No. 20-1215

IN THE

Supreme Court of the United States

NORTH AMERICAN MEAT INSTITUTE,
Petitioner,

v.

MATTHEW RODRIQUEZ, ACTING ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INDIANA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IOWA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Constitution permits California to extend its police powers beyond its territorial borders by banning the sale of wholesome pork and veal products imported into California unless out-of-state farmers restructure their facilities to meet animal-confinement standards dictated by California.

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INTEREST OF THE *AMICI* STATES*

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioners.

The Ninth Circuit's decision below permits California to regulate extraterritorial commercial conduct so long as it does not use price-control or price-affirmation statutes. *Amici* States file this brief to explain why that decision is wrong and why it presents an issue of enormous doctrinal and practical importance.

The Court's precedents squarely establish that the Commerce Clause prohibits States from directly regulating any commercial conduct—not merely pricing—that occurs entirely in *other* States. The Ninth Circuit's contrary decision here departs not only from those precedents but also from the decisions of five other federal circuit courts. And this lopsided circuit split means most States are at a regulatory disadvantage compared to the States of the Ninth Circuit. The decision below therefore not only threatens economic balkanization among States but also upends the fundamental principle of equal state sovereignty. The Court should grant the petition and reverse.

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* Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *Amici* States' intention to file this brief at least ten days prior to the due date of this brief.

SUMMARY OF THE ARGUMENT

The Court has long recognized that the "entire Constitution is 'framed upon the theory that the peoples of the several states are in union and not division,'" and that the Commerce Clause in particular reflects "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36 & n.12 (1989) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). Accordingly, the Court has held that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336. Notably, the Court has applied the prohibition on extraterritorial regulation outside the price control context and has repeatedly articulated it in general and categorical terms: "States may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) (citing *Baldwin*, 294 U.S. at 511) (explaining why a town could not justify a waste-disposal ordinance on the basis of concerns with *other* towns' environmental standards).

California's Proposition 12 is a paradigm of unconstitutional extraterritorial regulation: It requires hog

and veal-calf farmers in *every* State to follow *California's* animal-confinement rules on pain of exclusion from the California market. *See* Cal. Health & Safety Code § 25990(b). Yet the Ninth Circuit upheld Proposition 12 on the ground that the Constitution permits any extraterritorial regulation that "is not a price control or price affirmation statute." Pet. App. 2a. That decision warrants consideration not only because it permits precisely the sort of market-balkanizing interstate regulatory conflict the Commerce Clause was meant to prevent, but also because it conflicts with the holdings of at least five other circuits.

The Court should grant the petition and provide a uniform rule delineating States' authority to regulate out-of-state conduct. The current state of affairs—where lower courts permit one set of States "to fight freestyle, while requiring the other to follow Marquis of Queensberry rules," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992)—undermines "the constitutional equality of the States [that] is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle v. Smith*, 221 U.S. 559, 580 (1911).

ARGUMENT

I. The Decision Below Conflicts with Decisions of Multiple Other Circuits and with This Court's Precedents

A. At least five other circuits have applied the extraterritoriality doctrine beyond price-affirmation statutes

The decision below provides just one reason supporting its conclusion "that Proposition 12 does not regulate extraterritorial conduct"—that the law "is not a price control or price affirmation statute." Pet. App. 2a. It thereby holds that States are entirely free to regulate out-of-state conduct—no matter how directly—so long as such regulation does not take the form of a price-control or price-affirmation law. That holding squarely conflicts with the decisions of at least five other circuits.

The First Circuit has, for example, invalidated a Massachusetts law that excluded companies doing business in Burma from state government contracts. *Nat'l Foreign Trade Council v. Natsios* 181 F.3d 38, 45–46, 69–70 (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). In doing so the First Circuit explained that the law—which was of course completely unrelated to prices—violated the extraterritorial doctrine because "both the intention and effect of the statute [was] to change conduct beyond Massachusetts's borders." *Id.* at 69.

And in *American Booksellers Foundation v. Dean*, the Second Circuit held that the Commerce Clause barred Vermont from applying to internet communications the State's prohibition on distributing pornographic material to minors. 342 F.3d 96, 104 (2d Cir. 2003). It made no difference that Vermont's law did not regulate prices: Although the law did "not discriminate against interstate commerce on its face, . . . it present[ed] a *per se* violation of the dormant Commerce Clause," because "[i]n practical effect, Vermont 'ha[d] 'projected its legislation' into other States, and directly regulated commerce therein.'" *Id.* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986)).

The Fourth Circuit agrees: In *Association for Accessible Medicines v. Frosh*, it expressly "reject[ed]" the argument that this Court has "limited the extraterritorial principle only to price affirmation statutes." 887 F.3d 664, 670 (4th Cir. 2018). Rather than read this Court's decisions to "suggest that '[t]he rule that was applied in *Baldwin* and *Healy*' applies *exclusively* to 'price control or price affirmation statutes,'" *id.* (quoting *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)), the Fourth Circuit reaffirmed the general rule that "'a State may not regulate commerce occurring wholly outside of its borders,'" *id.* at 667 (quoting *Star Sci., Inc. v. Beales*, 278 F.3d 339, 355 (4th Cir. 2002)).

Similarly, in *American Beverage Association v. Snyder*, the Sixth Circuit invalidated a state law that

again had nothing to do with price regulation—Michigan's requirement that certain bottles possess a unique-to-Michigan mark. 735 F.3d 362, 376 (6th Cir. 2013). Although the law did "not discriminate against interstate commerce," the Sixth Circuit held that it was "virtually *per se* invalid," *id.* at 373, because it effectively forced companies (and other States) "to comply with its legislation in order to conduct business within its state," *id.* at 376.

Finally, the Seventh Circuit in *National Solid Wastes Management Association v. Meyer*, expressly held that, while some of this Court's extraterritorial cases concerned "price affirmation statutes, the principles set forth in these decisions are not limited to that context." 63 F.3d 652, 659 (7th Cir. 1995). And it has repeatedly applied the Commerce Clause's prohibition on state regulation of out-of-state conduct to a variety of state laws. *See, e.g., id.* at 660–61 (invalidating a Wisconsin law prohibiting the disposal of imported waste unless the originating jurisdiction had adopted Wisconsin's recycling standards); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam) (invalidating revised version of the same law and observing that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders"); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667–68 (7th Cir. 2010) (holding that the Commerce Clause barred Indiana from applying its title-lending law to out-of-state transactions because doing so "would be arbitrarily to exalt the public policy of one state over that of another"); *Legato Vapors,*

LLC v. Cook, 847 F.3d 825, 831 (7th Cir. 2017) (invalidating an Indiana law regulating out-of-state production of e-cigarettes and observing that among "almost two hundred years of precedents" not "a single appellate case permitt[ed]" such "direct regulation of out-of-state manufacturing processes and facilities").

Only one federal appellate court even arguably concurs with the Ninth Circuit's just-price-affirmation-laws approach. *See Energy & Envt. Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015) (Gorsuch, J.) (declining to invalidate a Colorado law regulating the production of electricity imported from out of state because it "isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters"). Yet even the Tenth Circuit has applied the extraterritoriality doctrine outside the price-control context. *See Hardage v. Atkins*, 619 F.2d 871, 872 (10th Cir. 1980) (invalidating a waste-disposal law that imposed environmental standards on out-of-state entities); *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (concluding that a New Mexico law prohibiting online distribution of harmful material to minors "represent[ed] an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause"); *cf. North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016) (opinion of Loken, J.) ("[T]he Supreme Court has never so limited the [extraterritoriality] doctrine [to price regulations], and indeed has applied it more broadly.").

In sum, the decision below implicates a pronounced circuit split concerning a straightforward question of law: Are the Constitution's limits on extraterritorial state regulation limited to price-control and price-affirmation statutes? The lower-court confusion over this question alone constitutes a "compelling reason" justifying the exercise of the Court's certiorari jurisdiction. Sup. Ct. R. 10.

B. The Court's precedents confirm that the extraterritoriality doctrine is not limited to price-affirmation statutes

Most circuits have refused to limit the extraterritoriality doctrine to price-affirmation statutes for good reason: The Court's precedents do not support such a distinction.

The Court has long held that state regulations of out-of-state conduct run afoul of the Commerce Clause. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), for example, the Court set aside a New York law that permitted *in-state* sale of imported milk only if the *out-of-state* dairy farmer was originally paid a price "that would be lawful upon a like transaction within [New York]." *Id.* at 519. The Court observed that New York had "no power to project its legislation into [another State] by regulating the price to be paid in that state for milk acquired there," and was "equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired [elsewhere]." *Id.* at 521. Nor, crucially, could it outlaw the *in-state sale* of lawfully imported milk, for

the Commerce Clause prohibits one State from using an in-state sales ban to "regulat[e] by indirection the prices to be paid to producers in another." *Id.* at 524.

A decade later, the Court applied this rule to invalidate an Arizona law that made "it unlawful . . . to operate within the state a railroad train of more than fourteen passenger or seventy freight cars." *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 763 (1945). The Court held that the law violated the Commerce Clause because the "practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it." *Id.* at 775; *see also Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion) (citing *Sullivan* for the proposition that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State").

In *Brown–Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), the Court invalidated state laws that required sellers to affirm that their *in-state* prices were no higher than their *out-of-state* prices. The laws violated the Commerce Clause—notwithstanding their connection to in-state sales—because they effectively regulated extraterritorial conduct by preventing sellers from reducing their out-of-state prices. In *Brown-Forman* the State's law "effectively force[d] [the seller] to abandon its promotional allowance program in States in which that program is legal." 476 U.S. at 583–84. Similarly,

the statute in *Healy* required sellers "to forgo the implementation of competitive-pricing schemes in out-of-state markets." 491 U.S. at 339. Critically, the Court read its "cases concerning the extraterritorial effects of state economic regulation" to "stand at a minimum" for the general proposition that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Id.* at 336.

Lest there be any doubt about the breadth of this proposition, the Court later applied it to explain why the Commerce Cause precluded a law having nothing to do with price affirmation or price control. In *C & A Carbone, Inc. v. Town of Clarkstown, New York*, the Court rejected a town's attempt to justify a waste-disposal ordinance based on environmental concerns with "out-of-town disposal sites," explaining that regulating such sites would "extend the town's police powers beyond its jurisdictional bounds." 511 U.S. 383, 393 (1994). Again, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *Id.*

Accordingly, there is nothing in the Court's precedents supporting the Ninth Circuit's arbitrary distinction between price-affirmation laws on the one hand and all other laws on the other. While some of the Court's decisions in this area have involved state regulation of out-of-state prices, others—including *Sullivan*, *Edgar*, and *C & A Carbone*—had nothing do with price regulation. And in its price-affirmation cases, the Court invalidated the statute at issue not

due to anything specific to price regulations but because the State violated the general prohibition on "regulat[ing] out-of-state transactions" by "'project[ing] its legislation into [other States].'" *Brown-Forman*, 476 U.S. at 582–83 (quoting *Baldwin*, 294 U.S. at 521 (second alteration in original)); *see also Healy*, 491 U.S. at 337. The decision below thus contravenes the decisions not only of five other circuit courts, but of this Court as well. The Court should grant the petition and reverse the decision.

II. The Court's Intervention Is Needed to Avert the Grave Effects of the Decision Below

The mere existence of a well-established, intractable split among the circuits—premised on an unsupported limitation of the Court's precedents, no less—alone justifies the Court's intervention. Yet here, additional factors make the need for certiorari especially acute. The Ninth Circuit's sweeping decision eliminates any meaningful limit on the ability of California and other west-coast States to regulate extraterritorial conduct, which in turn threatens to impede interstate commerce and aggravate divisions among States. And perhaps most seriously of all, by adopting a much less restrictive rule than other circuits, the decision below upends the fundamental principle of equal state sovereignty: It means some States are free to impose their policies on out-of-state actors while other States are prohibited from doing so.

A. Allowing California free rein to regulate out-of-state commercial conduct will balkanize commerce and worsen interstate conflict

The Court has long recognized that the Commerce Clause's prohibition on extraterritorial state regulation secures at least two fundamental interests: The "maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and . . . the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36 (1989). The decision below seriously undermines both. It freely permits California to impose regulations directly on out-of-state commercial conduct and thereby fosters inconsistent state regulatory obligations and enables tit-for-tat state regulatory conflict. The ultimate result may be transformation of America's current integrated national market into a patchwork of regulatory regions. And for apt illustration of these serious problems, one need look no further than Proposition 12 itself.

California's Proposition 12 forbids the sale of any veal and pork—including that derived from animals raised in *other* States—that "is the meat of a covered animal who was confined in a cruel manner" as defined under California law. Cal. Health & Safety Code § 25990(b). In other words, Proposition 12 prohibits out-of-state farmers from offering wholesome meat to the California market absent compliance with California's detailed animal-confinement rules. *See id.* § 25991(e). And California's animal-confinement rules depart markedly from the conventional rules of the

vast majority of States, which permit farmers to raise calves and hogs in accordance with commercial standards and agricultural best practices, rather than dictate mandatory animal-confinement requirements. *See generally* Elizabeth R. Rumley, *States' Farm Animal Confinement Statutes*, Nat'l Agric. Law Ctr., https://nationalaglawcenter.org/state-compilations/farm-animal-welfare/.

California's rules have serious economic consequences, as it is costly to convert animal-husbandry operations to comply with the new rules. According to Christine McCracken, senior analyst of animal protein at Rabobank, ordinarily an "average barn might cost $1,600 to USD 2,500 per sow, or $3 million to $4.5m million in total." Erica Shaffer, *Rabobank: California's Prop 12 a Call to Lead on Animal Welfare*, Meat + Poultry (2021), https://www.meatpoultry.com/articles/24659-rabobank-californias-prop-12-a-call-to-lead-on-animal-welfare. Under California's animal-confinement rules, however, some compliant barns are "averaging as much as $3,400 per sow," with the decision to convert operations becoming increasingly difficult in light of recently "elevated building costs." *Id.*

Furthermore, it is easy to imagine farmers getting caught in the crossfire should *other* States attempt to impose regulations that differ from California's. Massachusetts, Maine, Michigan, and Rhode Island have enacted similar exacting animal confinement laws with a market-exclusion enforcement mechanism. *See* Mass. Gen. Laws ch. 129 App., §§ 1–5; Me. Rev. Stat. tit. 7, § 4020(2); Mich. Comp. Laws § 287.746(2); R.I.

Gen. Laws § 4-1.1-3. If these and other States impose inconsistent obligations, producers will inevitably lose access to national markets and be deprived of the commercial benefits of an integrated national market.

More broadly, the decision below encourages States' voters to prosecute their political disagreements via retaliatory extraterritorial regulation—rather than via their representatives in Congress. And such regulation will extend far beyond Proposition 12's agricultural context.

In the energy sector, for example, Minnesota has enacted a statute prohibiting the importation of power from any new large energy facility, or entering into any new long-term purchase agreement, that would increase statewide power-sector carbon dioxide emissions. *North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016) (opinion of Loken, J.). The Eighth Circuit affirmed an injunction against enforcing the statute, with Judge Loken explaining that Minnesota's law regulated "activity and transactions taking place *wholly outside* of Minnesota" in violation of the Commerce Clause. *Id.* at 921. The Ninth Circuit's rule, however, would permit such regulation, with geographically segmented energy markets the inevitable result—precisely the sort of outcome the Commerce Clause was designed to prevent.

The labor market too could soon be the site of interstate economic antagonism. Under the Ninth Circuit's misguided approach, a State could close its markets to goods produced by labor paid less than $15 per hour—the hypothetical "satisfactory wage scale" this

Court dismissed as absurd in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935). Such a State could then face retaliation from *other* States implementing their own extraterritorial regulation of out-of-state labor markets—such as prohibiting the sale of goods produced by labor lacking right-to-work protections. If left uncorrected, the Ninth Circuit's error will have severe policy consequences for the integrated nationwide markets the Commerce Clause is meant to promote and protect.

B. This circuit split is especially significant, for it results in some States holding greater regulatory authority than others

Beyond the grave effects caused by the substance of the Ninth Circuit's decision, the simple fact that a different rule applies in the Ninth Circuit itself creates a serious problem. The circuit conflict means different States in different circuits are subject to different constitutional restraints on their regulatory power. Whatever it decides about the merits of this case, the Court should not allow this assault on States' equal sovereignty to continue.

At the core of our constitutional structure is a "'fundamental principle of *equal* sovereignty' among the States." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 544 (quoting *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). More than one hundred years ago, this Court powerfully underscored that our Nation "'was and is a union of States, equal in power, dignity and authority.'" *Id.* (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911). Indeed, "the

constitutional equality of the States [remains] essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle*, 221 U.S. at 580.

In the decision below, however, the Ninth Circuit reiterated its conclusion that the extraterritoriality doctrine is "'not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices.'" *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) (quoting *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013)); *see also* Pet. App. 2a. As noted, this arbitrary limitation contrasts markedly with the approach of at least five other circuits, which have refused to limit the extraterritoriality doctrine to the narrow context of price-affirmation regulations. *See, e.g., Legato Vapors, LLC v. Cook*, 847 F.3d 825, 831 (7th Cir. 2017) (reading this Court's decisions to stand for "the more general principle that a state may not impose its laws on commerce in and between other states"). This inter-circuit disagreement means some States are permitted to wield greater power than others. This Court should grant review to properly ensure that each State retains *equal* sovereignty.

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The Constitution permits California to serve as a laboratory of state policy experimentation with its animal-confinement laws—but only within its own borders. Precisely to ensure *other* States may experiment

with animal-confinement policies of their own, however, the Constitution prohibits California from applying its animal-confinement laws to conduct in other States. By allowing California to do so, the decision below creates an untenable situation: It permits California and a handful of other States to impose their policy choices on defenseless other States. Because the Constitution forecloses such unequal treatment, the Court should grant the petition and reverse the decision below.

CONCLUSION

The Court should grant the petition and reverse the decision below.

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