member sow farmers will face under Proposition 12. ER68-77 (¶58), ER113-114 (¶¶333-335, 342). Unlike Hormel, Plaintiffs' member farmers do not sell a vast array of non-pork products, such as Skippy Peanut Butter and Wholly Guacamole and the beef, chicken, and turkey that make losses from Proposition 12 immaterial to Hormel's overall financial picture.

Anyway, Proposition 12 has limited impact on Hormel's pork operations because in addition to owning very few sows regulated by Proposition 12, Hormel sells a significant amount of processed products like Spam, Hormel Chili, and pepperoni, and other ready to eat products such as Applegate Farms cold cuts, which are expressly not covered under Proposition 12, rather than the whole pork cuts that are subject to the law. ER102 (¶¶253-256). As Hormel's most recent 10K filing states, "the Company has emphasized for several years the manufacturing and distribution of branded value-added consumer items rather than commodity fresh meat products." Hormel Foods, Annual Report (Form 10-K) 3 (Oct 25, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0000048465/049e9679-5c2b-48fc-a67f-945fdc05db1f.pdf.

effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993). Under that rule, Proposition 12 is an impermissible extraterritorial regulation.

In practical effect, the complaint alleges, Proposition 12 will require that sow farms comply with the law regardless of whether pork from its market hogs are sold into California, because in the complex, multi-stage pork production process an individual cut of pork cannot practicably be segregated out and traced back to a particular sow. *E.g.*, ER107 (¶298). And because not every part of a Proposition 12-compliant pig raised in this more costly manner will be sold in California, in practical effect consumers in other states will bear the cost of California's law. ER83 (¶96), ER114 (¶¶346-347), ER139 (¶17). In both ways—its effect on out-of-state farmers and consumers—Proposition 12 has the effect of regulating conduct and transactions wholly outside the State.

1. In practical effect, Proposition 12 regulates out-of-state commerce.

a. The State asserts that, because "Proposition 12 addresses the standards for products that are sold in California," it "regulates only

in-state commerce." Cal. Br. 13. That argument misses the "critical inquiry" of examining the law's "practical effect." *See Healy*, 491 U.S. at 336; *Daniels*, 889 F.3d at 614. Indeed, the Supreme Court has said that the fact that a law "is addressed only to sales [in-state] is *irrelevant* if the 'practical effect' of the law is to control" conduct in other states. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986) (emphasis added).

The complaint alleges that Proposition 12 has the practical effect of regulating conduct outside California. The pork-production process generally involves multiple facilities in the production chain, frequently located in different states, so that the offspring of a single sow is typically raised in several farms in different locations before it is sent to a packer in still another location. ER88-89 (¶¶136-145). Throughout this process, millions of pigs from different sows and, later, cuts of pork from those pigs, are intermingled; tracing a single pig or pork cut back to a particular sow raised in particular conditions is not feasible. ER87-88 (¶¶128-133).

Because tracing and segregation of market hogs and pork cuts back to sows housed under particular conditions is not practicable,

many out-of-state producers will have to conform their entire operation—including the production of pork sold into the other 49 states—to Proposition 12's requirements. ER107-108 (¶¶298-301). In other words, a pig raised entirely outside California (as virtually all pigs are) and whose cuts are sold partly, or even entirely, into states other than California (as virtually all pigs are) will have to be housed in conformity with Proposition 12. That is not speculation. As the complaint alleges, it is already happening: packers are informing their suppliers that *all* hogs sent to the packer must be Proposition 12-compliant. ER108 (¶300). The complaint thus plausibly and clearly alleges that Proposition 12, in practical effect, does *not* "regulate only in-state commerce."[4]

The State counters that "Proposition 12 is indifferent to these out-of-state transactions" and that the choice to sell Proposition 12-compliant pork to other states "is not a direct and inevitable consequence of Proposition 12." Cal. Br. 16. That argument ignores

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[4] The United States correctly explains that, although "some of these burdens would result from the decisions of other market participants rather than the direct terms of Proposition 12, they are properly subject to consideration and proof as part of determining the overall 'practical effect' of the law." U.S. Am. Br. 21.

the well-pleaded allegations of the complaint that, due to the nature of the nationwide pork-production chain, which has been devised for animal-health reasons and to produce the affordable protein essential to food security, out-of-state pork producers do not have a meaningful choice about whether to comply with Proposition 12 for their entire operation. Because of the impracticalities of pig tracing or product-line segregation when pigs are transferred between farms for each stage of their life and a single animal is butchered into many cuts, many producers must inevitably conform to the dictates of the California law. ER107 (¶298).

b. The State places principal reliance on *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), wrongly claiming that Proposition 12 operates in the same way as the drug-rebate program at issue there. Cal. Br. 17. *Walsh* arose at the preliminary-injunction stage, at which a plaintiff's burden is particularly heavy. *See* 538 U.S. at 660 (stressing that "no matter how we answer the question whether petitioner's showing was sufficient to support the injunction, further proceedings in this case may lead to a contrary result"). It involved a challenge to a Maine law

that created a program in which the state attempted to negotiate rebates with pharmaceutical manufacturers for drugs sold in Maine. The manufacturers alleged that the rebate law violated the dormant Commerce Clause because it would affect the prices manufacturers charged to drug distributors, the majority of which were located outside Maine. In rejecting that argument, the Court stated that the Maine statute "'does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect.'" 538 U.S. at 669. The Court went on to say that, unlike other dormant Commerce Clause cases such as *Healy* and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Maine statute did not require the manufacturers to sell their drugs to wholesalers at a certain price or tie the price of in-state sales to out-of-state prices. *Walsh*, 538 U.S. at 669.

Walsh is readily distinguishable. The Maine drug-rebate program did not affect out-of-state transactions between drug manufacturers and distributors or wholesalers "by its express terms or by its inevitable effect." *Id.* Here, Plaintiffs plausibly allege that Proposition 12 *will* inevitably change how sow farms operate

nationwide and affect wholly out-of-state transactions among farmers and packers. *E.g.*, ER107-108 (¶¶298-300). Furthermore, the Court in *Walsh* did not suggest that Maine's rebate program would affect the prices manufacturers charged distributors for drugs that were not going to be sold in Maine. Here, Plaintiffs have made detailed allegations explaining that Proposition 12 *will* affect the supply and price of pork to consumers outside California. Thus, *Walsh* simply did not address the type of extraterritorial effects that Plaintiffs allege here.[5]

The State misapprehends Plaintiffs' claim as an argument that Proposition 12 is extraterritorial in effect simply because it imposes additional costs on out-of-state entities. Cal. Br. 17. True, Plaintiffs allege that Proposition 12 will require many hundreds of millions of

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[5] HSUS places heavy reliance on this Court's fuel-standards cases, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), and *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019), which upheld California's regulations governing how fuels are produced. HSUS Br. 14-19. But as this Court explained in the first of those cases, the fuel regulations at issue had some "upstream effects" but did "not control the production or sale of ethanol wholly outside California." 730 F.3d at 1104. Plaintiffs here allege that the *practical effect* of Proposition 12 is that it *will* regulate how pork is produced and sold outside California. *See Brown-Forman*, 476 U.S. at 583. The fuel-standard cases are therefore quite different.

dollars of structural changes to facilities by those out-of-state sow farmers who can afford to make them. ER114 (¶342). And Proposition 12 compliance will result in smaller herd sizes and other increased operating costs. ER111-113 (¶¶322-336). But those inevitable effects relate not only to pork sold in California; sow farmers will be forced to change their operations for *all* their sows, even if the pork cuts from those sows' progeny are never sold in California. ER107-108 (¶¶298-301). The result is that out-of-state farming methods and transactions will have to change, and the costs of those changes will be borne by out-of-state farmers and pork consumers.

For that reason, the State misplaces its reliance on cases like *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (prohibiting petroleum refiners from operating retail service stations within Maryland), and *National Association of Optometrists & Opticians v. Harris*, 682 F.3d 1144 (9th Cir. 2012) (prohibiting optical companies from offering prescription eyewear at the same California location in which eye examinations are provided). The State says those cases stand for the proposition that the Commerce Clause does not guarantee a business its "preferred method of operation." Cal. Br.

24. But the laws challenged in those cases controlled businesses' methods of operation only in-state: there was no suggestion that Exxon could not operate a retail station in New Jersey as a result of the Maryland law, or that LensCrafters could not sell eyewear at the same location it provided eye examinations in Oregon as a result of the California law. Proposition 12 *does* affect how pork producers house sows regardless of whether the pork cuts from their market hogs are sold in California or elsewhere. That is extraterritorial reach not present in *Exxon* or *Harris*.

Similarly, the State fails in its attempt to cast Proposition 12 merely as a law that "regulate[s] 'products that are brought into or are otherwise within the borders of the State.'" Cal. Br. 18. The well-pleaded allegations establish that the practical effect of the law—again, the "critical inquiry" in the extraterritoriality analysis, *Healy*, 491 U.S. at 336—is to regulate products that have no connection to California.

c. The State's effort to distinguish *NCAA v. Miller* is unpersuasive. Cal. Br. 22-23. The Nevada law in *Miller* specified procedural protections that the NCAA must afford Nevada

institutions, but it had the effect of requiring the NCAA to apply the Nevada requirements across the country because the NCAA needed to enforce its rules uniformly. 10 F.3d at 637, 639. Proposition 12 operates similarly because sow farmers will have to follow Proposition 12's requirements for the entirety of their herds, given the lack of knowledge about where cuts of pork from their market hogs will be sold six months after they leave the sow farm and given the needs of packers and retailers who cannot segregate Proposition 12-compliant and -non-compliant pork.

The State counters that Plaintiffs have not alleged that pork producers will be subject to a nationally uniform production method or that Proposition 12 has "imposed the sole production method" on them. Cal. Br. 23. But it was true in *Miller* too that the Nevada law did not purport to "impose" a uniform national practice. What Plaintiffs here allege, and *Miller* found unconstitutional, is that the inevitable effect of the law, within the context of the business realities of a national market, is to require one state's rules to be followed everywhere. Plaintiffs' complaint alleges that, because of the infeasibility of tracing pigs and pork cuts to a particular sow housed

in a particular manner at all times after six months of age, farmers will be required to convert their entire sow operations to become Proposition 12-compliant. Packers and retailers will be unable to comply with Proposition 12 unless they insist on that from their suppliers, and suppliers will have no option but to comply—if they can afford to—or go out of business. In that way the law does impose, in practical effect, California's preferred sow housing method on farmers nationwide.

HSUS tries to distinguish *Miller* on the ground that the Nevada law "attempted to regulate a wholly interstate organization engaged in wholly interstate conduct while leaving in-state organizations conveniently protected from regulation." HSUS Br. 22. HSUS's focus on the superficial characteristics of the regulated organization misses the effect of the law on the interstate market. Proposition 12 imposes California-specific rules on a nationwide market that will affect wholly out-of-state transactions in the same way that the NCAA was required to apply Nevada's procedural rules to issues with no connection to Nevada.

HSUS also argues that *Miller* is distinguishable because pork producers can and do use varied production methods and practices. HSUS Br. 22. That is true but irrelevant. Proposition 12 severely constrains the production methods and practices that may be used, requiring costly housing of a sort that hardly any sow farmer currently uses and that many farmers think harms their pigs and endangers their workers. ER105-106, 120-22 (¶¶279-288, 389-410). Countless farmers will be required to change their physical facilities and methods of operation to come into compliance with Proposition 12. *E.g.*, ER106 (¶¶283-289). The salient point is that the complaint plausibly alleges that industry-wide features of the national pork market mean that farmers everywhere will be required to conform to California's dictates.

2. The effect of Proposition 12 on wholly out-of-state transactions in the pork-production chain sets it apart from laws upheld in other cases.

The State claims that "a law that has even significant upstream effects does not regulate extraterritorially 'when, as here, those effects result from the regulation of in-state conduct.'" Cal. Br. 21. The cases the State relies on for that argument, however, do not

involve the type of extraterritorial regulation of wholly out-of-state conduct that results from Proposition 12.

For instance, *Chinatown Neighborhood Association v. Harris*, 794 F.3d 1136 (9th Cir. 2015), concerned a California ban on the sale of detached shark fins that did not have any effect on wholly out-of-state transactions. *See id.* at 1140 (explaining that the law "makes it a misdemeanor to possess, sell, trade, or distribute detached shark fins in California"); *id.* at 1146 ("The Shark Fin Law does not … attempt to regulate transactions conducted wholly out of state"). There were no allegations in *Chinatown*, like Plaintiffs' allegations here, that the law inevitably affected transactions with no connection to California.

HSUS attempts to rehabilitate *Chinatown* by arguing that "regulation of shark fin transactions outside California's borders was explicitly contemplated by the court." HSUS Br. 21 n.9. That is not true. This Court noted only that the law "prevent[ed] the flow of shark fins *through California* from one out-of-state destination to another" because it prevented their possession *in California*, thus "stemming the flow of shark fins through California into the rest of

the country." *Chinatown*, 794 F.3d at 1140, 1145 (emphasis added). Thus, the Shark Fin Law did not regulate any transactions that were wholly unconnected to California—a transaction involving out-of-state parties that did not involve the possession or sale of detached shark fins in California was not within the scope of the law. Proposition 12, by contrast, has the practical effect of regulating transactions relating to pork products that never pass through and have nothing at all to do with California.

The California ban on the in-state sale of products resulting from the force-feeding of birds addressed by this Court in *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), is likewise distinguishable. There this Court noted that, "Plaintiffs have not demonstrated that a nationally uniform foie gras production method is required to produce foie gras," and that, "[i]f no uniform production method is required, Plaintiffs may force feed birds to produce foie gras for non-California markets." *Id.* at 950. The Court concluded that "California's standards are therefore not imposed as the sole production method Plaintiffs must follow." *Id.* Here, Plaintiffs have alleged that Proposition 12's standards will in

practice be imposed on sow farmers nationwide due to features of the industry and product, including farm segmentation for herd-health and efficiency reasons, the fact that one pig produces many different cuts of pork that are sold across the country, and the impracticality of tracing and segregating California-compliant pigs and pork from the rest. Proposition 12 disrupts an entire, and huge, nationwide market; California's force-feeding law affects the miniscule foie gras market only in California.

The State's reliance (at 21-22) on *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014) ("*GLAAD*"), is also misplaced. The California law in *GLAAD* required CNN to provide captioning on videos on its website. In addressing CNN's Commerce Clause challenge, this Court concluded that the law "does not have the practical effect of directly regulating conduct wholly outside of California" because "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 statute. *Id*. at 433. Thus, the Court rejected CNN's argument that creation of "California-

specific version of its site would not be 'feasible'" based on the *evidence* before it. *Id.* Here, Plaintiffs have plausibly *alleged* that segregation and tracing of California-compliant pigs and pork cuts is not feasible; at this stage that is all that is required.

The State argues that Plaintiffs have not sufficiently alleged infeasibility, but rather only "difficulty" in tracing pork products. Cal. Br. 22 n.10. To the contrary, Plaintiffs allege that entirely "new" tracing methods would need to be developed, meaning that tracing is infeasible for the foreseeable future (with a law that goes into effect at the end of 2021). *E.g.*, ER85 (¶104). Furthermore, "[p]ork is a particularly difficult product to trace throughout the supply chain because of the multiple and segmented steps in the production process." ER87 (¶128). And "[a]fter pork comes out of a packing house, it become very difficult to ascertain where pork product came from," because a pork product "is often cut into many parts and combined with product from pigs raised by different producers." ER88 (¶132).

These allegations permit the reasonable inference that existing tracing methods are not practicable and stand in sharp contrast to

CNN's claim of infeasibility in *GLAAD*, where the evidence showed that providing California-specific captioning was possible and not onerous. 742 F.3d at 433. At this stage of the proceedings, there is no evidence to counter Plaintiffs' well-pleaded allegations that no current or foreseeable tracing methods permit the tracking necessary to permit segregation of California-compliant pork in the nationwide production chain, and California's mere say-so is not enough.

HSUS claims that "the record shows that the industry can segregate its products for [the California] market." HSUS Br. 26. In support, HSUS seizes on an allegation that distributors who sell pork into California will force their suppliers to produce all pork in a Proposition 12-compliant manner "or to carefully segregate products." ER107 (¶299). That allegation does not state that such segregation is feasible or practical, and other allegations are to the contrary. *E.g.*, ER108 (¶300).

HSUS also attempts, improperly, to interject new facts, asserting that the National Pork Board is working on a tracing program. HSUS Br. 27 n.12. But HSUS does not state that the program is designed or able to track Proposition 12 compliance, much

less that a Proposition-12 tracking program will be on line by the end of this year when the law goes into effect. Again, HSUS is free to raise this issue at the summary-judgment stage.

B. Proposition 12 regulates extraterritorially because it impermissibly intrudes into the operations of out-of-state businesses.

As we explained in our opening brief (at 46-48), the Seventh Circuit's decision in *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017), is an analogous application of the extraterritoriality doctrine. Like Proposition 12—and unlike laws imposing product standards or quality that are typically involved in dormant Commerce Clause cases—the Indiana law challenged in *Legato Vapors* injected the state deep into the *production practices* of an out-of-state manufacturer. The State attempts to distinguish *Legato Vapors* on the ground that one aspect of the law "directly governed" out-of-state transactions between manufacturers and their security contractors. Cal. Br. 19. But the Indiana statute imposed many other rules, such as the "clean room requirements," that regulated out-of-state manufacturers' physical plants. *Legato Vapors*, 847 F.3d at 835. Those requirements intrusively governed the manner in which manufacturers conducted out-of-state activities, including mixing and

bottling their products, and are analogous to Proposition 12's rules regulating pork producers' physical plants by requiring a certain amount of available floor space and prohibiting the use of individual stalls in most circumstances.

The State suggests that, unlike the Indiana law, Proposition 12 merely "establishes general requirements focused only on the product at issue, and … does not purport to govern any transactions by or between out-of-state entities." Cal. Br. 20. But the requirements that a facility allocate 24 square feet of usable floor space per pig and not use breeding stalls except in very limited circumstances are not "general requirements" that leave substantial discretion to farmers (and are at odds with how virtually every sow farmer now operates). ER100-101 (¶¶240, 243). Though Proposition 12 does not "purport" to regulate wholly out-of-state transactions, the proper inquiry looks to the "practical effect" of the law, and the well-pleaded allegations establish that pork producers nationwide will be required to conform their practices to California's rules for *all* of their sows.

In our opening brief (at 52-55), we further explained that, like the law at issue in *Legato Vapors*, the audit and inspection

requirements that will accompany Proposition 12 directly regulate out-of-state conduct. *See also* States' Am. Br. 19-20. The State responds that Plaintiffs have not challenged those regulations in the complaint, nor can they because the draft regulations are not final. Cal. Br. 25-26. Those objections miss the point.

Plaintiffs have alleged that the CDFA will need to audit and inspect out-of-state facilities to ensure compliance with Proposition 12. ER108 (¶302). The current pre-publication regulations at a minimum illustrate the type of direct, intrusive extraterritorial regulation that will be necessary to ensure compliance with Proposition 12. And *Legato Vapors* held 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. The State should not be permitted to hide its plans to audit and inspect out-of-state sow farms—a clear necessity if it is to enforce its extraterritorial law—behind the fact that CDFA has failed to issue regulations that Proposition 12 *required to be published by September 1, 2019*, and

continues to delay publishing even proposed regulations during this litigation though sow farmers nationwide would need to comply with those regulations from the end of this year.

The State also argues that a state law that imposes "labeling" or "reporting" requirements or "exact[s] certificates" from out-of-state producers does not violate the dormant Commerce Clause. Cal. Br. 26-27. But the relevant consideration is the degree of intrusiveness into a manufacturer's out-of-state operations (and a state's regulation of other states' citizens). CDFA's proposed regulations require a sow farmer to allow inspectors and auditors into any part of its facilities at any time. *See* Opening Br. 53-55. The fact that the inspections may be carried on by an authorized agent of California instead of a California state employee in no way mitigates the extraterritorial intrusiveness of that burden. *See* Cal. Br. 27 n.12.[6]

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[6] HSUS lists several other states' statutes that it claims require certifications or inspections. HSUS Br. 30 n.13. But most of those laws authorize inspection of products once they enter the forum state. *E.g.*, Mont. Code Ann. § 80-5-403 (subjecting imported seed potatoes "to inspection at the Montana receiving point"). And HSUS does not explain how any of those laws, typically addressing product quality or safety, are as intrusive and burdensome as the proposed regulation of out-of-state animal husbandry methods under Proposition 12. For instance, the Indiana law that HSUS cites permits state inspection of

C. Proposition 12 subjects pork producers to inconsistent regulations.

In determining whether a law operates extraterritorially, courts also consider how the challenged law may interact with the regulatory regimes of other states and what effect would arise if other states adopted similar legislation. *Healy*, 491 U.S. at 336. The Commerce Clause protects businesses from inconsistent regulation caused by one state's projection of its regulatory regime into another state. *Id.* at 336-37. The comprehensive and intrusive manner in which Proposition 12 prescribes sow-housing methods for predominantly out-of-state businesses is precisely the type of regulation that is likely to "offend Sister states" and conflict with their regulation of in-state businesses, placing those businesses in an impossible situation. *Id.* at 336 n.13; *see* States' Am. Br. 16-21.

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petroleum products, consisting of taking a 16 to 64 ounce sample of the product so long as the sampling "does not unduly inconvenience or hamper the transportation of the products." Ind. Code § 16-44-2-11(a). That inspection for safety and quality (*see id.* § 16-44-2-8(b)) is far less intrusive than the on-site inspections and audits contemplated by the proposed regulations. *See* Opening Br. 20-22 (describing scope of proposed CDFA inspections and recordkeeping requirements).

The State argues that Plaintiffs' "'fear of balkanization'" of the pork market is based on speculation, which is insufficient to state a claim that the statute is extraterritorial. Cal. Br. 24-25. To the contrary, both *amici* States and *amici* business groups identify many states that have already enacted animal-confinement laws or sales bans. States' Am. Br. 17-18; NAM Am. Br. 27-28. This growing trend could result in additional local laws creating a regulatory patchwork that throttles the nationwide pork market. For instance, other states may recognize that California's 24-square-feet requirement is dangerous to sows and employees and prohibit that practice. *See* ER119-120 (¶¶382-388). Ohio has already specifically authorized sow farmers to do what Proposition 12 forbids—to use breeding pens post-weaning "to maximize embryonic welfare and allow[] for the confirmation of pregnancy." Ohio Admin. Code 901:12-8-02(G)(4), (5).

Regulatory decisions like California's that intrusively control the operations of out-of-state businesses undermine the sovereign prerogatives of other states *not* to regulate certain practices. *See* States' Am. Br. 16-17; ER108 (¶304). The result is a real possibility, not merely a speculative chance, of the sort of regulatory

Balkanization that the dormant Commerce Clause seeks to prevent. *See S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 470 (9th Cir. 2001) (the "threat" of conflicting legislation must be "real and not speculative"); *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011) (court must consider the "possibility" of similar extraterritorial legislation imposing inconsistent obligations).

II. PLAINTIFFS HAVE ADEQUATELY ALLEGED THAT PROPOSITION 12 IMPOSES AN EXCESSIVE BURDEN ON INTERSTATE COMMERCE IN RELATION TO ITS PUTATIVE LOCAL BENEFITS.

Plaintiffs have also plausibly alleged that Proposition 12 is unconstitutional under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because Proposition 12 burdens interstate commerce in a way that is "clearly excessive in relation to the putative local benefits." *Id.* at 142.

A. Proposition 12 substantially burdens interstate commerce.

Proposition 12 substantially burdens interstate commerce because it "impacts … commerce beyond [California's] borders" and those significant "impacts … fall more heavily on out-of-state interests." *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994); *see* Opening Br. 65-68. A law that disproportionately

burdens "out-of-state residents and businesses" receives greater scrutiny under the Commerce Clause because in those cases it is less likely that the state's "'own political processes [have served] as a check against unduly burdensome regulations.'" *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 675-76 (1981) (plurality op.).

The burden of Proposition 12 unquestionably falls mainly on out-of-state businesses, because 99.8% of pork consumed in California comes from farmers located outside the State (ER61 (¶¶18, 20)) and because, Plaintiffs allege, sow farmers will need to adopt Proposition 12-compliant practices regardless of where their pork is sold. Therefore, California's "own political processes" have not reliably served as a check on the passage of "unduly burdensome regulations" and rigorous Commerce Clause scrutiny is necessary. That is particularly true for a law adopted by popular referendum that went through none of the detailed, multi-step consideration, informed by hearings and debate, that is entailed in the normal legislative process.

The State argues that the fact that "most producers are located out-of-state does not … establish discrimination," because Proposition

12 affects California pork producers the same way it affects out-of-state producers. Cal. Br. 29-30. But Plaintiffs make no discrimination claim, so there is no requirement that they allege that Proposition 12 was designed to benefit in-state economic interests at the expense of their out-of-state counterparts.

The relevance of Plaintiffs' allegations that Proposition 12's burden falls mainly on out-of-state farmers is not to show that the law is discriminatory, but instead to show that Proposition 12 unduly burdens those non-California businesses and interferes with the interstate flow of goods by disrupting production in a market that is "inherently national" in scope. *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th 2019), *cert. denied,* 140 S. Ct. 2762 (2020); *see also id.* at 450 (a plaintiff can show substantial burden on interstate commerce by plausibly alleging "a net negative effect on commerce outside of California").

Plaintiffs plausibly allege that Proposition 12's disproportionate impact on out-of-state pork producers impedes the free flow of goods across state lines. *See* Opening Br. 67-69. The State responds that the financial burden pork producers face to bring their operations into

compliance with Proposition 12 "without more" does not establish that the free flow of commerce will be affected. Cal. Br. 31. But the complaint is hardly "without more."

The complaint alleges, for example, that Proposition 12 will cause supply problems resulting in the flow of less—and more expensive—pork across state lines because of decreased herd sizes due to increased physical-space requirements, increased sow injuries and fatalities caused by the Proposition 12 standards, and reduced births because of the bar on housing sows in individual breeding stalls post-weaning. ER80-81 (¶¶77-84), ER114 (¶¶346-347).

The State contests Plaintiffs' allegations that Proposition 12 will have the practical effect of imposing "a uniform system of regulation" on sow farms nationwide. *Rosenblatt*, 940 F.3d at 452; *see* Cal. Br. 30. But the complaint alleges that already, even before Proposition 12 goes into effect, packers have begun to tell farmers that they will require *all* hogs to be Proposition 12-compliant, regardless of whether their meat will be sold in California. ER113 (¶¶337, 339), ER115 (¶350). Plaintiffs further allege that the infeasibility of tracing pigs and pork cuts back to a particular sow, and of segregating Proposition

12-compliant pigs and meat, makes it inevitable that farmers will have to retrofit their facilities so that all sows are handled in compliance with Proposition 12. ER114-115 (¶¶346-48). Plaintiffs have therefore plausibly alleged that Proposition 12 will operate as a national sow housing standard. As the United States explains, the law "prevents out-of-state pork producers from employing more efficient and cost-effective farming practices made possible by the legal regimes in their home States," and forces them to adopt "California's preferred farming methods." U.S. Am. Br. 19.

HSUS speculates that sow farmers will enjoy "potential benefits" from complying with Proposition 12, including "long-term increased profit margins from taking advantage of a growing and unmet demand for humane-conscious products in national and international markets." HSUS Br. 39, 41. Plaintiffs allege, to the contrary, that farmers' herd sizes will shrink and costs will go up, negatively impacting not only their profits but also the availability and cost of pork nationwide. *E.g.*, ER109 (¶¶307-309), ER112 (¶329), ER113 (¶¶333-334). It is those allegations, not animal-rights groups' speculations, that are to be credited at this stage of the litigation.

Anyway, if farmers could reap financial rewards by switching to Proposition-12-type housing practices, they would have done so. Sow farmers know that no market premium will cover the cost of Proposition-12 compliance. *See* ER236 (¶6) (Decl. of Greg Maher) (Maher re-built his sow housing with group pens expecting that he would receive a premium price for his hogs, but that did not happen and the prices he received did not cover the increased costs of a group pen system).

In sum, Plaintiffs have alleged, with detailed support, that Proposition 12 substantially burdens interstate commerce because it (1) disproportionately burdens out-of-state businesses that supply more than 99% of the pork consumed in California; (2) impedes the free flow of commerce by causing smaller herd sizes (and more expensive pork products) due to the per-sow space requirements and mortalities and injuries to sows that result from the housing requirements; and (3) harmfully injects California regulation into a nationwide market, in effect requiring a national industry to conform to California's specific requirements.

B. Proposition 12's burden on interstate commerce far exceeds its illusory local benefits.

The State argues that Proposition 12 advances the legitimate interest of preventing animal cruelty.[7] Cal. Br. 33-35. The State acknowledges that the vast majority of pigs affected by the law are not located in California but claims an interest in preventing complicity in a practice it deems cruel to animals. *Id*. at 33-34 (citing *Ass'n des Eleveurs*, 729 F.3d at 952). That argument ignores the fact that the focus of the *Pike* test is on the "putative *local* benefits." *Pike*, 397 U.S. at 142 (emphasis added). California may legitimately (and does) address how pigs are raised in-state. But preventing allegedly

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[7] HSUS alone claims that Proposition 12 also addresses "public health concerns" and refers to "the role of factory farms in the creation of influenza pandemics." HSUS Br. 11. The State does not advance that argument, and for good reason. Proposition 12 does not prohibit "factory farms" and HSUS offers no evidence that Proposition 12's sow-housing mandates are related in any way to preventing "influenza pandemics." The well-pleaded allegations of the complaint are that Proposition 12 does not have any effect on preventing illnesses in humans. *See* Opening Br. 72; ER123-127 (¶¶419-453). Research shows that it is wet animal markets and cross-contamination of herds at swine exhibitions that present the greatest risk of spreading a flu—not the Nation's sow farms, where disease prevention and avoiding cross-contamination are among farmers' foremost goals. *See*, *e.g.*, Andrew S. Bowman et al., *Influenza A (H3N2) Virus in Swine at Agricultural Fairs and Transmission to Humans*, 23(9) Emerging Infectious Diseases 1551 (2017).

cruel treatment of sows in other states—where the pigs are raised in compliance with *those* states' laws—is not a "local benefit." *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) (invalidating local ordinance that sought to address local environmental issues by regulating out-of-state conduct).

The United States correctly explains that, "[t]o the extent out-of-state farming practices cause cruelty to animals, that harm is inflicted outside California and suffered by animals outside the State." U.S. Am. Br. 18. As a result, the State has no "plausible argument" that Proposition 12 "is intended to promote the welfare of animals within California." *Id.* And "California does not invoke any legitimate interest in avoiding in-state harm." *Id.* at 19 n.3.

The State entirely omits any discussion of Plaintiffs' allegations that Proposition 12 is *harmful* to pigs. Opening Br. 74-75; ER119 (¶¶376-383), ER120-122 (¶¶389-410), ER126-127 (¶¶443-452). For instance, as experienced farmers who submitted declarations with the complaint explain, Proposition 12's limitations on the use of breeding stalls are harmful to sow welfare because they expose sows to fights and aggressive behavior, and they stand in the way of providing

individualized care to sows when they are weak and more vulnerable after weaning and during the early stages of gestation. ER120-122 (¶¶389-401); *see* ER67 (¶58.b) (experience of Phil Borgic); ER75 (¶58.j) (experience of Howard Roth).[8]

The State's position is that this Court must simply "presume" that Proposition 12 serves legitimate state interests. Cal. Br. 34. That presumption, however, is not irrebutable. *See Kassel*, 450 U.S. at 670 (plurality op.) (explaining that mere incantation of legitimate public purpose does not insulate law from challenge). Plaintiffs have adequately alleged that the prevention of animal cruelty is an illusory rationale and have therefore stated a claim under *Pike*. Any dispute about whether the presumption of legitimacy is warranted or rebutted is an appropriate issue for litigation on the merits, not a motion addressed to the pleadings.

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[8] HSUS once again improperly asserts a competing set of facts, hypothesizing (without explanation) that farmers could still keep sows in individual stalls after weaning. HSUS Br. 47 n.26. That is not what Proposition 12 says, and the State does not make that claim about its law.

CONCLUSION

For these reasons and those stated in our opening brief, the district court's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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