FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL PORK PRODUCERS COUNCIL; AMERICAN FARM BUREAU FEDERATION, *Plaintiffs-Appellants*, v. KAREN ROSS, in her official capacity as Secretary of the California Department of Food & Agriculture; TOMÁS J. ARAGÓN, in his official capacity as Director of the California Department of Public Health; ROB BONTA,* in his official capacity as Attorney General of California, *Defendants-Appellees*, and THE HUMANE SOCIETY OF THE UNITED STATES; ANIMAL LEGAL DEFENSE FUND; ANIMAL EQUALITY; THE HUMANE LEAGUE; FARM SANCTUARY; COMPASSION IN	No. 20-55631 D.C. No. 3:19-cv-02324-W-AHG OPINION

* Rob Bonta is substituted for his predecessor, Xavier Becerra, as Attorney General of California; and Tomás J. Aragón is substituted for his predecessor, Sonia Angell, as Director of the California Department of Public Health. Fed. R. App. 43(c)(2).

WORLD FARMING USA;
COMPASSION OVER KILLING,
Intervenor-Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Argued and Submitted April 14, 2021
Pasadena, California

Filed July 28, 2021

Before: Milan D. Smith, Jr. and Sandra S. Ikuta, Circuit Judges, and John E. Steele,** District Judge.

Opinion by Judge Ikuta

** The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

SUMMARY[***]

Constitutional Law

The panel affirmed the district court's dismissal for failure to state a claim of an action filed by the National Pork Producers Council and the American Farm Bureau Federation, seeking declaratory and injunctive relief on the ground that California's Proposition 12 violates the dormant Commerce Clause in banning the sale of whole pork meat (no matter where produced) from animals confined in a manner inconsistent with California standards.

The panel held that the complaint did not plausibly plead that Proposition 12 violates the dormant Commerce Clause by compelling out-of-state producers to change their operations to meet California standards and thus impermissibly regulating extraterritorial conduct outside of California's borders. First, Proposition 12 does not dictate the price of a product and does not tie the price of in-state products to out-of-state prices. Further, the interconnected nature of the pork industry does not mean that Proposition 12's extraterritorial impact violates the underlying principles of the dormant Commerce Clause. The panel held that the complaint plausibly alleged that Proposition 12 has an indirect practical effect on how pork is produced and sold outside California, but such upstream effects do not violate the dormant Commerce Clause. The panel also held that California's promulgation of regulations to implement Proposition 12, which, as a practical matter, may result in the

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

imposition of complex compliance requirements on out-of-state farmers, does not have an impermissible extraterritorial effect.

The panel further held that the complaint did not plausibly plead that Proposition 12 violates the dormant Commerce Clause by imposing excessive burdens on interstate commerce without advancing any legitimate local interest. The panel concluded that alleged cost increases to market participants and customers did not qualify as a substantial burden to interstate commerce for purposes of the dormant Commerce Clause.

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OPINION

IKUTA, Circuit Judge:

In 2018, California voters passed Proposition 12, which bans the sale of whole pork meat (no matter where produced) from animals confined in a manner inconsistent with California standards. The National Pork Producers Council and the American Farm Bureau Federation (collectively referred to as "the Council") filed an action for declaratory and injunctive relief on the ground that Proposition 12 violates the dormant Commerce Clause. Under our precedent, a state law violates the dormant Commerce Clause only in narrow circumstances. Because the complaint here does not plausibly allege that such narrow circumstances apply to Proposition 12, we conclude that the district court did not err in dismissing the Council's complaint for failure to state a claim.

I

Proposition 12 amended sections 25990–25993 of the California Health and Safety Code to "prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." Cal. Prop. 12, § 2 (2018). The relevant portion of Proposition 12 precludes a business owner or operator from knowingly engaging in a sale within California of various products, including the sale of "[w]hole pork meat" unless the meat was produced in compliance with specified sow confinement restrictions. Cal. Prop. 12, § 3(b) (2018); *see* Cal. Health & Safety Code §§ 25990(b)(1)–(2), 25991(e)(1)–(4).

On December 5, 2019, the Council filed a complaint against California officials (referred to collectively as the California defendants) challenging Proposition 12 and seeking, among other things, a declaratory judgment that Proposition 12 is unconstitutional under the dormant Commerce Clause, and a permanent injunction enjoining the implementation and enforcement of Proposition 12.[1] The complaint alleged that Proposition 12 violates the dormant Commerce Clause in two ways. First, it impermissibly regulates extraterritorial conduct outside of California's borders by compelling out-of-state producers to change their operations to meet California standards. Second, it imposes excessive burdens on interstate commerce without advancing any legitimate local interest because it significantly increases operation costs, but is not justified by any animal-welfare interest and "has no connection to human health or foodborne illness."

On April 27, 2020, the district court granted the California defendants' motion to dismiss and the intervenors' motion for judgment on the pleadings. The district court held that Proposition 12 did not impermissibly control extraterritorial conduct and did not impose a substantial burden on interstate commerce. Although the district court had granted the Council leave to amend, the Council instead moved for entry of judgment, and the district court dismissed the complaint with prejudice. The Council timely appealed.

We have jurisdiction under 28 U.S.C. § 1291, and review de novo the district court's order granting a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal

[1] On January 9, 2020, several nonprofit organizations were granted intervention as defendants (referred to collectively as the intervenors).

Rules of Civil Procedure, *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009), and the district court's order granting a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011). At the motion to dismiss stage, we take as true the facts plausibly alleged in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

II

The Constitution grants Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I., § 8, cl. 3. The Commerce Clause does not, on its face, impose any restrictions on state law in the absence of congressional action. Nonetheless, "[f]rom early in its history," the Supreme Court has interpreted the Commerce Clause as implicitly preempting state laws that regulate commerce in a manner that is disruptive to economic activities in the nation as a whole. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 200–01 (1824). In its most recent consideration of the scope of the dormant Commerce Clause, the Court stated there are "two primary principles that mark the boundaries of a State's authority to regulate interstate commerce." *Wayfair*, 138 S. Ct. at 2090. "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Id.* at 2091. Although "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity,'" *id.* (quoting *Granholm v. Heald*, 544 U.S. 460, 476 (2005)), "State laws that 'regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce

is clearly excessive in relation to the putative local benefits,'" *id.* (quoting *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970)). *Wayfair* indicated that these two principles are "subject to exceptions and variations." *Id*. Among other things, *Wayfair* cited an earlier decision holding that a state law may violate the dormant Commerce Clause when it has extraterritorial effects. *Id.* (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986)).

The Council does not argue that the complaint has plausibly pleaded that Proposition 12 discriminates against out-of-state interests, and so has foregone the first principle recognized in *Wayfair*. Instead, it argues the second *Wayfair* principle, that Proposition 12 places an undue burden on interstate commerce, and the *Brown-Forman* variation, that Proposition 12 has an impermissible extraterritorial effect. At the motion to dismiss stage, we must determine whether the Council has plausibly pleaded a dormant Commerce Clause claim under its theories.

A

The Council's primary argument is that the complaint adequately alleges that Proposition 12 has an impermissible extraterritorial effect.

1

In making this claim, the Council relies primarily on three historical Supreme Court cases that first delineated when a state law violates the dormant Commerce Clause by impermissibly regulating prices in other states. *See Baldwin v. G.A.F. Seelig, Inc*., 294 U.S. 511 (1935); *Brown-Forman*, 476 U.S. at 579; *Healy v. Beer Inst., Inc*., 491 U.S. 324

(1989). In *Baldwin*, the Court struck down a New York law that required a dealer selling milk in New York to pay an out-of-state milk producer the minimum price set by New York law in order to equalize the price of milk from in-state and out-of-state producers. 294 U.S. at 518–19. As the Court later explained, the New York law in *Baldwin* was "aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, [which] amounted in effect to a tariff barrier set up against milk imported into the enacting state." *Milk Control Bd. of Pa. v. Eisenberg Farm Prods.*, 306 U.S. 346, 353 (1939). In *Brown-Forman*, the Court invalidated a New York law requiring every liquor distiller or producer selling to wholesalers within the state to affirm that the prices charged for every bottle or case of liquor were no higher than the lowest price at which the same product would be sold in any other State during the month covered by the particular affirmation. 476 U.S. at 576. The Court concluded that the price-affirmation law was invalid because it had the "practical effect" of requiring "producers or consumers in other States to surrender whatever competitive advantages they may possess," by forcing them to sell their product in-state for a set price. 476 U.S. at 580, 583. Last, *Healy* struck down a Connecticut price-affirmation statute that, in interaction with the laws in the neighboring states, had the practical effect of controlling prices in those states, causing an anti-competitive result. 491 U.S. at 337–39.

These cases used broad language. For instance, *Healy* states that the extraterritoriality principle "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State," and "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 [regulating] State." *Id.* at 336–37 (cleaned up). But such broad statements are "so sweeping that most commentators have assumed that these cases cannot mean what they appear to say." Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1090 (2009); *see also* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 806 (2001) (suggesting that the Court's "overbroad extraterritoriality dicta" can be ignored). The extraterritoriality test cannot strictly bar laws that have extraterritorial effect, scholars argue, because "[i]n practice, states exert regulatory control over each other all the time." Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1521 (2007) (noting, for example, "Delaware's corporate law, which has de facto nationwide application").

And indeed, the Supreme Court has given force to these scholarly observations, as it has indicated that the extraterritoriality principle in *Baldwin*, *Brown-Forman*, and *Healy* should be interpreted narrowly as applying only to state laws that are "price control or price affirmation statutes," *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003). We have adopted this interpretation and held that the extraterritoriality principle 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." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris* (*Eleveurs*), 729 F.3d 937, 951 (9th Cir. 2013) (cleaned up). The Tenth Circuit has followed suit. *See Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.) (holding that the "three essential characteristics"

that mark *Baldwin*, *Brown-Forman*, and *Healy* are that the state law at issue (1) was a price-control statute, (2) linked prices paid in-state with those paid out-of-state, or (3) discriminated against interstate commerce).

Under this narrow interpretation, *Baldwin, Brown-Forman,* and *Healy* do not support the Council's arguments. It is undisputed that Proposition 12 is neither a price-control nor price-affirmation statute, as it neither dictates the price of pork products nor ties the price of pork products sold in California to out-of-state prices. *See Eleveurs*, 729 F.3d at 951. And the Council has not claimed that Proposition 12 discriminates against interstate commerce.

2

The Council nevertheless asks us to hold that Proposition 12's extraterritorial impact violates the underlying principles of the dormant Commerce Clause in light of the unique nature of the pork industry. According to the allegations of the complaint, the pork industry is highly interconnected. A single hog is butchered into many different cuts which would normally be sold throughout the country. In order to ensure they are not barred from selling their pork products into California, all the producers and the end-of-chain supplier will require assurances that the cuts and pork products come from hogs confined in a manner compliant with Proposition 12. This means that all pork suppliers will either produce hogs in compliance with California specifications or incur the additional cost of segregating their products. As a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers will be forced to comply with California requirements. The cost of compliance with Proposition 12's requirements is high, and

would mostly fall on non-California transactions, because 87% of the pork produced in the country is consumed outside California. Therefore, the complaint alleges, Proposition 12 violates the dormant Commerce Clause given its substantial extraterritorial impact as a practical matter.

The Council's theory is not barred by *Walsh*'s characterization of the *Baldwin* line of cases as being limited to price-control and price-affirmation statutes. We have recognized that the Supreme Court has not expressly narrowed the extraterritoriality principle to only price-control and price-affirmation cases, and we have recognized a "broad[er] understanding of the extraterritoriality principle" may apply outside this context, *Ward v. United Airlines, Inc*., 986 F.3d 1234, 1240–41 (9th Cir. 2021). But even though the Council's complaint plausibly alleges that Proposition 12 has an indirect "practical effect" on how pork is produced and sold outside California, we have rejected the argument that such upstream effects violate the dormant Commerce Clause.

Under our precedent, state laws that regulate only conduct in the state, including the sale of products in the state, do not have impermissible extraterritorial effects. *See Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 445 (9th Cir. 2019). A state law may require out-of-state producers to meet burdensome requirements in order to sell their products in the state without violating the dormant Commerce Clause. *See Rocky Mountain Farmers Union v. Corey* (*Rocky II*), 913 F.3d 940, 952 (9th Cir. 2019); *Eleveurs*, 729 F.3d at 942. Even if a state's requirements have significant upstream effects outside of the state, and even if the burden of the law falls primarily on citizens of other states, the requirements do not impose *impermissible* extraterritorial effects. *See Eleveurs*, 729 F.3d at 942, 948–53. A state law is not

impermissibly extraterritorial unless it directly regulates conduct that is wholly out of state. *Rosenblatt*, 940 F.3d at 442, 445 (holding that a city ordinance restricting vacation rentals in a California city did not violate the dormant Commerce Clause even though 95% of vacation rentals in the city involved an out-of-state party, because the ordinance penalized only conduct within the city).

The Council's allegations regarding the upstream effects of Proposition 12 are most closely analogous to those we rejected in *Eleveurs*. 729 F.3d at 942. In *Eleveurs*, plaintiffs argued that a law banning the sale in California of certain duck products made by force feeding the duck violated the extraterritoriality principle because it controlled commerce outside of California. According to the plaintiffs, the law targeted out-of-state entities and compelled out-of-state farmers to comply with California's standards. *Id.* at 949. We held that the plaintiff's argument failed because the state law applied to "both California entities and out-of-state entities," and the law merely precluded "a more profitable method of operation—force feeding birds for the purpose of enlarging its liver—rather than affecting the interstate flow of goods." *Id.*

The requirements under Proposition 12 likewise apply to both California entities and out-of-state entities, and merely impose a higher cost on production, rather than affect interstate commerce. Therefore, even though Proposition 12 has some upstream effects, California is "free to regulate commerce and contracts within [its] boundaries with the goal of influencing the out-of-state choices of market participants." *Rocky Mountain Farmers Union v. Corey* (*Rocky I*), 730 F.3d 1070, 1103 (9th Cir. 2013); *see also Eleveurs*, 729 F.3d at 948–49 ("A statute is not invalid merely

because it affects in some way the flow of commerce between the States." (cleaned up)).

For the same reason, California's promulgation of regulations to implement Proposition 12, which, as a practical matter, may result in the imposition of complex compliance requirements on out-of-state farmers, does not have an impermissible extraterritorial effect. Proposition 12 required the California Department of Food and Agriculture (CDFA) to publish implementing regulations. Cal. Prop. 12 § 6 (2018); Cal. Health & Safety Code § 25993(a). Under the proposed regulations,[2] an out-of-state producer must hold a valid California certification in order to sell its products in California. CDFA, Proposed Regulations at 30 (May 28, 2021) (proposing to adopt California Code of Regulations Title 3, § 1322.1(b)). And to obtain the certification, a producer must "allow access by the certifying agent, and/or authorized representatives of the Department, to . . . houses where covered animals and covered animal products may be kept . . . ." *Id.* at 40 (proposing to adopt § 1326.1(c)). Once certified, pork-producing operations must also comply with the recordkeeping requirements. *Id.* at 40–41 (proposing to adopt § 1326.2).

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[2] The complaint alleges that Proposition 12 charges California agencies with promulgating regulations to implement the proposition. After oral argument was held in this appeal, CDFA published proposed regulations implementing Proposition 12. The proposed regulations are located at http://www.cdfa.ca.gov/ahfss/pdfs/regulations/AnimalConfinementText1stNotice_05252021.pdf. *See also* 22-Z Cal. Regulatory Notice Reg. 594 (May 28, 2021).

Although the CDFA has published the proposed regulations, it has not yet promulgated a final version.

Even assuming these proposed regulations become effective, "[a]ppropriate certificates may be exacted" from out-of-state producers for in-state health and safety purposes without violating the dormant Commerce Clause. *Baldwin*, 294 U.S. at 524. Indeed, in *Rocky I*, we held that a California law did not impermissibly regulate extraterritorial conduct even though it required out-of-state fuel distributors "to seek regulatory approval in California before undertaking a transaction also in California" and imposed reporting requirements on out-of-state producers. 730 F.3d at 1104. Therefore, the proposed regulations' requirement that out-of-state producers seek a California certification in order to access the California market is not an impermissible extraterritorial effect.

3

The Council relies on a handful of cases in which we determined that a state law had an impermissibly extraterritorial effect because it directly regulated transactions conducted entirely out of state. In *Daniels Sharpsmart, Inc. v. Smith*, we struck down a California law requiring a company that sent medical waste out of state for disposal to use only a medical waste facility that met California requirements. 889 F.3d 608, 612–13, 615–16 (9th Cir. 2018). The transaction at issue in that case (the purchase of medical waste disposal services from out-of-state treatment facilities in Kentucky and Indiana) occurred wholly outside California. *Id.*; *see also Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (striking down a law that required California residents to pay five percent of their sales price in out-of-state art sale transactions to the artists). And in *National Collegiate Athletic Ass'n v. Miller*, we held that a statute had extraterritorial effect because it was

"directed at interstate commerce and only interstate commerce," given that "it regulates only interstate organizations, *i.e.*, national collegiate athletic associations which have member institutions in 40 or more states." 10 F.3d 633, 638 (9th Cir. 1993); *see also Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833 (7th Cir. 2017) (invalidating a state law which "govern[ed] the services and commercial relationships between out-of-state manufacturers and their employees and contractors"). Citing *Daniels Sharpsmart* and *Miller*, the Council argues that Proposition 12 necessarily controls transactions conducted among out-of-state pork producers, processors, distributors and sellers of pork products, because it compels them to ensure that pork products that may eventually be sold in California are traceable to hogs that have been confined in a manner that meets California requirements.

The Council's reliance on the *Daniel Sharpsmart* line of cases is misplaced, because Proposition 12 does not regulate transactions conducted wholly outside of California. Rather, Proposition 12 directly regulates only the in-state sales of "products that are brought into or are otherwise within the borders of [California]." *Daniels Sharpsmart*, 889 F.3d at 615. Nor does Proposition 12 directly regulate interstate commerce; rather, by its terms, it is aimed at the in-state sales of pork, regardless whether it is produced by in-state or out-of-state farmers. We have not extended the *Daniel Sharpsmart* line of cases to a situation where the state law had an upstream effect only as a practical matter on out-of-state transactions. As explained above, we have rejected similar arguments relying on this theory. *See Eleveurs*, 729 F.3d at 942; *see also Epel*, 793 F.3d at 1174 (holding that the Supreme Court has rejected the "grand[] proposition" that the *Baldwin* line of cases "require [courts] to declare

automatically unconstitutional any state regulation with the practical effect of controlling conduct beyond the boundaries of the State" (cleaned up)).

4

Finally, the Council argues that Proposition 12 violates the dormant Commerce Clause because it poses a risk of inconsistent regulations that undermines a "compelling need for national uniformity in regulation." *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997). While *Wayfair* did not overrule this principle (so it may be deemed a "variation" of the two primary principles of the dormant Commerce Clause), *see* 138 S. Ct. at 2090–91, we have held that only "state regulation of activities that are inherently national or require a uniform system of regulation" violates the dormant Commerce Clause, *Rosenblatt*, 940 F.3d at 452 (quoting *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015)); *see also Ward*, 986 F.3d at 1242 (holding that to prevail on the contention that it will inevitably be subjected to a patchwork of inconsistent regulations, a party must show that the challenged state law "regulates in an area that requires national uniformity"). Absent such a need for uniform national regulation, a state regulation does not violate the dormant Commerce Clause even where there is a threat of conflicting regulations. *See Chinatown*, 794 F.3d at 1146–47. The "small number" of cases dealing with "activities that are inherently national or require a uniform system of regulation" generally concern taxation or interstate transportation. *See Rosenblatt*, 940 F.3d at 452 (quoting *Chinatown*, 794 F.3d at 1146). Unless the state law at issue interferes with a system of national concern, it does not violate the dormant Commerce Clause. Thus in *Eleveurs*, we held that "Plaintiffs have not demonstrated that

a nationally uniform foie gras production method is required to produce foie gras." 729 F.3d at 950. Likewise, neither optometrists nor gas producers demonstrated a need for national uniformity in their economic activities. *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012); *Rocky I*, 730 F.3d at 1104–05.

The complaint here fails to make a plausible allegation that the pork production industry is of such national concern that it is analogous to taxation or interstate travel, where uniform rules are crucial. *See Gen. Motors Corp.*, 519 U.S. at 298 n.12. Although the complaint plausibly alleges that Proposition 12 will have an impact on a national industry, we have already held that such impacts do not render the state law impermissibly extraterritorial. Accordingly, the complaint fails to state a claim on this basis.[3]

B

We now turn to the Council's second argument that Proposition 12 imposes a burden on interstate commerce which is "clearly excessive in relation to the putative local

[3] In any event, the Council has not shown that a threat of "*conflicting*, legitimate legislation[s]" by other jurisdictions is "both actual and imminent." *Rocky I*, 730 F.3d at 1104–05 (emphasis added) (quoting *S.D. Myers v. City of San Francisco*, 253 F.3d 461, 469–70 (9th Cir. 2001)). According to an amicus brief, "Massachusetts, Maine, Michigan, and Rhode Island have enacted animal-confinement laws similar" or "nearly identical" to California's current confinement rules. The Council points to Ohio's regulations, *see* Ohio Admin. Code 901:12-8-02(G)(4), (5), but while they differ in approach from Proposition 12, compliance with both sets of regulations is possible. In short, while it is plausible that other states will implement laws regulating pork meat production, the referenced laws demonstrate that the Council has not stated a plausible claim that the various regulations will be conflicting.

benefits" and thus violates the dormant Commerce Clause. *Pike*, 397 U.S. at 142. The Supreme Court has not provided a clear methodology for comparing in-state benefits and out-of-state burdens, but at the motion to dismiss stage a complaint must, at a minimum, "plausibly allege the ordinance places a 'significant' burden on interstate commerce." *Rosenblatt*, 940 F.3d at 452.

We have held that a statute imposes such a significant burden only in rare cases. "[M]ost statutes that impose a substantial burden on interstate commerce do so because they are discriminatory." *Eleveurs*, 729 F.3d at 952. As indicated above, the Council does not allege that Proposition 12 has a discriminatory effect. "[L]ess typically, statutes impose significant burdens on interstate commerce as a consequence of inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Id.* (cleaned up). As we have explained, the complaint here does not plausibly allege that Proposition 12 falls into the narrow class of state laws that meets this requirement.

For dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce. "The mere fact that a firm engaged in interstate commerce will face increased costs as a result of complying with state regulations does not, on its own, suffice to establish a substantial burden on interstate commerce." *Ward*, 986 F.3d at 1241–42. Nor does a non-discriminatory regulation that "precludes a preferred, more profitable method of operating in a retail market" place a significant burden on interstate commerce. *Nat'l Ass'n of Optometrists*, 682 F.3d at 1154–55. Finally, even a state law that imposes heavy burdens on some out-of-state sellers does not place an impermissible burden on interstate commerce.

In *Exxon Corp. v. Governor of Maryland*, the Supreme Court held that even where the burdens imposed by a Maryland law would cause some refiners to stop selling in Maryland, and would deprive consumers of some special services, the law did not impermissibly burden interstate commerce. 437 U.S. 117, 127 (1978). While some refiners "may choose to withdraw entirely from the Maryland market," it was reasonable to assume that they would "be promptly replaced by other interstate refiners." *Id*. "[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id*.; *see also Rosenblatt*, 940 F.3d at 453 (holding that a city ordinance did not violate the dormant Commerce Clause merely because it shifted tourism dollars from vacation rentals to hotels).

In this case, the crux of the allegations supporting the Council's substantial burden claim is that the cost of compliance with Proposition 12 makes pork production more expensive nationwide. The complaint alleges that, to comply with Proposition 12's requirements, "producers will have to expend millions in upfront capital costs and adopt a more labor-intensive method of production." The cost of compliance would result in a 9.2 percent increase in production cost, which would be passed on to consumers, and producers that do not comply with Proposition 12 would lose business with packers that are supplying the California market.

Taking the plausible allegations in the complaint as true and making all reasonable inferences in the Council's favor, we conclude that these alleged cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce for purposes of the dormant

Commerce Clause. "[A] loss to [some specific market participants] does not, without more, suggest that the [state] statute impedes substantially the free flow of commerce from state to state." *Burlington N. R.R. Co. v. Dep't of Pub. Serv. Regul.*, 763 F.2d 1106, 1114 (9th Cir. 1985) (cleaned up). Even if producers will need to adopt a more costly method of production to comply with Proposition 12, such increased costs do not constitute a substantial burden on interstate commerce. *Eleveurs*, 729 F.3d at 952. Nor do higher costs to consumers qualify as a substantial burden on interstate commerce. *See Nat'l Ass'n of Optometrists*, 682 F.3d at 1152. "[I]f the statute caused the loss [to some sellers] and therefore caused harm to the consuming public, such a result would be related to the wisdom of the statute, not to a burden on interstate commerce." *Id.* (citing *Exxon*, 437 U.S. at 127–28)).

Accordingly, the district court did not err in holding that, as a matter of law, the Council failed to state a claim that Proposition 12 imposes a substantial burden on interstate commerce. Because the complaint failed to make a plausible allegation to that effect, the district court was correct in concluding that it "need not determine whether the benefits of the challenged law are illusory." *See Rosenblatt*, 940 F.3d at 452.

III

While the dormant Commerce Clause is not yet a dead letter, it is moving in that direction. Indeed, some justices have criticized dormant Commerce Clause jurisprudence as being "unmoored from any constitutional text" and resulting in "policy-laden judgments that [courts] are ill equipped and arguably unauthorized to make," *Camps*

Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610, 618 (1997) (Thomas, J., dissenting). Under our precedent, unless a state law facially discriminates against out-of-state activities, directly regulates transactions that are conducted entirely out of state, substantially impedes the flow of interstate commerce, or interferes with a national regime, a plaintiff's complaint is unlikely to survive a motion to dismiss. Even though the Council has plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide, it has not stated a violation of the dormant Commerce Clause under our existing precedent.

AFFIRMED.