No. _____

IN THE

Supreme Court of the United States

IOWA PORK PRODUCERS ASSOCIATION,

Petitioner,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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January 3, 2025

QUESTIONS PRESENTED

In *National Pork Producers Council v. Ross*, six Justices "affirmatively retain[ed] the longstanding *Pike* [*v. Bruce Church*] balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." 598 U.S. 356, 403 (2023) (Kavanaugh, J., concurring and dissenting in part). And five Justices believed that California's Proposition 12—which enacts a pork sales ban to regulate the manner in which pigs are housed in States across the country—could "impose[] a substantial burden on interstate commerce under *Pike*." *Id.* at 410. But because the petitioner there had "disavow[ed] any discrimination-based claim," the lawsuit failed. Thus, when a lawsuit arose that *did* allege discrimination, however, the result should have been clear: a party actually alleging a discrimination-based challenge to Proposition 12 states a claim, and "at least survive past the motion-to-dismiss stage." *Id.*

Not in the Ninth Circuit. Here, petitioner vigorously pursued a *Pike* challenge to Proposition 12 (among several other claims), yet the Ninth Circuit rejected them all with little analysis. The panel concluded it was bound to do so because of *its own* prior ruling in *NPPC*, even despite the subsequent rulings from this Court. That's wrong substantively and procedurally. Substantively, although appearing in a fractured decision, the rulings reached by a majority of Justices are right—petitioner does state a claim under *Pike*, not to mention petitioner's several other claims.

Procedurally, the only way the Ninth Circuit reached this conclusion was by rejecting the majority views from this Court in *NPPC*, because some of those

opinions were styled as "dissents." The Ninth Circuit's approach exacerbates a hopeless division among the circuits about how to evaluate holdings from fractured opinions from this Court.

The questions presented are:

1. Whether a party alleging that Proposition 12 discriminates against interstate commerce, both directly and under *Pike v. Bruce Church* (among many other viable counts), states a claim, as a majority of Justices concluded in *Ross*.

2. Whether lower federal courts evaluating fractured opinions from this Court consider all Justices' opinions to determine the majority position on a legal issue as the First, Third, Fourth, and Eighth Circuits hold, or whether lower courts are limited to consider only opinions concurring in the result as the District of Columbia, Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits hold.

PARTIES TO THE PROCEEDING

Iowa Pork Producers Association ("IPPA") is the petitioner here and was the plaintiff-appellant below.

Rob Bonta, in his official capacity as Attorney General of California; Karen Ross, in her official capacity as Secretary of the California Department of Food and Agriculture; and Dr. Tomas Aragon, in his official capacity as Director of the California Department of Public Health, are the respondents here and were the defendants-appellees below.

Additionally, The Humane Society of the United States, the Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook are also respondents here and were the intervenors-appellees below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

IPPA is not a publicly held corporation. IPPA does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this case are:

1. *Iowa Pork Producers Ass'n v. Bonta*, No. 22-55336, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 25, 2024; panel rehearing and rehearing en banc denied July 9, 2024.

2. *Iowa Pork Producers Ass'n v. Bonta*, No. 2:21-CV-09940-CAS (AFMX), U.S. District Court for the Central District of California. Judgment entered March 29, 2022.

There are no additional proceedings in any court that are directly related to this case.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Statutes

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

IPPA respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals (App. 1a-15a) appears as an unpublished memorandum disposition at 2024 WL 3158532. The court's denial of panel rehearing and rehearing en banc (App. 16a-17a) is unreported. The decision of the district court (App. 18a-53a) is not published but available at 2022 WL 613736.

JURISDICTION

The court of appeals issued its decision on June 25, 2024 and denied a timely petition for panel rehearing and rehearing en banc on August 6, 2024. App. 1-17. On October 24, 2024, this Court granted an application for extension of time to file a petition for writ of certiorari until January 3, 2025. *Iowa Pork Producers Ass'n v. Bonta*, No. 24A400 (Oct. 24, 2024). The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Relevant constitutional, statutory, and regulatory provisions are reproduced in the petition appendix. App. 142-59.

INTRODUCTION

Petitioner IPPA challenges the legality and constitutionality of California's Proposition 12, a law attempting to regulate pig farming practices nationwide. In short, Proposition 12 requires pig farmers—*in any State*—to raise breeding pigs using

vague and arbitrary housing techniques that conflict with traditional and time-tested farming practices used for generations to feed the Nation. If farmers don't comply with Proposition 12, their pork can't be sold in the State. Further, as a factual matter, California's prescribed housing techniques are untethered to the reality of farming and lack any scientific support, yet their enforcement would leave the entire pork supply chain in a state of emergency, inflicting irreparable harm on farmers, processors, retailers, and pork consumers nationwide, as well as to the wellbeing of breeding pigs currently being raised.

This isn't the first time this Court has encountered a challenge to Proposition 12. In 2023, this Court evaluated a different challenge to the law, pursued by the National Pork Producers Council ("NPPC") and made exclusively under the Supreme Court's "dormant Commerce Clause" precedents. *See NPPC v. Ross*, 598 U.S. 356 (2023). But in making those arguments under the dormant Commerce Clause, NPPC did not advance any theory of "discrimination"—that Proposition 12 discriminated against out-of-state farmers and in favor of in-state farmers. In fact, NPPC *conceded* as much. *Id.* at 370.

Explaining that such a discrimination theory stood at the "very core" of this Court's dormant Commerce Clause precedents, this Court affirmed dismissal due to that theory's absence. And even as to the claims NPPC did assert, the Court concluded it ultimately failed to include sufficient allegations to state those claims. Further, NPPC's own repudiation of any allegation of discrimination also undermined its effort to show that Proposition 12 imposed too substantial of a burden on interstate commerce in violation of *Pike*

v. Bruce Church, Inc., 397 U.S. 137 (1970) and its progeny, as NPPC also failed to include any sufficient allegations to assert a valid challenge under *Pike*. (As discussed in greater detail throughout this petition, the Court reached this ultimate conclusion despite a majority of Justices concluding that the petition had alleged a substantial burden sufficient for a *Pike* claim.)

The opposite is true here. Petitioner's core claim expressly alleges that Proposition 12 is discriminatory, which was not even at issue in *NPPC*. In addition to IPPA's allegations establishing that Proposition 12 is discriminatory, IPPA also included substantial allegations to illustrate how Proposition 12 violates the dormant Commerce Clause as elucidated in *Pike*. Finally, IPPA also challenged Proposition 12 on numerous other bases not included in *NPPC*, including the Due Process Clause, the Privileges and Immunities Clause, and preemption under the Supremacy Clause.

Simply put, this case raises constitutional questions this Court prompted in *NPPC v. Ross*, which are now ripe for review. And the consequences of failing to do so now are drastic. By denying this petition, this Court would implicitly endorse an individual state's regulation of an out-of-state industry based on the state's own sense of what is "moral." It's difficult to see where that road ends. While this case involves pork, the next case could involve any good or service imaginable—ones that individual states have developed entire robust economies around—incentivizing tit-for-tat trade wars among State legislatures. And if issues of "morality" can drive the regulation of out-of-state industry (as was supposedly the case with Proposition

12), why couldn't future regulation be based on minimum wage policies of sister States, or employees' immigration status, or any other hot-button social issue of the day? The Framers prohibited precisely this type of discriminatory and overly onerous out-of-state regulation.

This Court should also take this opportunity to resolve an entrenched circuit split. The only reason the Ninth Circuit was able to reach the result it did was by refusing to apply the law as a majority of this Court's Justices see it, merely because some of those pronouncements came in opinions entitled "dissents." In doing so, the Ninth Circuit effectively treated this Court's *NPPC* decision as a nullity, instead simply deferring to its *own* prior decision in *NPPC*, because (according to the panel) a majority of this Court's Justices did not agree upon a "single rationale" and there is no opinion in that case that "can reasonably be described as a logical subset of the other." App. XX-XX. This is a misapplication of Supreme Court precedent and demonstrates a circuit split with respect to what constitutes binding principles of law within a fractured Supreme Court decision.

These are critically important issues, this case presents an ideal vehicle to address them, and the Ninth Circuit is markedly incorrect on the merits. This Court should grant the petition.

STATEMENT OF THE CASE

I. California's Propositions 2 and 12

In November 2008, California passed Proposition 2, a ballot initiative adding §§ 25990–25994 to the California Health and Safety Code. 2008 Cal. Legis. Serv. Prop. 2 ("Proposition 2"); Cal. Health & Safety Code §§ 25990–25994. Relating to the "confinement of farm animals," Proposition 2 prohibited *California*

farmers from tethering or confining pregnant pigs in a way that prevented them from "[l]ying down, standing up, and fully extending [their] limbs," or from "[t]urning around freely." *See* Cal. Health & Safety Code §§ 25990, 2599l(b). Proposition 2 gave California farmers *over six years* to construct and comply with these new and expensive housing requirements, with an effective date of January 1, 2015. *See id.* § 25990. At the time, only in-state farmers were subject to these requirements. *Id.* § 25990(a).

Ten years later, California passed Proposition 12. 2018 Cal. Legis. Serv. Prop. 12 ("Proposition 12"); Cal. Health & Safety Code §§ 25990– 25993.1. According to the ballot language, Proposition 12 was intended "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." *See* 2018 Cal. Legis. Serv. Prop. 12 § 1.

Remarkably, Proposition 12 reached beyond the borders of California, now banning a seller from "knowingly engag[ing] in the sale within the state" of pork meat that the seller "knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of the immediate offspring of a covered animal that was confined in a cruel manner." Cal. Health & Safety Code § 25990(b)(2).[1] Further,

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[1] Proposition 12 provided two definitions for "[c]onfined in a cruel manner" as related to pork: "[c]onfining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely," *id.* § 25991(e)(1) (the "turnaround requirements") in effect January 1, 2015, and "confining a breeding pig with less than 24 square feet of usable floorspace per pig," *id.* § 25991(e)(3) (the "square footage requirements") in effect as of December 31, 2021.

Proposition 12 defined a "sale," stating that a "sale shall be deemed to occur at the location where the buyer takes physical possession of" the noncompliant meat. *Id.* § 25991(o).

Proposition 12 also had a truncated enforcement timeline, especially as compared to what California imposed on its own in-state farmers with Proposition 2. Whereas Proposition 2 allowed instate farmers *six years* to comply with its provisions (November 4, 2008, to January 1, 2015), Proposition 12 was designed to take effect for out-of-state farmers immediately. The turnaround requirements were to take effect on December 19, 2018—giving out-of-state farmers a *mere six weeks* to fund, construct, and come into compliance (as opposed to the prior five-year benefit provided to in-state farmers). *See* Cal. Health & Safety Code §§ 25990– 25993.1. Proposition 12's square footage requirements were to take effect on December 31, 2021, approximately three years after its approval. In-state farmers, therefore, had nine years to recover from the initial financial and operational impact of the turnaround requirements before imposing the square footage requirements, while out-of-state farmers had to suffer the financial and operational burden of implementing them both within three years. Aside from the accelerated acute financial burden only for out-of-state farmers, conversions of farms of any meaningful size cannot take place in a six-week timeline, and in most cases, a three-year timeline, placing these out-of-state farmers immediately in violation of the law, or excluding them from the California market.

Proposition 12 bears significant consequences for noncompliance. Any person who violates Proposition 12 is criminally guilty of a misdemeanor punishable

by a fine of up to $1,000 and up to 180 days imprisonment. *Id.* § 25993(b). Moreover, violating Proposition 12 is a per se violation of California's unfair competition laws, which carry crippling civil penalties and invites injunctive relief to be pursued not only by any local prosecutor in California, but also by private individuals alleging harm by an unlawful sale of whole pork meat into California. *Id.* § 25993(b) (citing Cal. Bus. & Prof. Code § 17200); *see also* Cal. Bus. & Prof. Code § 17206.

II. District Court Proceedings

On November 9, 2021, IPPA, on behalf of its members, filed suit in Fresno Superior Court against various California officials tasked with enforcing Proposition 12. App. 13. On November 16, 2021, California removed the case to the United States District Court for the Eastern District of California. App. 19a. On December 16, 2021, IPPA filed its first amended complaint seeking declaratory and injunctive relief. App. 93a-141a. The complaint alleged that Proposition 12 was unconstitutional and otherwise unlawful because it (1) violated IPPA's members' due process rights under the Due Process Clause; (2) violated the Privileges and Immunities Clause; (3) was preempted by Packers and Stockyards Act; and (4) violated the dormant Commerce Clause. App. 119a-138a.

On December 16, 2021, IPPA filed a motion for a preliminary injunction seeking to enjoin enforcement of Proposition 12. App. 20a. On December 27, 2021, the case was transferred to the Central District of California. On January 3, 2022, California filed a motion to dismiss. App. 20a.

On February 28, 2022, the district court held a hearing on both the motion to dismiss and the motion

for preliminary injunction. App. 20a. The district court denied IPPA's motion for a preliminary injunction and simultaneously granted California's motion to dismiss. App. 54a, 90a. With respect to the motion for preliminary injunction, the district court rejected IPPA's arguments regarding the likelihood of success on the merits and did not consider the other injunctive factors. App. 68a-90a. With respect to the motion to dismiss, the Court ordered dismissal of each of IPPA's claims for the same reasons it denied the preliminary injunction. App. 28a-54a.

III. Appellate Proceedings

IPPA appealed both the denial of its motion for preliminary injunction and the dismissal. On April 29, 2022, California moved the Ninth Circuit to stay appellate proceedings pending the outcome of *NPPC v. Ross*, then pending before this Court, which involved a dormant Commerce Clause challenge to Proposition 12, but only based only upon a per se application of the so-called "extraterritorial doctrine" and the substantial burden analysis set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970). IPPA opposed due to the substantial difference in the theories advanced and procedural posture, but the Ninth Circuit granted the motion and stayed the case pending this Court's decision in *NPPC*.

On May 11, 2023, this Court issued its decision in *NPPC v. Ross*. 598 U.S. 356 (2023) [hereinafter *NPPC II*]. In a fractured opinion, this Court affirmed the Ninth Circuit's opinion (styled as *NPPC v. Ross*, 6 F.4th 1021 (9th Cir. 2021) [hereinafter *NPPC I*]), with a plurality holding that NPPC failed to state a claim that Proposition 12 violated the dormant Commerce Clause under the limited legal theories NPPC advanced. *Id.* at 390–91. Most notably, the Court

specifically recognized that for purposes of the dormant Commerce Clause claim, NPPC had "disavow[ed] any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones." *Id.* at 370. Given there was no discrimination allegation to consider from NPPC, this Court turned to NPPC's other two theories for why Proposition 12 violated the dormant Commerce Clause: (1) a per se application of what NPPC called the "extraterritoriality doctrine," and (2) the substantial burden balancing test articulated in *Pike*. *Id.* at 369–80.

As for the first, the Court rejected NPPC's suggested per se application of the "extraterritoriality doctrine," finding that such an application—at least on a per se basis—extended the dormant Commerce Clause too far. *Id.* at 371–77, 390–91; *see also id.* at 394 (Roberts, C.J., concurring in part and dissenting in part) ("I also agree . . . that our precedent does not support a per se rule against state laws with 'extraterritorial' effects.").

As for the second, NPPC argued that under *Pike*, "a court must at least assess 'the burden imposed on interstate commerce' by a state law and prevent its enforcement if the law's burdens are 'clearly excessive in relation to the putative local benefits.'" *Id.* at 377. NPPC then provided a list of reasons why the benefits Proposition 12 secures for Californians did not outweigh the costs it imposed on out-of-state economic interests. *Id.*

But in Part IV-A of the opinion, a majority of five Justices determined that NPPC had overstated the extent to which *Pike* "depart[ed]" from the antidiscrimination principles lying at the heart of the

dormant Commerce Clause. *Id.* at 377–80. The majority reasoned that *Pike*—which involved a state law that violated the dormant Commerce Clause by requiring cantaloupes grown in the state of Arizona to be processed and packed within the state of Arizona—was actually a discrimination case, because the state law at issue required business operations to be performed in the state that could be more efficiently performed elsewhere. *Id.* Consequently, the "'practical effect[s]' of the order in operation thus revealed a discriminatory purpose—an effort to insulate in-state processing and packaging businesses from out-of-state competition." *Id.* at 378.

Consequently, the majority reasoned that under *Pike*, a law that was facially neutral could still violate the dormant Commerce Clause if the "law's practical effects . . . disclose[d] the presence of a discriminatory purpose." *Id.* Applying those principles to the case at hand, since NPPC had disavowed any claim that Proposition 12 discriminated on its face or that its "practical effects in operation would disclose purposeful discrimination against out-of-state business," NPPC's claim failed. To be sure, even that portion of the opinion recognized that the Court "has left the 'courtroom door open' to challenges premised on 'even nondiscriminatory burdens,'" *id.* at 379 (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008)), and that "'a small number of our cases have invalidated state laws . . . that appear to have been genuinely nondiscriminatory,'" *id.* (quoting *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997)). Even so, the Court concluded that as NPPC had opted not to include discriminatory allegations in its claim, the claim it "f[e]ll[] well outside *Pike*'s heartland," which was "not an auspicious start." *Id.* at

379–80.

The Court then moved on to the question of what to do with *Pike* in this specific case; it is on that question that the opinion deeply fractured. Three Justices concluded that *Pike* should be a dead letter, asserting that it inappropriately asked judges to engage in a balancing act that no court was adequately equipped to perform. *Id.* at 380–84 (Part IV-B). Four Justices determined that even if the Court were to apply the *Pike* test as NPPC had articulated it, NPPC's specific allegations in the complaint failed to adequately allege a necessary prerequisite—a sufficient burden on interstate commerce—as Proposition 12 simply did not meet the level for a substantial burden as described in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). *Id.* at 383–87 (Part IV-C). Consequently, the plurality concluded that NPPC failed to "plausibly" suggest a substantial harm to interstate commerce. *Id.*

Four Justices dissented. While they agreed the application of a per se rule against state laws with extraterritorial effects was inappropriate, they explained that *Pike* was still good law to ensure that there be "free private trade in the national marketplace" (and, to be clear, that holding represented the view of six justices). *Id.* at 395 (Roberts, C.J., concurring in part and dissenting in part). Applying *Pike*, the dissent concluded that because NPPC had "identif[ied] broader, market-wide *consequences* of compliance" with Proposition 12, NPPC had stated "economic harms that our precedents have recognized can amount to a burden on interstate commerce." *Id.* at 397. In response to the dissent, three Justices disagreed with the contemplation of harm to the interstate market,

contending it was merely a rearticulation of the per se rule and that it would prevent California from regulating itself, purely because of its position within the broader national market, and that it was taking into account harms that were not even economic in nature as *Pike* required. *Id.* at 387–89 (Part IV-D).

In sum, while the Court's application was deeply fractured, only a three-Justice minority held that judges could not engage in a *Pike* balancing test; in contrast, a six-Justice majority "affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." *Id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part). In applying that standard *to NPPC's specific allegations*, two schools of thought emerged: four Justices (including two of the six holding that *Pike* should be retained) concluded NPPC's allegations in the complaint failed to allege sufficient burden on interstate commerce, which was a prerequisite before even reaching the balancing portion of the *Pike* test. And five Justices (four of whom held that *Pike* should be retained) found that NPPC had "identif[ied] broader, market-wide consequences of compliance" with Proposition 12, and thus had stated "economic harms that our precedents have recognized can amount to a burden on interstate commerce." *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part).

After the Supreme Court's decision in *NPPC II*, IPPA moved to lift the stay to allow for resolution of IPPA's claims, and also moved to expedite the appeal. The motion to lift the stay was granted, and the motion to expedite the appeal was partially granted. After briefing and oral argument, the Ninth Circuit

affirmed dismissal of IPPA's complaint. *IPPA v. Bonta*, No. 22-55336, 2024 WL 3158532 (9th Cir. June 25, 2024); App. 2a. The panel concluded that a "majority of the Justices in *NPPC II* did not agree upon a 'single rationale' and there is no opinion in that case that 'can reasonably be described as a logical subset of the other.'" *Id.* at *2 (quotation omitted); App. 6a. Thus, "[b]ecause the Court did not agree upon a single rationale for affirming, and neither of the two rationales is a logical subset of the other, only the specific result [in *NPPC II*] is binding on lower federal courts" and thus determined that "we remain bound by our decision in *NPPC I*." *Id.* at *3 (quotations omitted); App. 6a-7a.

The panel then applied their own holding from *NPPC I* to affirm the dismissal of IPPA's *Pike* claim. *Id.*; App. 7a-8a. However, in a concurrence, Judge Callahan opined that under *NPPC II*, a majority of the Supreme Court would have determined that IPPA had plausibly alleged a substantial burden on interstate commerce, and thus if the panel had not been bound by their own holding from *NPPC I*, she would have remanded for the district court to decide IPPA's *Pike* claim. *Id.* at *5 (Callahan, J. concurring); App. 15a. The panel majority did not agree, instead holding that this approach would disregard the so-called "settled rule that dissents may not be considered when interpreting the holding of a splintered Supreme Court decision." *Id.* at *3, n.5; App. 15a.

IPPA's petition for panel rehearing and rehearing en banc was denied over Judge Callahan's vote to rehear the case en banc. App. 16a-17a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Ignored The Majority of Justices in *NPPC II* On Materially Important Issues.

Below, the Ninth Circuit ruled that IPPA's complaint failed to state a claim that Proposition 12—a California state law dictating how breeding pigs must be housed nationwide—violates the dormant Commerce Clause and a host of other constitutional provisions. This sweeping dismissal of new and separate constitutional claims not yet adjudicated before this Court reflects a patent misunderstanding of the guidance this Court supplied in *NPPC II*. And this error is of no small consequence; the Ninth Circuit's opinion represents yet another step towards a growing declaration of open economic warfare already simmering between the States.

A. This Court should grant the petition to effectuate the rulings of a majority of this Court's Justices.

In *NPPC II*, this Court "synthesized decades of dormant Commerce Clause jurisprudence into a few key principles." *New Jersey Staffing All. v. Fais*, 110 F.4th 201, 205 (3d Cir. 2024). One of those key principles is that the dormant Commerce Clause "prohibits the enforcement of state laws driven by . . . economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* (cleaned up). The Court stated "[t]his antidiscrimination principle lies at the very core of our dormant Commerce Clause jurisprudence." *NPPC II*, 598 U.S. at 369 (internal quotation omitted). Importantly, this portion of *NPPC II* was a unanimous opinion, joined by all nine Justices. Below, the Ninth Circuit failed to recognize

this key holding, and thus failed to respect the expressed viewpoints of the majority of Justices on the matter. The Court should grant this petition to effectuate the majority views of this Court.

1. Unlike petitioner's case here, *NPPC II* did not involve any allegations or claims of direct discrimination under the dormant Commerce Clause. In *NPPC II*, the operative complaint only brought two claims under the dormant Commerce Clause: "Impermissible Extraterritorial Regulation" and "Excessive Burden on Interstate Commerce in Relation to Putative Local Benefits." *Complaint*, *NPPC v. Ross*, 2019 WL 6683174 (S.D. Cal. Dec. 5, 2019). However, this Court rejected both arguments, primarily because the petitioners had "conced[ed] that Proposition 12 imposes the same burdens on in-state producers that it imposes on out-of-state ones." *NPPC II*, 598 U.S. at 370. This concession colored the entire lawsuit from the get-go, particularly with respect to the *Pike* claim. As the Court opined, this concession meant that the "petitioners begin in a tough spot" and that the argument did not have "an auspicious start." *Id.* at 370, 380.

Contrast this with petitioner's lawsuit here. Allegations of express discrimination—meaning disparate impact on in-state versus out-of-state commerce—formulate the heart of IPPA's dormant Commerce Clause claims that challenge the constitutionality of Proposition 12. Stated summarily, these allegations are predicated upon (1) California's attempt to level the playing field between out-of-state farmers and in-state farmers, due to the earlier impact of Proposition 2; and (2) the unfair lead time that California gave their own in-state farmers to become compliant with Proposition 12. These

arguments were simply not addressed in *NPPC II*, because they were never raised in *NPPC II*—indeed, the petitioners there had foregone any such theory when they had conceded there was no disparate impact as a result of Proposition 12 on out-of-state commerce. *Id.* at 370–71 (emphasizing that the petitioners had failed to allege that "California's law seeks to advantage in-state firms or disadvantage out-of-state rivals."). There is no such concession here.

And these allegations of discrimination dovetail with the "antidiscrimination" principle articulated in *NPPC II* by this Court. Instead of squaring the analysis with these principles as articulated in *NPPC II* via a unanimous holding, the Ninth Circuit turned a blind eye. For this reason alone, the Court should grant the petition.

2. The Ninth Circuit also failed to effectuate the rulings of a majority of Justices with respect to petitioner's claim under *Pike*. Irrespective of the allegations of direct discrimination, the Ninth Circuit also failed to recognize that the majority of justices in *NPPC II* validated a *Pike* claim just like the one in this case. There are two majority views critical to this analysis. First, *Pike* is still good law; second, a challenge to Proposition 12 states a claim under *Pike*.

As to the first question, there is no doubt that a majority of Justices held that *Pike* remains good law. In concurrence, Justice Sotomayor and Justice Kagan reasoned that the complaint in *NPPC II* failed to state a *Pike* claim, "not because of any fundamental reworking of that doctrine," but because the complaint had failed "to allege a substantial burden on interstate commerce." *Id.* at 391–92 (Sotomayor, J., concurring in part). And four other Justices—Chief Justice Roberts, Justice Alito, Justice Kavanaugh, and

Justice Jackson—similarly held that "it is possible to balance benefits and burdens under the approach set forth in *Pike*." *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part). In other words, there was a six-Justice majority that "affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." *Id.* at 598 U.S. at 403 (Kavanaugh, J., concurring in part and dissenting in part).

As for the second question—whether the plaintiffs in *NPPC II* had adequately alleged a *Pike* claim—there was also a majority of justices that answered in the affirmative. Concurring in part and dissenting in part, Chief Justice Roberts, Justice Alito, Justice Kavanaugh, and Justice Jackson found that the complaint "plausibly alleged a substantial burden against interstate commerce, and would therefore vacate the judgment and remand the case for the court below to decide whether petitioners have stated a claim under *Pike*." *Id.* at 395 (Roberts, C.J., concurring in part and dissenting in part). And Justice Barrett ultimately agreed that the "complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California" and thus would have permitted "petitioners to proceed with their *Pike* claim." *Id.* at 394 (Barrett, J., concurring in part).[2]

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[2] It is true that Justice Barrett also reasoned that the relevant "burdens and benefits were [not] capable of judicial balancing," *Id.* at 394 (Barrett, J., concurring in part), but it was on this point that Justice Sotomayor and Justice Kagan differed, holding instead (alongside the Chief Justice and the three other Justices who joined him) that judges *could* engage in such an analysis. *Id.* at 392–393 (Sotomayor, J., and Kagan, J., concurring in part) ("Yet, I agree with THE CHIEF JUSTICE

Thus, *NPPC II* affirmed the viability of a *Pike* claim, and a majority of Justices actually found that the specific petition in *NPPC II* had alleged a substantial burden sufficient for a *Pike* claim.

If *NPPC's* complaint contained sufficient allegations to state a claim according to a majority of Justices, there is no doubt that petitioner's complaint here does so; the complaint here contains *far more* allegations illustrating that Proposition 12 violates the dormant Commerce clause by failing the *Pike* balancing test. Most critically, of course, are petitioner's claims of direct discrimination, placing IPPA's claim more squarely within what the unanimous Court called "*Pike*'s heartland." *Id.* at 380. These include allegations involving California's attempt to level the playing field between out-of-state farmers and in-state farmers, due to the earlier impact of Proposition 2 and the difference in lead time that California gave their own in-state farmers to become compliant with Proposition 12. In support of these allegations, IPPA detailed how the California legislature enacted Proposition 12 after having recognized that out-of-state farmers were at an advantage as a result of Proposition 2, and how Proposition 12 will impact the Iowa and national pork production industry. App. 102a-17a. Among these impacts include significant and extremely costly changes to farming operations in states like Iowa that have been used for decades; harm to smaller farmers and they will be unable to stay in the industry; and increased capital costs to those farmers who do

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that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency.").

become compliant. App. 113a-17a.

And yet—even despite a majority of Justices ruling that NPPC stated a *Pike* claim, and even despite petitioner here including far more robust allegations—the panel below refused[3] to respect these holdings, and instead applied its previous precedent from *NPPC I* after incorrectly reasoning that "there is no controlling reasoning" from *NPPC II*. App. 7a. This was an error that conflicts with the spirit and letter of *NPPC II*. Recall too that the district court and Ninth Circuit dismissed this case at the *pleading stage*, precluding petitioner from further proving, through concrete evidence, the devastating interstate impacts of Proposition 12. There is no doubt petitioner's complaint included sufficient allegations to allow it that opportunity.

This Court should grant the petition to effectuate the rulings of the majority of Justices.

3. *NPPC II* also did not involve the many other claims at issue here. Petitioner asserted several other claims in addition to its dormant Commerce Clause claims, some of which were specifically raised by members of this Court in *NPPC II*. These new claims include direct discrimination under the dormant Commerce Clause, violations of the Due Process Clause, violations of the Privileges and Immunities Clause, and claims of conflict preemption under the Packers and Stockyards Act.

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[3] Even though she ultimately determined that *NPPC II* was nonbinding, Judge Callahan recognized (in her concurrence) that "a majority of the Justices would find that (i) Proposition 12 is compatible with *Pike* balancing, and (ii) IPPA plausibly alleged that Proposition 12 imposes a substantial burden on interstate commerce." App. 12a.

Again, some of these theories were referenced by several Justices as reflected in *NPPC II*. *See, e.g.*, *NPPC II*, 598 U.S. at 370, 376, 408. But rather than give these theories their due credence when given the opportunity as identified by this Court, the Ninth Circuit simply affirmed their dismissal with cursory reasoning that failed to engage with the specific and robust allegations in the complaint. Rejecting these claims was incorrect as a matter of law, as set forth more fully in Section IV below. And their dismissal only further shows that the panel did not appropriately account for *NPPC II*. This Court should grant this petition for this reason as well.

B. This is an important issue due to the implications on interstate economic warfare.

The Ninth Circuit's opinion is not simply an academic exercise. Instead, the Ninth Circuit's misapplication of law decided a question of vital importance to this Nation's system of federalism and constitutional order. By refusing to recognize the precedential value of *NPPC II* with respect to the dormant Commerce Clause and the limits of one State's power over another, the Ninth Circuit sets the stage for an economic showdown between States that happen to disagree on any number of moral issues. As a result, states will only be emboldened to pass laws that foment interstate discrimination, encourage potential retaliation at worse, and significantly burden and impact interstate commerce at best.

Begin with pure economic interests. Proposition 12 targets, discriminates, and causes substantial economic disruption to developed pig-farming economies in several Midwestern States. So, the incentive in those states is to now pass retaliatory

legislation targeting products or industries robust in California—wine or avocadoes for example—creating a cascading series of tit-for-tat economic harm. This type of economic warfare is precisely what the dormant Commerce Clause operates to prevent.

To make matters even worse, here, California is attempting to justify its enforcement of Proposition 12 based on its own alleged, subjective sense of what is "moral" for pig farming practices. So, can states condition the sale of certain products on the minimum wage that out-of-state companies' pay their workers; or their parental or sick leave policies; or the immigration status of their employees; or the type of health insurance they offer; or the types of healthcare services available to workers? Can the social or moral issue *du jour* just become the subject of sales bans on out-of-state products? This is a slippery slope that this country simply cannot afford. *See NPPC II*, 598 U.S. at 407 (Kavanaugh, J., concurring in part and dissenting in part) ("If upheld against all constitutional challenges, California's novel and far-reaching regulation could provide a blueprint for other States.").[4]

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[4] California has continued to enact laws that have a nationwide impact to set the stage for national policy. For example, on October 7, 2023, California Governor Gavin Newsom signed SBs 253 and 261 into law. *See, e.g.*, Cal. Health & Safety Code §§ 38532(c)(1)(A), (F)(ii)–(iii), 38533(b)(1)(A). SBs 253 and 261 require certain businesses "that do[] business in California" to annually disclose various types of emissions (regardless of location) and disclose climate-related financial risk information. *Id.* §§ 38532(b)(2), (c)(1), 38533(a)(4). *See also* 13 Cal. Code Regs. §§ 1961.3, 1962.2. And more states are following suit. *See* Fla. Stat. Ann. § 500.452 (West) (making it unlawful for any person to manufacture, sell, hold or offer for sale, or distribute cultivated meat in the state).

If the Ninth Circuit was correct and that the Constitution permits such a world, this Court should explain why. This Court should grant the petition.

II. The Court Should Resolve The Circuit Split On How To Interpret Fractured Supreme Court Opinions.

As explained above, the Ninth Circuit—most abundantly apparent in its dismissal of IPPA's *Pike* claim—refused to recognize the rulings of the majority of Justices in *NPPC II*. The panel's error was the product of the Ninth Circuit's erroneous reading and interpretation of *Marks v. United States*, 430 U.S. 188 (1977). Specifically, the Ninth Circuit ruled that it was bound by its own earlier decision in *NPPC I*, because, according to the panel, when this Court decided *NPPC II*, "a majority of the Justices . . . did not agree upon a 'single rationale' and there is no opinion in that case that 'can reasonably be described as a logical subset of the other.'" App. 6a (quoting *United States v. Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc)). But by refusing to consider the dissenting votes to determine the majority ruling from *Ross*, the Ninth Circuit deepened an intractable and hopeless split among the circuits with respect to how to interpret fractured Supreme Court opinions.

On one side, the Ninth Circuit has now joined the District of Columbia and several other circuits in holding that such votes may not be counted. *See King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."); *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013) (quoting *United States v. Eckford*, 910

F.2d 216, 219 n.8 (5th Cir. 1990)); *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 991 F.3d 740, 744–45 (7th Cir. 2021), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) ("Dissenting opinions do not count in the *Marks* assessment."); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("In our view, *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented.").

But on the other side, the First, Third, Fourth, and Eighth Circuits have held that dissenting votes may count towards determining the majority view on a principle of law from a fractured Supreme Court opinion. *See United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) ("[W]e do not share the reservations of the D.C. Circuit about combining a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices."); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) ("[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue."); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) (concluding that lower courts are "bound to follow the five-four vote against the takings claim in [a case]" where four of those five votes were provided by the dissenters); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

This is a hopeless split[5] among the circuits. And

[5] Several other circuits have cannibalized portions of both approaches, depending on the particular case; it hardly can be

several Justices have endorsed counting dissents in determining the Court's holding in a splintered opinion. As the First Circuit noted, several Justices "have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced." *Johnson*, 467 F.3d at 65 (citing *Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions and citing *Marks* to identify the test that lower courts should apply); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Kennedy, J.) (analyzing *Vieth v. Jubelirer*, 541 U.S. 267 (2004) to find that agreement among one concurring and four dissenting Justices establishes majority support for a legal proposition); *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001) (Scalia, J.) (noting the agreement of five Justices who joined plurality and various dissenting opinions)). Even in *NPPC II* itself, Justice Kavanaugh determined that "on the question of whether to retain the *Pike* balancing test in cases like this one, THE CHIEF JUSTICE's opinion reflects the majority view because six Justices agree to retain the *Pike* balancing test:

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said that there is any one uniform approach in these circuits. *See, e.g.*, *United States v. Guillen*, 995 F.3d 1095, 1119 (10th Cir. 2021); *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013); *compare United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 72-25 (7th Cir. 2006) (counting votes from the dissent to determine which of the concurring opinions should control under *Marks*) *with Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 991 F.3d 740, 744-45 (7th Cir. 2021), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) ("Dissenting opinions do not count in the *Marks* assessment.").

THE CHIEF JUSTICE and Justices ALITO, SOTOMAYOR, KAGAN, KAVANAUGH, and JACKSON." *NPPC II*, 598 U.S. at 407 n.3 (2023) (Kavanaugh, J., concurring in part and dissenting in part). Again, the Chief Justice's opinion was the lead *dissent*.

This issue has been a long time coming. *See Nichols v. United States*, 511 U.S. 738, 745–46 (1994) (stating that the *Marks* inquiry "has so obviously baffled and divided the lower courts that have considered it."). And it has only become more critical due to the increasing number of splintered decisions. *See, e.g.*, Ryan C. Williams, Questioning *Marks*: Plurality Decisions and Precedential Constraint, 69 Stan. L. Rev. 795, 799 (2017); *see also* Nina Varsava, The Role of Dissents in the Formation of Precedent, 14 Duke J. Cont. L. & Pub. Pol'y 285, 291 (2019). It is time for the Court to squarely address it.

III. This Case Presents An Ideal Vehicle To Answer Both Issues.

This case presents an ideal vehicle to address these issues. This Court is already familiar with the law at issue, Proposition 12, and petitioner's allegations fill the specific gaps identified in *NPPC II*. Further, this case is a particularly a good vehicle to address the *Marks* question, given the unique nature of the *NPPC II* opinion and the fact that the issue was the determining factor in the Ninth Circuit's adjudication of the appeal.

A. This case fills the gaps identified by this Court in *NPPC II*.

Petitioner's case, although presenting different claims, involves the same statute that this Court analyzed in *NPPC II*. And it involves several claims that were identified in *NPPC II* as having been

conceded away, as well as claims that were potentially viable, such as a direct discrimination claim under the dormant Commerce Clause, a *Pike* claim that five Justices validated, and a claim under the Privileges and Immunities Clause. *See NPPC II*, 598 U.S. at 409 (2023) (Kavanaugh, J., concurring in part and dissenting in part) ("Under this Court's precedents, one State's efforts to effectively regulate farming, manufacturing, or production in other States could raise significant questions under that Clause.").

But that is not all; the case below comes to this Court also on a motion to dismiss, and the issues presented are thus clear questions of law, ripe for this Court to consider. For these reasons, this case presents an ideal vehicle by which this Court can resolve these important issues.

B. Providing guidance on the *Marks* analysis with respect to *NPPC II* will resolve the circuit split.

With respect to the *Marks* analysis, this case presents a particularly good vehicle by which the Court can resolve the issue. The *NPPC II* decision is as fractured as they come. All nine Justices participated in the case and split in a variety of ways across numerous issues. Furthermore, the degree of overlap between the various opinions is rare and would thus serve as a specific guidepost and template for lower courts in future cases. By way of reiteration, in the *NPPC II* opinion, Justice Gorsuch and Justice Thomas, joined by Justice Sotomayor and Justice Kagan, held that the complaint did not adequately allege a substantial burden within the meaning of a *Pike* claim. On the other hand, a five-Justice dissenting "majority"—Chief Justice Roberts, Justice Alito, Justice Kavanaugh, Justice Jackson, and

Justice Barrett—concluded the opposite: the complaint did adequately allege a substantial burden for purposes of pleading a *Pike* claim. However, Justice Barrett joined Justice Gorsuch and Justice Thomas in holding that judges could not engage in the *Pike* analysis in the first place; but Justice Sotomayor and Justice Kagan disagreed instead (alongside the Chief Justice and the three other Justices who joined him) that judges could engage in such an analysis. In light of these overlapping opinions, the Court can decide what principles of law are binding, if any, that stem from dissenting opinions.

Further, there is no doubt that the Ninth Circuit made its decision based solely on this issue, particularly with respect to the *Pike* claim. The panel majority specifically rejected such an approach that has included dissents, while Judge Callahan ultimately held that *NPPC I* still controlled over *NPPC II*. Compare App. 7a ("The concurrence's analysis of *NPPC II* disregards the settled rule that dissents may not be considered when interpreting the holding of a splintered Supreme Court decision.") with App. 14a (finding that "a majority of the Court does indeed find that the burdens and benefits of Proposition 12 are capable of judicial balancing" but reasoning that the panel was still bound by *NPPC I*). Thus, resolution of this question would squarely resolve the issues identified by the panel below without facing interference from other issues.

IV. The Ninth Circuit Erred In Dismissing The Complaint On The Merits.

Finally, the Court should grant this petition because the Ninth Circuit erred on the merits when dismissing each claim.

A. Direct Discrimination

In *NPPC II*, when affirming dismissal of NPPC's complaint, the Court explained that a substantial amount of the Court's dormant Commerce Clause precedents invalidate regulations that are discriminatory (i.e., benefit home state commerce at the expense of other states), and thus it was an awkward fit where NPPC had not only declined to pursue such a claim, but had in fact conceded that Proposition 12 was nondiscriminatory. *NPPC II*, 598 U.S. at 370–71 ("[P]etitioners disavow any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones.").

But the precise opposite is true here. In contrast to NPPC's concession, IPPA's core claim expressly alleges that Proposition 12 is discriminatory, alleging that Proposition 12 inflicts a disparate impact between in-state and out-of-state farmers, period. This discrimination was effectuated by California's choice to first regulate its *own* pork industry via Proposition 2; but then, once California learned of the negative, practical effect of limiting in-state pork farmers' ability to compete with out-of-state farmers, it chose to regulate out-of-state industry via Proposition 12—all while giving out-of-state farmers several years less time to become compliant. Specifically, Proposition 2 gave in-state farmers six years to come into compliance with its turnaround provisions. Cal. Health & Safety Code § 25990. Contrast that with Proposition 12, which gave out-of-state farmers less than six weeks to comply with the turnaround requirements (and just three years for the square-footage requirements). *Id.* This shortchanging in "lead time," as alleged by IPPA, meant that

California farmers had many additional years to bring themselves into compliance, allowing them to spread out compliance costs over a longer period of time than what was afforded to out-of-state farmers. App. 96a, 102a. This is blatant discrimination. *See N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1028 n.7 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020) (reasoning that any difference in lead in time for compliance with Proposition 12 could indicate discriminatory effect on out-of-state commerce).

Needless to say, explicitly targeting out-of-state farmers under the guise of leveling the playing field is an excuse that doesn't work here and has concrete, discriminatory effects which were pled and argued below. App. 113a-17a, 132a-35a. California was the one who set the regulatory market—and the in-state farmers' place in it—prior to the enactment of Proposition 12. It has no right to then directly discriminate against out-of-state farmers to temper the economic ill effects it foisted upon its own farmers—and with significantly less time to become compliant. This type of "simple economic protectionism" renders the law unconstitutional, and the Ninth Circuit was incorrect in ruling otherwise.

B. *Pike* Claim

The Ninth Circuit also erred, at the very least, in holding that petitioner failed to allege that Proposition 12 impermissibly burdens interstate commerce in violation of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Even if Proposition 12 served a legitimate state interest—which it does not—the impacts on interstate commerce are clearly excessive and outweigh any such interest. IPPA alleged, at length, the devastating impact that Proposition 12 has on out-of-state farmers in connection with California's

attempt to level the playing field between out-of-state and in-state farmers, due to the earlier impact of Proposition 2 and the difference in lead time that California gave their own in-state farmers to become compliant with Proposition 12. App. 102a-17a. Again, IPPA detailed how Proposition 12 will create significant and extremely costly changes to farming operations in states like Iowa that have been used for decades; harm to smaller farmers and they will be unable to stay in the industry; and increased capital costs to those farmers who do become compliant. App. 113a-17a.

Again, this was the claim that a majority of this Court explicitly condoned; thus, the Ninth Circuit erred in rejecting it.

C. Due Process Claim

The Ninth Circuit also erroneously dismissed IPPA's claim under the Due Process Clause. Proposition 12's criminalized conduct—"engag[ing] in the sale [of non-compliant pork meat] within the state"— failed to give time to out-of-state farmers to comply before going into effect and is unconstitutionally vague. Cal. Health & Safety Code § 25990(b)(2). For out-of-state farmers only, the criminalized turnaround requirements went into effect *immediately*. This not only did not allow time for out-of-state farmers to comply, but the pork en-route to California after the effective date was already in process prior to the enactment of the statute. Farmers and processors had no ability to stop it, yet knew the pigs and processed pork was not compliant, leaving them in immediate violation of a criminal statute.

Further, the statute does not define what "engaged in the sale" means. And as the plain meaning of

"engage" is incredibly broad, meaning "to employ or involve oneself," to "take part in," or to embark on," *Engage*, BLACK'S LAW DICTIONARY (11th ed. 2019). Proposition 12 is unclear at best and unlimited at worst, conceivably applying to anyone within the pork supply chain, who knows they are involved or "engaged" with processors who ship to California. Furthermore, Proposition 12 applies to those "knowingly" engaging in such a sale. Because it is unclear what "engaging in a sale" means, it is impossible to determine whether one "knows" he is engaging in such a sale when the farmer, or others involved in the chain, have knowledge that the processor is selling to California and could include parts of the pigs received from the farmer. A farmer's pig is processed and distributed across multiple states, with California being the largest market.

The vagueness of the criminal statute is clear by the fact that Proposition 12 *mandated* that "the Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate clarifying regulations for the implementation of this act by September 1, 2019." Cal. Health & Safety Code § 25993(a). Yet, Proposition 12 regulations were due *after* the effective date of the turnaround provisions. For the square foot requirements, Proposition 12 mandated two years and four months between the time California was supposed to pass final regulations implementing Proposition 12's square footage requirements, and when those requirements became effective on December 31, 2021. App. 137a. However, California failed to timely promulgate any regulations at all in that timeframe. App. 137a-38a. This disregard of both California law and the Due Process Clause failed to provide actual time to comply before

placing farmers and processors in immediate violation of the statute, and failed to provide individuals of ordinary intelligence a reasonable opportunity to know what conduct is actually prohibited, so they could act to avoid criminal exposure, entrapping them in immediate violation of the criminal statute. The Ninth Circuit erred in holding otherwise by dismissing this claim.

D. Privileges and Immunities Clause

The Privileges and Immunities Clause "prevent[s] State[s] from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State." *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 383 (1978). IPPA alleged and argued that Proposition 12 runs afoul of the Privileges and Immunities Clause because it impairs the right and ability of out-of-state farmers to do business within California and was designed to take away an economic advantage that out-of-state farmers had by not being required to comply with the turnaround provisions to sell pork in California. App. 128a-30a. These allegations are exactly the type of harm the Clause is intended to preclude. *NPPC II*, 598 U.S. at 370 (reasoning that the antidiscrimination principle commonly associated with the dormant Commerce Clause is enshrined in the Privileges and Immunities Clause); *see also id.* at 409 (Kavanaugh, J., concurring in part and dissenting in part) ("Under this Court's precedents, one State's efforts to effectively regulate farming, manufacturing, or production in other States could raise significant questions under that Clause."). This is precisely what IPPA alleged below, and thus the Ninth Circuit erred in dismissing the claim at the pleading stage.

E. Packers and Stockyards Act

With respect to the Packers and Stockyards Act ["the PSA"], Proposition 12 is preempted because it is impossible to comply with both Proposition 12 and the PSA, or at least Proposition 12 stands as an obstacle to complying with the PSA. The PSA prohibits any packer or swine contractor from providing any preference to a particular locality and from subjecting any particular locality to a "disadvantage" in the sale of meat. *See* 7 U.S.C. § 192(b). But Proposition 12 directly requires packers or wholesalers to favor in-state localities and to disadvantage out-of-state localities who have not had as much time to come into compliance with the turnaround provisions or could not meet the square footage requirements deadline. And at the very least, even if packers could comply with both state and federal law, Proposition 12 creates obstacles to accomplishing the PSA's objectives because it requires wholesalers to favor in-state farmers as alleged in the suit. And if there was any dispute about the impact of Proposition 12 and the associated conflict generated within the PSA, a motion to dismiss was not the appropriate vehicle to do so.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 25, 2024]

No. 22-55336
D.C. No. 2:21-cv-09940-CAS-AFM

IOWA PORK PRODUCERS ASSOCIATION,

Plaintiff-Appellant,

v.

ROB BONTA, in his official capacity as Attorney General of California; *et al.*,

Defendants-Appellees,

and

HUMANE SOCIETY OF THE UNITED STATES; *et al.*,

Intervenor-Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted January 9, 2024
Pasadena, California

MEMORANDUM[*]

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: CALLAHAN, CHRISTEN, and BENNETT, Circuit Judges.

Concurrence by Judge CALLAHAN.

Appellant Iowa Pork Producers Association ("IPPA") appeals the district court's order denying IPPA's motion for a preliminary injunction and its order granting Appellees' motion to dismiss. Because the parties are familiar with the facts, we do not recount them here. "We review de novo an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's dismissal of IPPA's complaint.[1]

1. We begin with IPPA's claim that Proposition 12 unconstitutionally discriminates against interstate commerce in violation of the dormant Commerce Clause. "If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

On its face, Proposition 12 does not discriminate against out-of-state pork producers. As codified, Proposition 12 provides that any "business owner or

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[1] "Because we affirm the district court's Rule 12(b)(6) dismissal of the complaint, . . . we need not separately address the question whether the denial of the [plaintiff's] motion for a preliminary injunction was proper." *See Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1291 n.1 (9th Cir. 2015).

operator," regardless of their location, "shall not knowingly engage in the sale within" California of any pork meat derived from a breeding pig "confined in a cruel manner." Cal. Health & Safety Code § 25990(b). Where a statute—like Proposition 12—bans the sale of a product, regardless of whether the product is intra-state or interstate in origin, it is not discriminatory. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013) (holding that a statute banning the sale of any product resulting from force feeding a bird, regardless of the product's origin, was not discriminatory). Because the statute "treats all private companies exactly the same," it "does not discriminate against interstate commerce." *Id.* (alteration accepted) (quoting *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007)).

Nor has IPPA adequately alleged that Proposition 12 has a discriminatory purpose. IPPA asserts that California enacted Proposition 12 to "avoid negative fiscal impacts to the State of California." But Proposition 12's stated purpose "is 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." Prop. 12, § 2 (2018) (emphasis added). This statement reflects a concern about fiscal impacts associated with foodborne illness, and cannot support an inference that California sought to discriminate against out-of-state producers by enacting Proposition 12.[2]

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[2] IPPA also alleges the California Department of Food and Agriculture ("CDFA") "explicitly noted that, unless out-of-state farmers are required to comply with the confinement

As for discriminatory effects, IPPA notes that Proposition 12 was enacted against the backdrop of California's Proposition 2, which prohibits in-state pork producers from confining breeding pigs in conditions where they cannot turn around. Prop. 2, § 3 (2008). IPPA argues California imposed similar restrictions on out-of-state pork producers by enacting Proposition 12 and contends this had the effect of benefiting in-state producers who had been competitively disadvantaged by Proposition 2. IPPA also alleges that Proposition 2 gave in-state producers six years to comply with its turnaround provisions, whereas Proposition 12 gave producers less than six weeks to comply with its turnaround provisions and only three years to comply with its square footage requirements. *See* Cal. Health & Safety Code § 25991(e).

Contrary to IPPA's characterization, Proposition 12 did not extend the provisions of Proposition 2 to out-of-state producers. Proposition 2 imposed turnaround provisions on all breeding pigs located in California, regardless of where pork derived from those pigs might ultimately be sold. Prop. 2, § 3 (2008). Proposition 12, by contrast, requires all pork producers who *sell* pork meat in California to comply with certain confinement standards, including turnaround provisions and square footage requirements. *See* Cal. Health & Safety Code § 25991(e). Although in-state producers

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requirements as well, '[i]n-state farms will find it more costly to compete with farms outside of the state when selling . . . whole pork meat to an out of state buyer compared to farms located in states that do not have the same animal confinement standards as described in the Act.'" But rather than revealing protectionist intent, this statement suggests that Proposition 12 may place in-state farms at a competitive disadvantage with respect to sales to out-of-state buyers.

may have felt less impact from Proposition 12 because they were already subject to the turnaround provisions of Proposition 2, that does not demonstrate that Proposition 12 discriminates against out-of-state producers. *See Eleveurs*, 729 F.3d at 948 (noting that a statute is not discriminatory "even when only out-of-state businesses are burdened because there are no comparable in-state businesses" (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119-20, 125 (1978))). The district court properly concluded that IPPA did not adequately allege discrimination under the dormant Commerce Clause.[3]

2. We next address IPPA's claim that Proposition 12 is unconstitutional under the dormant Commerce Clause because it imposes an excessive burden on interstate commerce. A statute is unconstitutional under the dormant Commerce Clause where "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Rocky Mountain*, 730 F.3d at 1087-88 (alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

We previously considered and rejected such a challenge to Proposition 12 in *National Pork Producers Council v. Ross (NPPC I)*, 6 F.4th 1021 (9th Cir. 2021).

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[3] To the extent IPPA relies on the CDFA's answers to Frequently Asked Questions, those answers make no distinction between in-state and out-of-state businesses. *See Animal Care Program*, CDFA (Mar. 5, 2021), www.cdfa.ca.gov/AHFSS/pdfs/Prop_12_FAQ_March_2021.pdf. IPPA also contends that California's implementing regulations, which were not presented to the district court, enhance the discriminatory effects of Proposition 12. But we may not consider matters outside the complaint when reviewing a motion to dismiss. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

The Supreme Court later affirmed in a fractured decision. *See Nat'l Pork Producers Council v. Ross (NPPC II)*, 598 U.S. 356 (2023). We conclude that *NPPC I* remains controlling in this circuit because a majority of the Justices in *NPPC II* did not agree upon a "single rationale" and there is no opinion in that case that "can reasonably be described as a logical subset of the other." *United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (en banc); *see also Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).[4]

In *NPPC II*, a majority of the Court held that the plaintiff's challenge to Proposition 12 fell "well outside *Pike*'s heartland," but did not agree on the underlying reasoning. 598 U.S. at 380; *id.* at 377-89. A four-justice plurality concluded that the plaintiff had not met its initial burden of showing the "challenged law imposes 'substantial burdens' on interstate commerce." *Id.* at 383, 386-87 (plurality opinion). Three justices separately reasoned that the case demanded a comparison of "incommensurable" goods, which is "a task no court is equipped to undertake." *Id.* at 382 (three-justice opinion).

Because the Court did not agree upon a single rationale for affirming, and neither of the two rationales is a "logical subset" of the other, "only the specific result [in *NPPC II*] is binding on lower federal courts." *Davis*, 825 F.3d at 1022; *see also Ballinger v. City of Oakland*, 24 F.4th 1287, 1295 (9th Cir. 2022) (recognizing that, "when determining the holding of a fractured Supreme Court decision[,] only the opinions of those who concurred in the judgment[] can be

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[4] Indeed, IPPA conceded at oral argument that our court is bound by *NPPC I*.

considered").[5] Because only the result in *NPPC II* is binding, and there is no controlling reasoning, we remain bound by our decision in *NPPC I*.

Under *NPPC I*, a plaintiff "must, at a minimum, plausibly allege the ordinance places a significant burden on interstate commerce." 6 F.4th at 1032 (citation and internal quotation marks omitted). The plaintiffs in *NPPC I* could not satisfy that burden—which is met "only in rare cases"—because "laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce." *id.*; *see also id.* at 1033.

Here, as in *NPPC I*, IPPA argues that complying with Proposition 12 will require costly alterations to its infrastructure and substantial new training and labor.[6] *See id.* at 1033 (noting that the "crux" of the

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[5] The concurrence's analysis of *NPPC II* disregards the settled rule that dissents may not be considered when interpreting the holding of a splintered Supreme Court decision. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (limiting review to opinions of "those Members [of the Court] who concurred in the judgments" (citation omitted)). In our 2016 en banc decision in *Davis*, we "assume[d] but [did] not decide that dissenting opinions may be considered in a *Marks* analysis," and noted that doing so would not have changed our conclusion in that case. 825 F.3d at 1025; *see also id.* at 1025 n.12 ("We emphasize here . . . that we do not decide that issue."). Although we left the question unresolved in *Davis*, we squarely decided it in *Ballinger*, where we rejected the argument that a controlling rationale could be derived from a concurrence and a four-justice dissent. *Ballinger*, 24 F.4th at 1295 (holding that "[d]issenting opinions cannot be considered when determining the holding of a fractured Supreme Court decision"); *see also Miller*, 335 F.3d at 900.

[6] To the extent IPPA argues that Proposition 12 has an "impermissible extraterritorial effect," the *NPPC I* court already concluded that "state laws that regulate only conduct in the state,

plaintiffs' allegations was that "the cost of compliance with Proposition 12 makes pork production more expensive nationwide"). But "[t]he 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." *Id.* at 1032 (citation omitted). Moreover, "a non-discriminatory regulation that 'precludes a preferred, more profitable method of operating in a retail market'" does not "place a significant burden on interstate commerce," even if it inflicts "heavy burdens on some out-of-state sellers." *Id.* (citation omitted). We conclude the district court properly dismissed IPPA's *Pike* claim.

3. We next consider IPPA's as-applied vagueness challenge. A regulation "is unconstitutionally vague if it does not give 'a person of ordinary intelligence fair notice of what is prohibited.'" *Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Where criminal sanctions are involved, as is the case here, Cal. Health & Safety Code § 25993(b), "the standards of certainty [are] higher than" in the case of civil sanctions. *Maldonado v. Morales*, 556 F.3d 1037, 1045 (9th Cir. 2009) (citation omitted).

Section 25990(b) makes it unlawful to "knowingly engage in the sale" within California of non-compliant pork meat. The statute further provides that "a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by [the statute]." Cal. Health & Safety Code § 25991(o).

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including the sale of products in the state, do not have impermissible extraterritorial effects." 6 F.4th at 1029.

IPPA first argues that "engage in" is unconstitutionally vague because it could apply to anyone in the supply chain. We disagree.

The term "engage in" is widely used and readily understood. Generally, to "engage in" an activity means to "take part in" that activity. *See, e.g.*, *Engage*, Black's Law Dictionary (11th ed. 2019) ("To employ or involve oneself; to take part in; to embark on"). IPPA insists that entities upstream of a sale in California might be deemed to have "engaged in" that California sale. Upstream entities, by virtue of being upstream, are not engaging in the ultimate sale in California; rather, they are engaging in earlier, separate sales.[7]

IPPA also makes the derivative argument that "knowingly," as used in § 25990(b), is impermissibly vague because one cannot *know* whether one is "engaging in a sale" in California. This argument is premised upon IPPA's contention that the phrase "engaging in" is unconstitutionally vague. Because "engaging in" a California sale is not unconstitutionally vague, however, one would understand what it means to "know" one is taking part in such a sale. *See* Cal. Penal Code § 7 (to act "knowingly" is to act with "knowledge that the [operative] facts exist"); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."). One knowingly engages in the sale of pork meat in California if one takes part in a

[7] To the extent IPPA challenges the regulations accompanying Proposition 12, those regulations are not identified in the complaint and are therefore not before the court. *See Lee*, 250 F.3d at 688.

sale with knowledge that the buyer will take possession of the pork meat in California.

4. IPPA also raises a facial vagueness challenge. Where a challenged law does not implicate First Amendment rights, a party raising a facial challenge "must demonstrate that the enactment is impermissibly vague in all of its applications." *Hess v. Bd. of Parole & Post-Prison Supervision*, 514 F.3d 909, 913 (9th Cir. 2008) (citation omitted). Because Proposition 12 does not implicate First Amendment rights, it is only facially vague if it specifies "no standard of conduct . . . at all." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1020 (9th Cir. 2013) (citation omitted). Because the statute is sufficiently clear as applied to IPPA, it is not "impermissibly vague in all of its applications." *Hess*, 514 F.3d at 913 (citation omitted).

5. We now address IPPA's claim under the Privilege and Immunities Clause, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. To state a claim, IPPA "must show that the challenged law treats nonresidents differently from residents and impinges upon a 'fundamental' privilege or immunity protected by the Clause." *Marilley v. Bonham*, 844 F.3d 841, 846 (9th Cir. 2016) (en banc) (citation omitted). IPPA cannot do so because Proposition 12 treats all businesses the same by prohibiting all of them from selling non-compliant pork, regardless of where they reside. *See* Cal. Health & Safety Code § 25990. Thus, citizens of other states are on "the same footing" as citizens of California. *See McBurney v. Young*, 569 U.S. 221, 226 (2013) (citation omitted).

6. IPPA contends that Proposition 12 is impliedly preempted by the Packers and Stockyards Act based

on principles of conflict preemption. A federal statute preempts state law where "a party's compliance with both federal and state requirements is impossible," or where "state law poses an obstacle to the accomplishment of Congress's objectives." *Whistler Invs., Inc. v. Depository Tr. & Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008).

The Packers and Stockyards Act makes it unlawful "for any packer or swine contractor" to "[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." 7 U.S.C. § 192(b). IPPA argues that Proposition 12 requires packers and wholesalers to favor in-state pork producers, who have had more time to comply with the requirements of Proposition 12. But Proposition 12 does not require packers or wholesalers to favor or disfavor any pork producers based on their location. It instead prohibits packers and wholesalers from selling non-compliant pork meat in California, regardless of where such meat originates. *See* Cal. Health & Safety Code § 25990. IPPA does not allege that out-of-state producers are unable to comply with California's requirements, such that Proposition 12 requires packers and wholesalers to prefer in-state producers. Thus, Proposition 12 does not render it impossible to comply with the Packers and Stockyards Act, nor serve as an obstacle to its purposes and objectives. AFFIRMED.

[Filed: June 25, 2024]

CALLAHAN, Circuit Judge, concurring in the judgment:

I join the court in holding that we are bound by *National Pork Producers Council v. Ross (NPPC I)*, 6 F.4th 1021 (9th Cir. 2021). As the memorandum disposition explains, none of the opinions in *National Pork Producers Council v. Ross (NPPC II)*, 598 U.S. 356 (2023) "can reasonably be described as a logical subset of the other." *See United States v. Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc). I also find it significant that IPPA concedes that the result in *NPPC I* controls. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) ("[W]e rely on the parties to frame the issues for decision . . . .").

I write separately, however, to note that there may indeed be a "single underlying rationale" in *NPPC II* that would have saved IPPA's *Pike* claim. *See Davis*, 825 F.3d at 1021–22. By my count, a majority of the Justices would find that (i) Proposition 12 is compatible with *Pike* balancing, and (ii) IPPA plausibly alleged that Proposition 12 imposes a substantial burden on interstate commerce. In view of this, were we not bound by *NPPC I*, remand to the district court would have been appropriate "to decide whether [IPPA] stated a claim under *Pike*." *NPPC II*, 598 U.S at 395 (Roberts, C.J., concurring in part and dissenting in part).[1]

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[1] The majority says my analysis "disregards" a rule that courts cannot consider dissents when interpreting fractured Supreme Court decisions. Mem. Disp. n.5. The opposite is true. The last time this court sat en banc to interpret *Marks* it looked at the votes of *all* Supreme Court justices from a fractured decision. *See Davis*, 825 F.3d at 1025 (considering Chief Justice Roberts's dissent in *Freeman v. United States*, 564 U.S. 522 (2011) to explain why "the plurality and dissent do not share common reasoning whereby one analysis is a logical subset of the other.") (internal

Proposition 12 Is Compatible with *Pike* Balancing

To begin, only three Justices believe that Proposition 12 is incompatible with *Pike* balancing. According to Justices Gorsuch, Thomas, and Barrett, weighing the burdens of Proposition 12 on interstate commerce with the moral and health interests of California is "a task no court is equipped to undertake." *NPPC II*, 598 U.S. at 381–82 (Part IV-B).

Six Justices disagree. Chief Justice Roberts—joined by Justices Alito, Kavanaugh, and Jackson—explained that when it comes to Proposition 12, "a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*." *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part.). Justices Sotomayor—joined by Justice Kagan—similarly found Proposition 12 capable of judicial balancing. *Id.* at 392–93 (Sotomayor, J., concurring in part) ("Justice Gorsuch, for a plurality, concludes that petitioners' *Pike* claim fails because courts are incapable of balancing economic burdens against noneconomic benefits. I do not join that portion of Justice Gorsuch's opinion. . . . I agree with the Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency."). *See also id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part) ("In today's fractured decision, six Justices of this

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quotations omitted). The statement in *Ballinger* about *Marks*, which was not "germane to the eventual resolution of [*Ballinger*]," does not change this. *See United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019); *see also United States v. Orozco-Orozco*, 94 F.4th 1118, 1128 (9th Cir. 2024) (explaining that statements regarding "non-litigated issues" cannot be "precedential holdings binding future decisions").

Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations.").

Proposition 12 Imposes a Substantial Burden on Interstate Commerce

Writing separately, Justice Barrett stated that *if* the "burdens and benefits [of Proposition 12] were capable of judicial balancing, I would permit petitioners to proceed with their *Pike* claim." *NPPC II*, 598 U.S. at 393–94 (Barrett, J., concurring in part). According to Justice Barrett, this is because petitioners' complaint alleged that "Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California." *Id.* ("I disagree with my colleagues who would hold that petitioners have failed to allege a substantial burden on interstate commerce."). And, as explained above, a majority of the Court does indeed find that the burdens and benefits of Proposition 12 are capable of judicial balancing.

According to Chief Justice Roberts and the three other Justices who joined him, petitioners in *NPPC II* plausibly alleged that Proposition 12 imposes "a substantial burden against interstate commerce" and that "*Pike* found both compliance costs and consequential market harms cognizable in determining whether the law at issue impermissibly burdened interstate commerce." *Id.* at 398 (Roberts, C.J., concurring in part and dissenting in part). The four Justices further noted that, in addition to alleging compliance costs, petitioners asserted harms "to the interstate market itself." *Id.* at 399–400 ("[D]ue to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California."). Accordingly, they would have held that

"[t]he Ninth Circuit misapplied our existing *Pike* jurisprudence" and that remand was required for the court below to decide petitioners' *Pike* claim. *Id.* at 395.

So, five Justices would have found IPPA plausibly alleged that Proposition 12 imposes a substantial burden on interstate commerce. Only four Justices would conclude that Proposition 12 does not impose "substantial burdens" on interstate commerce. *See* 598 U.S. at 383–87 (Part IV-C) (Gorsuch, Thomas, Sotomayor, Kagan, J.J.).

* * *

Putting this all together, I read *NPPC II* as supporting the following conclusions: (i) that Proposition 12 is compatible with *Pike* balancing, and (ii) that IPPA plausibly alleged Proposition 12 imposes a substantial burden on interstate commerce. However, these conclusions do not derive from opinions that are a "logical subset of the other." *Davis*, 825 F.3d at 1025 ("[T]he plurality and dissent do not share common reasoning whereby one analysis is a logical subset of the other." (internal quotations and citations omitted)). If they did, I would remand for the district court to decide IPPA's *Pike* claim.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: August 6, 2024]

No. 22-55336
D.C. No. 2:21-cv-09940-CAS-AFM

IOWA PORK PRODUCERS ASSOCIATION,

Plaintiff-Appellant,

v.

ROB BONTA, in his official capacity as Attorney General of Californi; *et al.*,

Defendants-Appellees,

and

HUMANE SOCIETY OF THE UNITED STATES; *et al.*,

Intervenor-Defendants-Appellees.

Central District of California, Los Angeles

ORDER

Before: CALLAHAN, CHRISTEN, and BENNETT, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing.

Judge Callahan voted to grant the petition for rehearing en banc. Judge Christen and Judge Bennett

voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition.

The petition for panel rehearing and rehearing en banc (Dkt. 62) is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL'O'

Case No. 2 :21 -cv-09940-CAS *(AFMx)*

Date February 28, 2022

Title Iowa Pork Producers Association v. Rob Bonta et al.

Present: The Honorable CHRISTINA A. SNYDER

Catherine Jeang
Deputy Clerk

Sherri Kleeger
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs:

Willis Wagner
Eldon McAfee
Marnie Jensen

Attorneys Present for Defendants:

Marla Weston
Benjamin Glickman

Proceedings: DEFENDANTS' MOTION TO DISMISS (Dkt. 51, filed on JANUARY 3, 2022)

I. INTRODUCTION

On November 9, 2021, plaintiff Iowa Pork Producers Association ("Iowa Pork") filed suit in Fresno Superior Court against Rob Bonta, the Attorney General of California, Karen Ross, the Secretary of the California

Department of Food and Agriculture ("CDFA"), and Tomas Aragon, the Director of the California Department of Public Health ("CDPH") (collectively, "defendants"). Dkt. 1. Iowa Pork challenges the constitutionality and seeks to prevent the enforcement of California Health & Safety Code § 25990, *et seq.*, which California voters amended through the passage of Proposition 12 on November 6, 2018 ("Proposition 12"). Proposition 12 prohibits the sale of "whole pork meat" from a "covered animal" that was confined in a "cruel manner," or is the immediate offspring of a covered animal that was confined in a cruel manner. Cal. Health & Safety Code § 25900. The statute defines "confined in a cruel manner" to include confining any covered animal in a manner that "prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely," or "[a]fter December 31, 2021, confining a breeding pig with less than 24 square feet of useable floorspace per pig." *Id.* at § 25901.

On November 16, 2021, defendants removed the case to the United States District Court for the Eastern District of California. Dkt. 1. On December 16, 2021, plaintiff filed the operative first amended complaint. Dkt. 23 ("FAC"). Plaintiff's FAC asserts claims for: (1) violation of the Due Process Clause (facial and applied challenge); (2) violation of the Due Process Clause for failure to provide notice of the compliance requirements to those subject to Proposition 12 by September 1, 2019; (3) violation of the Privileges and Immunities Clause; (4) preemption by the Packers and Stockyards Act under the Supremacy Clause; (5) violation of the dormant Commerce Clause; and (6) declaratory relief pursuant to Cal. Code of Civ. P. § 1060. FAC ¶¶ 125-230.

On December 16, 2021, plaintiff filed a motion for a preliminary injunction and alternative motion for a temporary restraining order. Dkt. 24-1 ("PI Mot."). On December 27, 2021, the U.S. District Court for the Eastern District of California, the Hon. Dale A. Drozd presiding, issued an order granting plaintiff's request to transfer the case to the U.S. District Court for the Central District of California. Dkt. 28. On December 28, 2021, the case was assigned to this Court, given that it presides over the related case *North American Meat Institute v. Xavier Becerra et al*, Case No. 2:19-cv-08569-CAS-FFM. Dkt. 39.

On January 3, 2022, defendants filed a motion to dismiss the first amended complaint. Dkt. 51 ("MTD"). On January 4, 2022, the Court set the hearings on plaintiffs motion for a preliminary injunction and defendants' motion to dismiss for February 28, 2022. Dkt. 56. On January 31, 2022, plaintiff filed an opposition to defendants' motion to dismiss. Dkt. 70 ("Opp."). On February 14, 2022, defendants filed a reply. Dkt. 78 ("Reply").

On February 28, 2022, the Court held a hearing.[1] Having carefully considered the parties' arguments and submissions, the Court finds and concludes as follows.

II. BACKGROUND

A. California Voters Enact Proposition 2 (2008)

In the November 2008 election, California voters passed Proposition 2, a ballot initiative intended to "prohibit the cruel confinement of farm animals." FAC ¶ 6. *See* Cal. Prop. 2 at § 2, as approved by voters (Gen. Elec. Nov. 4, 2008). Proposition 2 added §§ 25990-

[1] At oral argument, council for plaintiff submitted on the Court's tentative order.

25994 to the California Health and Safety Code, and took effect on January 1, 2015. *See* Cal. Health & Safety Code §§ 25990-25994. The enacted provisions prohibit California farmers from tethering or confining pregnant pigs, veal calves, and egg-laying hens in a way that prevented them from lying down, standing up, fully extending their limbs, or turning around freely. *Id.* at §§ 25990, 25991(b). Out-of-state pork producers were not subject to these requirements. *Id.* at § 25990(a).

Proposition 2 gave California producers over six years to comply with these confinement requirements, with an effective date of January 1, 2015. *See id.* at § 25990.

B. California Enacts Assembly Bill 1437 (2010)

The California legislature subsequently enacted Assembly Bill 1437 ("AB 1437") in 2010. FAC ¶ 65. AB 1437 added §§ 25995-97 to the Health and Safety Code. These provisions prohibit selling eggs in California that are produced by hens confined under conditions that do not meet the confinement requirements of Proposition 2. *See* Cal. Health & Safety Code §§ 25995-97. AB 1437 did not apply to calves raised for veal or to breeding pigs.

A coalition of states challenged AB 1437's sales ban pursuant to the Commerce Clause of the United States Constitution, but their action was dismissed on jurisdictional grounds. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017). The states then attempted to petition the Supreme Court pursuant to its original jurisdiction over disputes between states, *see* U.S. Const., Art. III, § 2, but were denied. *See Missouri v. California*, No. 22-0-148 (filed U.S. Dec. 4, 2017).

C. California Enacts Proposition 12 (2018)

In the November 2018 election, California voters passed Proposition 12 to amend §§ 25990-93 of the California Health and Safety Code by adding § 25993.1. FAC ¶ 7. *See* Cal. Prop. 12 at § 1, as approved by voters (Gen. Elec. Nov. 6, 2018).

Proposition 12 prohibits the sale in California of "whole pork meat" that a seller "knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of the immediate offspring of a covered animal that was confined in a cruel manner." FAC ¶ 16-21; Cal. Health & Safety Code §§ 25990(b)(2). Confinement in a cruel manner refers to confining an animal in a manner that does not allow the animal to turn around freely, lie down, stand up, or fully extend their limbs (the "Turn Around Requirements"), and also, as of January 1, 2022, to confining a breeding pig in a space with less than twenty-four square feet of usable floorspace per pig (the "Square Footage Requirements"). *Id.* at §§ 25990(a); 25991(e).

The prohibition deems that a sale occurs in California where the buyer takes physical possession" of the meat at issue in California. *Id.* at § 25991(o). Any person who violates Proposition 12's sales prohibition is guilty of a misdemeanor punishable by a fine of up to $1,000 and up to 180 days imprisonment. *Id.* at § 25993(b). Moreover, violating Proposition 12 constitutes unfair competition, as defined by Cal. Bus. & Prof Code § 17200. Cal. Health & Safety Code § 25993(b).

Whereas Proposition 2 allowed in-state producers six years to comply with the Turn Around Requirements, the Turn Around Requirements imposed on out-of-state producers by Proposition 12 went into effect on

December 19, 2018, six weeks after it was passed. FAC ¶ 7.

According to the ballot language, Proposition 12 is intended "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." *See* Cal. Prop. 12 at § 1, as approved by voters (Gen. Elec. Nov. 6, 2018).

The State has yet to issue final regulations implementing Proposition 12 (the "Final Regulations") despite the statutory language stating that "[t]he Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019." *Id.* at § 25993.[2]

On March 5, 2021, the CDFA issued FAQs that stated that pork meat not in compliance with the Square Footage Requirements, but already in inventory or in commerce by December 31, 2021, will remain legal to sell in California. *See* CDFA AHFSS Animal Care Program Prop 12 FAQ, (March 5, 2021), *https://www.cdfa.ca.gov/AHFSS/pdfs/Prop 12 FAQ March 2021.pdf* ("Prop. 12 FAQs"). Plaintiff notes that the Prop. 12 FAQs do not provide any relief to pork producers who are not in compliance with the Turn Around Requirements. FAC ¶¶ 56-57.

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[2] On May 28, 2021, CDFA and CDPH published draft regulations, and on December 3, 2021, the CDFA published amended draft regulations. FAC ¶ 12. Accordingly, the regulations have been proposed and opened for public comment, but remain unfinalized.

D. The North American Meat Institute ("NAMI") Seeks to Enjoin Proposition 12 (2019)

On October 4, 2019, the North American Meat Institute, a national trade association of meat packers and processors, filed suit to challenge the constitutionality and prevent the enforcement of Proposition 12. Their motion for a preliminary injunction was denied by this Court on November 22, 2019, and the denial was affirmed by the Ninth Circuit on October 15, 2020. *See N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1017 (C.D. Cal. 2019), aff'd, 825 F. App'x 518 (9th Cir. 2020). The Supreme Court denied NAMI's petition for writ of certiorari on June 28, 2021. *See N. Am. Meat Inst. v. Bonta*, 141 S. Ct. 2854 (2021).[3]

E. Plaintiff Files Suit, Alleging Constitutional Violations (2021)

Plaintiff filed suit challenging the constitutionality of Proposition 12, and seeking injunctive and declaratory relief, on November 9, 2021. Dkt. 1. Plaintiff is a trade association that represents Iowa pork producers. FAC ¶ 26. Iowa is the leading pork producing state in the United States, and is also the leading state for pork exports. FAC 7 3-4.[4] Plaintiff contends that the economic impact of Proposition 12 will primarily fall on out-of-state producers, and that California cannot

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[3] Likewise, in a separate case, the U.S. District Court for the Southern District of California granted a motion to dismiss a dormant Commerce Clause challenge to Proposition 12. *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1210 (S.D. Cal. 2020), aff'd, 6 F.4th 1021 (9th Cir. 2021).

[4] In 2020, pork sales in Iowa totaled $40.8 billion, and nearly 150,000 jobs in Iowa are associated with the Iowa pork Industry. McGonegle Decl. ¶ 8; *id.*, Ex. A at 7. There are about 24 million total hogs and pigs on Iowa farms. *Id.* ¶ 24.

produce enough pork to meet its own pork demand. *Id.* ¶ 105.

Plaintiff's suit alleges that Proposition 12 is unconstitutionally vague, violates the dormant Commerce Clause, and threatens the nation's food supply. FAC ¶¶ 34-111. Moreover, plaintiff claims that because the vast majority of Iowa pork producers are not currently in compliance with Proposition 12, pork producers "face an imminent and irreparable Hobson's choice of: (1) being forced to harvest their breeding pigs in order to enter the California market, which makes up 13-15% of the national market, (2) ceasing operations, or (3) being forced to forgo one of the largest pork consumption markets in the nation at crippling expense." FAC ¶ 121.

On February 2, 2022, the California Superior Court for the County of Sacramento, in *California Hispanic Chamber of Commerce v. Ross*, Case No. 34-2021-80003765 (Cal. Sup. Ct.), concluded that "the promulgation of joint regulations is a condition precedent to the enforcement of the square-footage requirement governing sales of whole pork meat pursuant to Sections 25990(b)(2) and 25591(e)(3)." *See* Dkt. 79-1 ("Sup. Ct. Ord.") at 17. The case was brought by "a meat processing operation and business associations whose members sell whole pork meat in California," who argued, on state statutory grounds, that "without regulations fleshing out a written certification system supporting a good faith defense pursuant to Section 25993.1,[5] they should not be subject to penalties

[5] Section 25993.1 states that [i]t shall be a defense to any action to enforce subdivision (b) of Section 25990 that a business owner or operator relied in good faith upon a written certification by the supplier that the whole veal meat, whole pork meat, shell egg, or liquid eggs at issue was not derived from a covered animal who

associated with the sale of nonconforming whole pork meat." *Id.* at 13. The court held that Sections 25990(b)(2) and 25591(e)(3), which pertain to the Square Footage Requirement as applied to "business owners and operators . . . knowingly engag[ing] in the sale within the state" of "[w]hole pork meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner," would not be enforceable until 180 days after the Final Regulations are enacted. Sup. Ct. Ord. at 18; *see also* Cal. Health & Safety Code §§ 25990(b)(2), 25591(e)(3).

III. LEGAL STANDARD

A motion pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. Under this Rule, a district court properly dismisses a claim if "there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balisteri v. Pacifica Police Dept*, 901 F.2d 696, 699 (9th Cir. 1988)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[F]actual

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was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner." Cal. Health & Safety Code § 25993.1.

allegations must be enough to raise a right to relief above the speculative level." *Id.*

In considering a motion pursuant to Rule 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). However, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see Moss v. United States Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint *(e.g.*, facts presented in briefs, affidavits, or discovery materials). *In re American Cont'l Corp./Lincoln Say. & Loan Sec. Litig.*, 102 F.3d 1524, 1537 (9th Cir. 1996), *rev'd on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or

alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); *see Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture* Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

IV. DISCUSSION

Defendants challenge each claim plaintiff brings, including claims (1) under the Due Process Clause, (2) under the Privileges and Immunities Clause, (3) for preemption under the Supremacy Clause, (4) under the dormant Commerce Clause, and (5) for declaratory relief, arguing that plaintiff cannot plausibly state a claim on which relief can be granted. The Court addresses each of defendants' argument in turn.

A. Due Process

First, defendants argue that plaintiff cannot establish that Proposition 12 is unconstitutionally vague and violates the Due Process Clause on its face or as applied to plaintiffs members, and that a lack of implementing regulations does not constitutionally invalidate the law. MTD at 1.

1. *Vagueness*

Defendants contend that plaintiff cannot state a claim that Proposition 12 is unconstitutionally vague under the Due Process Clause of the Fourth Amendment.

MTD at 7. "The void-for-vagueness doctrine prohibits the government from imposing sanctions under a criminal law so vague that it fails to give ordinary people fair notice." *Welch v. United States*, 578 U.S. 120, 124 (2016) (internal citations and quotation marks omitted). As such, to satisfy due process, a penal statute must define the criminal al offense to (1) "provide a person of ordinary intelligence fair notice of what is prohibited" and (2) not be "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 533 U.S. 295, 304 (2008).

a) *Facial Challenge*

Defendants assert that, by its own plain text, Proposition 12 gives fair notice to plaintiff, and therefore plaintiff cannot assert a facial Due Process Clause challenge that the statute is unconstitutionally vague. *See Williams*, 533 U.S. at 295. Defendants first rebut plaintiff's assertion that Cal. Health & Safety Code § 25990(b) is unconstitutionally vague because it "does not define what it means for an individual to be 'engaged in' a sale within" California. FAC ¶ 47. Defendants explain that by the statute's plain terms, a violation only occurs if one is engaged in the sale "within the state of California," and that "for purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 25990." MTD at 8 (citing Cal. Health & Safety Code § 25991(o)). Defendants contend that this plain language unambiguously defines the term "engaged in a sale" to mean where the buyer take physical possession.

Defendants next argue that plaintiff cannot allege that "Proposition 12 does not define what it means for facilities to comply with" the applicable animal

confinement requirements because the terms of animal confinement are clearly defined in the statute. MTD at 9; FAC ¶ 47. Citing to Proposition 12, defendants point to language which defines specifically what "fully extending the animal's limbs," "turning around freely," and "usable floorspace" mean. Cal. Health & Safety Code § 25991(e)(1); (s). MTD at 9-10. Defendants note that plaintiff does not explain how these straightforward and well-defined standards—which go so far as to provide how to calculate square footage of floorspace—are unclear to the ordinary person.

Further, defendants contend that Proposition 12 makes clear that moving a breeding pig to a compliant facility before a new gestational period will suffice for the production of compliant whole pork, even if the pig was kept in noncompliant conditions for a past gestational period. MTD at 10-11; FAC ¶ 48. Defendants emphasize the statutory language which states that "the meat of a covered animal . . . or . . . the meat of its immediate offspring who was confined in a cruel manner" cannot be compliant. Cal. Health & Safety Code § 25990(b). Defendants argue that the "immediate offspring" language clarifies that the confinement standards for the offspring of breeding pigs relate to a particular gestation period, and do not include confinement conditions for past gestational periods of the breeding pig. MTD at 11.

Plaintiff argues that it has alleged facts sufficient to state a claim that Proposition 12 is unconstitutionally vague on its face because Proposition 12 fails to place plaintiff's members on notice of how they can avoid criminal prospection and fails to give them sufficient time to comply. Opp. at 2. Plaintiff reiterates its allegations from its complaint, arguing that defendants do not direct the Court to any definition of "engaged in" a

sale within the State of California, and that defendants' interpretation of what "engaged in a sale" means in its motion is insufficient to provide plaintiff with notice. Opp. at 4-5; FAC ¶¶ 42, 46.

Further, plaintiff argues that the Act fails to give adequate notice as to how pork producing facilities may comply with both the Turn Around Requirements and the Square Footage Requirements, leading to arbitrary enforcement. FAC ¶ 47; Opp. at 8. Plaintiff notes that in March 2021, the CDFA published regulatory guidance which stated that pork from pigs already born into inventory prior to January 1, 2022, can be sold after January 1, 2022. Plaintiff contends that because this guidance only concerns the Square Footage Requirements and is silent as to the Turn Around Requirements, it causes confusion among plaintiff's members and others regarding whether pork meat that was not in compliance with the Turn Around Requirements as of December 31, 2021, but was already in inventory or commerce, can be sold into California. Opp. at 9. Another area of vagueness plaintiff emphasizes is that the Act fails to provide adequate notice as to whether the confinement requirements apply to the life of the breeding pig or whether moving a breeding pig to a new confinement will suffice. *Id.*

In the context of a facial challenge on constitutional vagueness grounds, a plaintiff confronts a "heavy burden" in asserting its claim. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) ("[f]acial invalidation 'is, manifestly, strong medicine' that has been employed by the Court sparingly and only as a last resort') (internal citations omitted).

The Court finds that the plain language of the statute is clear, and plaintiff does not plausibly state a facial

Due Process Claim violation. Indeed, in the complaint, plaintiff appears to understand the plain meaning of Proposition 12's compliance requirements, explaining that it realizes that removing pigs from an enclosure is one means of providing more square footage. FAC ¶ 99. Further, the statute clearly defines "engaged in a sale" under Proposition 12 to mean "when a buyer takes physical possession" of a covered item in California. Cal. Health & Safety Code § 25990(b).

Plaintiff's argument that the statute is vague as to whether the offspring of a breeding pig that was not in compliance with the confinement requirements prior to January 1, 2022, but came into compliance on the aforementioned date, can be sold in California, is foreclosed by the California Department of Food and Agriculture's FAQ published on March 5, 2021. *See* Prop. 12 FAQs. The FAQ clarifies:

> 4. Will inventory of [] pork meat already in stock prior to January 1, 2022 need to be discarded if this covered product originated from animals not raised according the confinement standards of [] twenty-four square feet per breeding pig? No. The definition of "confined in a cruel manner" changes at the end of the day on December 31, 2021 for egg-laying hens and breeding pigs. Therefore, [] pork meat already in inventory or commerce on December 31, 2021 will still be legal to sell in California.
>
> 7. For covered pork product to be compliant after Jan 1, 2022, does the farm of origin have to house breeding pigs with a minimum of twenty-four square feet per pig at the time of breeding (February 2021)? Per the Proposition 12 statutes, the definition of

> "confined in a cruel manner" changes at the end of the day on December 31, 2021 for breeding pigs. Therefore, covered product and animals in inventory would be considered compliant if born before this effective date.

Id.

Indeed, the FAQ clarifies that the definition of "confined in a cruel manner" changes on January 1, 2022, and as such if a breeding pig is moved to a space that complies with the Square Footage Requirements by January 1, 2022, any non-compliant conditions the breeding pig was subject to previously would not be considered "cruel" because the Square Footage Requirements had not yet gone into effect. Further, plaintiffs argument that the FAQs only provides clarity as to the Square Footage Requirements and not for the Turn Around Requirements is unsupported by the plain text of the statute. There should be no confusion among plaintiff's members regarding the Turn Around Requirements after January 1, 2022, because plaintiff's members were required to be in compliance with the Turn Around Requirements since 2018.

Moreover, in its *Amicus Curiae* brief filed in support of defendants, Niman Ranch, a network of independent family farmers who raise pigs, notes that it is fully compliant with Proposition 12. Dkt. 80 ("Niman *Amicus").* Niman Ranch's statements that "compliance is straightforward and economically feasible," and that Niman Ranch and other "industry leaders have already implemented and satisfied compliance requirements" weakens plaintiffs vagueness argument. *Id.*

b) *"As Applied" Challenge*

Defendants contend that plaintiffs as applied Due Process Clause challenge that the statute is uncon-

stitutionally vague fails because plaintiff makes no allegation that the law has ever been applied to plaintiffs members. MTD at 12-13. Because plaintiff does not provide details of any particular member's noncompliance, defendants argue these generalized allegations are insufficient to support an as applied challenge. *Id.*

Plaintiff argues that the same allegations that support plaintiff's facial due process challenge, also support plaintiffs as applied challenge. Opp. at 8. Specifically, plaintiff argues that as applied to its members' conduct in pig production, Proposition 12 is unconstitutionally vague because its members face a threat of imminent criminal prosecution. Opp. at 9. Plaintiff emphasizes that, contrary to defendants' contention, the fact that no one has been prosecuted within plaintiff's organization does not defeat its as applied challenge because Proposition 12 either forces its members to risk criminal prosecution if their pork is sold in California, forego one of the largest pork consumption markets in the nation, or harvest their breeding pigs in order to enter the California market. FAC ¶ 121-22; Opp. at 10.

Defendants reply that plaintiffs as applied vagueness challenge is flawed because plaintiff has alleged no facts showing "how the statute operates in practice against itself [] and identifies no particular [Iowa Pork] member to show the statute operates in practice against that member." Reply at 3. Further, defendants note that the as applied challenge fails to allege any member's "intent to engage in a course of conduct proscribed by the statute." Reply at 4.

In an as applied challenge, a statute is void for vagueness and thus unconstitutional if the statute "(1) does not define the conduct it prohibits with

sufficient definiteness and (2) does not establish minim- al guidelines to govern law enforcement." *United States v. Shetler*, 665 F.3d 1150, 1164 (9th Cir. 2011) (quoting *United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005)).

The Court finds that plaintiff has not stated an as applied vagueness claim under the Due Process Clause. Plaintiff raises nearly identical arguments for its as applied challenge as it did for its facial Due Process challenge, and the Court has already found that plaintiff cannot state a plausible facial claim. Plaintiffs as applied challenge merely adds that "Proposition 12, as applied to its members' conduct in pig production is unconstitutionally vague." Opp. at 8-9. But plaintiff has not shown how the statute has been applied to its members.

Further, plaintiff's contention that the threat "of imminent criminal prosecution and penalties if their [members'] pork is sold into California" is insufficient to state an as applied challenged. *Vill. Of Hoffman Ests. v. Flipside Hoffman Ests., Inc.*, 455 U.S. 489, 503 (1982) (stating theoretical possibility of enforcement is "of no due process significance unless the possibility ripens into a prosecution") (citation omitted). Plaintiffs citation to *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) is not to the contrary. In *Babbit*, the Supreme Court held that in pre-prosecution, a plaintiff must allege an intent to engage in the course of conduct proscribed by the statute and face a credible threat of prosecution to bring an as applied challenge. Here, there is no allegation that any of plaintiffs members are going to represent to their distributors that non-complaint meat is compliant. Even if plaintiff could show a real possibility of

prosecution, plaintiff has not shown on the merits how the statute is impermissibly vague as to its members.

2. *Regulations*

Defendants argue that plaintiff cannot state a Due Process Clause claim for vagueness based on CDFA's and CDPH's failure to promulgate Final Regulations by the statutory deadline. MTD at 13; FAC ¶¶ 156-167. Citing to *Robles v. Domino's Pizza, LLC*, defendants emphasize that the "Constitution only requires that [an individual] receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations." 913 F.3d 898, 908 (9th Cir. 2019).

Plaintiff contends that because the statute mandated that CDFA and CDPH promulgate Final Regulations by September 1, 2019, and it is now beyond January 1, 2022—the date on which the Square Footage Requirements went into effect—and only revised draft Proposed Regulations have been issued, individuals of ordinary intelligence have not been given a reasonable opportunity to know what conduct is prohibited so they can avoid prosecution. Opp. at 10; Cal. Health & Safety Code § 25993(a).

In their reply, defendants note that plaintiff's members have had more than three years—since November 2018 when voters approved Proposition 12—to prepare for the Square Footage Requirements that took effect on January 1, 2022, providing them with clear notice of what producers like plaintiff's members must do to sell pork in California in 2022 and beyond. Reply at 5.

The Court finds *Robles v. Domino's Pizza, LLC* instructive. 913 F.3d at 898. In *Robles*, the Court held that where a statute is sufficiently clear, a lack of implementing regulations does not invalidate the

statute on due process grounds. *Id.* "Moreover, the possibility that an agency might issue technical standards in the future does not create a due process problem." *Id.* at 909, citing *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440, 445 (9th Cir. 1994). While the Court acknowledges that Proposition 12 required that DFA and the SDPH promulgate regulations by September 1, 2019, and the Final Regulations are not yet complete, the Court finds that the provisions that apply to plaintiffs members are clear from the statute's plain text. Further, any potential vagueness issues from the statute's plain texts are clarified in CDFA's FAQ published on March 5, 2021. Prop. 12 FAQs. Plaintiff has failed to state facts to sufficiently allege that the lack of Final Regulations does not provide adequate notice to plaintiff

B. Privileges and Immunities

Second, defendants contend that the fact that California producers had more time to come into compliance with the Turn Around Requirements than out-of-state producers does not, as plaintiff alleges, "serve as a proxy for differential treatment and discriminate[] in practical effect against out-of-state producers." MTD at 14; FAC ¶ 18081. Significantly, defendants point out that plaintiff has failed to state a claim under the Privileges and Immunities Clause because the claim applies only to natural persons, and plaintiff is a legal entity. MTD at 1. U.S. Const. art. IV § 2 cl. 1.

Plaintiff argues that it does have standing to bring a Privileges and Immunities Clause claim on behalf of its members, and has alleged facts sufficient to show it has associational standing to challenge Proposition 12's constitutionality. Opp. at 12. Plaintiff argues that it has stated a claim sufficient to show that the statute treats nonresidents differently than residents because

in-state producers were provided with additional years to comply with the Turn Around Provisions, and by extension, were provided with an easy stepping-stone for compliance with the Square Footage Requirements. Opp. at 13; FAG ¶ 178-80.

Defendants reply that even if some of plaintiff's members are natural persons that have associational standing under the Privileges and Immunity Clause, plaintiff cannot show that the statute discriminates in practical effect against out-of-state pork producers. Reply at 6. Defendants point out that plaintiff does not allege that plaintiffs members have been prevented from selling their meat into California under Proposition 12. Reply at 6-7.

Under the Privileges and Immunities Clause of the Fourth Amendment, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV § 2 cl. 1. The Court notes that the Privileges and Immunities Clause applies to natural persons only, and not legal entities. *W. Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).

Plaintiff Iowa Pork is not a natural person but rather a self-declared "grassroots organization" whose members include "individuals, companies [and] other organizations with an interest in the pork industry." Dkt. 70-1 ("McGonegle Decl.") ¶ 5. Therefore, while Iowa Pork on its own does not have standing as a natural person to bring a Privileges and Immunities claim, because some of plaintiff's members are individuals, Iowa Pork may have associational standing to bring a Privileges and Immunities claim on their behalf. *See Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 363 F. Supp. 2d 47, 55 (D.P.R. 2005) ("Associational [] standing permits organizations, in certain circumstances, to premise standing entirely

upon the injuries suffered by their members.") (internal citations omitted).

However, even if Iowa Pork can establish associational standing on behalf of its members who are individuals, it still cannot plausibly state a Privileges and Immunities claim because Proposition 12 applies equally to all pork meat sold within California, regardless of where it was produced, and therefore plaintiff cannot state a claim that Proposition 12 treats nonresidents and residents differently. MTD at 2. Because everyone is treated the same under Proposition 12, and its standards apply equally to all meat sold in California, California is not "discriminating against citizens of other states in favor of its own." *Nat'l Ass'n for the Advancement of Multi jurisdictional Prac. v. Berch*, 773 F.3d 1037, 1046 (9th Cir. 2014). Further, the fact that in-state producers had more "lead time" to implement the Turn Around Requirements based on a previous statute, does not change the fact that Proposition 12 on its face requires that both in-state and out-of-state producers comply with the Square Footage Requirement as of January 1, 2022.

C. Preemption

Third, defendants argue that plaintiff cannot state a claim under the Supremacy Clause that Proposition 12 is preempted by the Packers and Stockyards Act, 7 U.S.C. §§ 181-229. MTD at 2; U.S. Const. art. VI, cl. 2. "Conflict preemption arises when [1] compliance with both federal and state regulations is a physical impossibility, or [2] when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (citing *Hillsborough Cty., Fla. v. Automated Med.*

Lab'ys, Inc., 471 U.S. 707, 713) (1985) (internal quotation marks omitted).

Defendants contend that plaintiff misapprehends the Packers and Stockyards Act's purpose and scope, and plaintiff cannot not plausibly allege that it is impossible to comply with both laws or that Proposition 12 creates hurdles to comply with the federal law. MTD at 2. The Packers and Stockyards Act states, in relevant part:

> "It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to: . . (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect[.]"

7 U.S.C. § 192(b).

Defendants argue that plaintiff's claim that Proposition 12 disadvantages "out-of-state pork producers who have not had as much time to come into compliance with the Turn Around Requirements, and now, the Square Footage Requirements" fails because it is not impossible for plaintiff to comply with both the Packers and Stockyards Act and Proposition 12. FAC ¶ 197; MTD at 16.[6] Defendants cite to the plain text of

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[6] Defendants also emphasize that plaintiff does not have standing to bring a Supremacy Clause claim because neither plaintiff nor its members are wholesalers, and plaintiff s claim rests on the assertion that "it is impossible for a wholesaler to comply with both Proposition 12 and the Packers and Stockyards

the proposition, noting that wholesalers are not required to favor in-state pork producers because Proposition 12 applies equally to all meat sold within California, whether produced in or out of state. Cal. Health & Safety Code § 25990(b); MTD at 17. Further, defendants contend that Proposition 12 does not create an obstacle to comply with federal law because the Packers and Stockyards Act forbids packers from engaging in "unfair, discriminatory, or deceptive practices in [] commerce," and complying with Proposition 12 does not require any unfair or discriminatory practices. *See Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922); MTD 17-18.

Plaintiff argues that it has sufficiently alleged that Proposition 12 is preempted by federal law because the Packers and Stockyards Act prohibits any packer from subjecting any particular locality to a "disadvantage" in the sale of meat, and Proposition 12 requires packers "to favor in-state localities and to disadvantage out-of-state localities who have not had as much time to come into compliance." Opp. 14-15; FAC ¶ 197-98. Plaintiff alleges that wholesalers will favor and purchase from in-state producers because in-state producers were given six years to comply with the Turn Around Requirements, and therefore wholesalers will buy from in-state producers so that they do not risk non-compliance from out-of-state producers who had less time to implement the requirements. Opp. at 15-16.

Act." FAC ¶ 1 98 ; MTD at 16. Defendants contend that plaintiff has not met the prudential requirements to have standing to bring a preemption claim because plaintiff has not alleged that its members are wholesalers or packers that are governed by the Packers and Stockyard Act. *Id.*

When evaluating whether federal law has preempted a state law, a court must "(1) look to the purpose of Congress as the ultimate touchstone, while also (2) starting with the assumption that the historic police powers of the States were not to be superseded unless that was the clear and manifest purpose of Congress." *McClellan*, 776 F.3d at 1039 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)) (internal quotations omitted).

The Packers and Stockyards Act states, with regard to preemption:

> No requirement of any State or territory of the United States, or any subdivision thereof, or the District of Columbia, with respect to bonding of packers or prompt payment by packers for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions under Section 204 of this title, and prompt payment provisions of Section 228b of this title, respectively: Provided, this section shall not preclude a State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this chapter, which is not in conflict with this chapter or regulations thereunder: Provided further, that this section *shall not preclude a State from enforcing State law or regulations* with respect to any packer not subject to this chapter or section 204 of this title.[7]

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[7] 7 U. S.C. § 204 states that "the Secretary may require reasonable bonds from every mark agency [][and] every packer [] in connection with its livestock purchasing operations," and is not relevant to Proposition 12.

7 U.S.C. § 228(c) (emphasis added). *See* also *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (discussing the Packers and Stockyards Act and stating that "obviously Congress had no intention of regulating the entire business of the livestock and meat industry").

The statutory language implies that Congress did not intend for the Packers and Stockyards Act to preempt the field, and intended that the statute only preempt state laws in narrow circumstances when states were imposing requirements on the "bonding of packers," which Proposition 12 does not do. *Id.* Moreover, animal welfare and the health and safety of citizens, which are at issue here, have long been recognized as part of the historic police power of the states. *See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra (Éleveurs II)*, 870 F.3d 1140, 1146 (9th Cir. 2017) ("[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Moreover, plaintiff has not alleged any facts that show that Proposition 12 stands in the way of the execution of the Packers and Stockyards Act. *McClellan*, 776 F.3d at 1039. Accordingly, the Court finds that plaintiff has failed to state a claim alleging preemption by the federal Packers and Stockyards Act.

D. Dormant Commerce Clause

Fourth, defendants argue that plaintiff's dormant Commerce Clause claims fail because plaintiff has not plausibly alleged that Proposition 12 is discriminatory in its purpose and effect, that it regulates extra-territorially, or that it substantially burdens interstate commerce. FAC ¶ 205-219.

The Constitution extends to Congress the power to "regulate Commerce . . . among the several states." U.S. Const., Art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) *("Optometrists II")* (quoting *South—Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984)). "This limitation on the states to regulate commerce is 'known as the dormant Commerce Clause.' *Ass'n des Eleveurs de Canards et d'Oies du Ouebec v. Harris*, 729 F.3d 937, 947 (9th Cir. 2013) (quoting *Optometrists II*, 682 F.3d at 1148). "The primary purpose of the dormant Commerce Clause is to prohibit 'statutes that discriminate against interstate commerce' by providing benefits to 'in-state economic interests' while 'burdening out-of-state competitors.' *Id.* at 947 (quoting *CTS Corp. v. Dynamics Corp.* of Am., 481 U.S. 69, 87 (1987) and *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008)).

"The Supreme Court has adopted a 'two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Eleveurs*, 729 F.3d at 948 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986)). On the one hand, state regulations that (1) "discriminate against interstate commerce" or (2) "directly regulat[e] extra-territorial conduct" are generally "struck down . . . without further inquiry." *Id.* at 948-49 (quoting *Brown-Forman); see also Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (explaining that such laws "face a virtually *per se* rule of invalidity"). However, state regulations that (3) "regulate 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." *Wayfair, Inc.*, 138 S. Ct. at 2091 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)); *see* also *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015) (Gorsuch, J.) (explaining that "dormant commerce clause cases are said to come in [these] three varieties").

1. *Discrimination in Purpose and Effect*

Defendants argue that plaintiff does not, and cannot, plausibly allege that Proposition 12 is discriminatory on its face. MTD at 19-20. Discrimination against out-of-state commerce "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). "The party challenging a regulation" on this basis "bears the burden of establishing that a challenged statute has a discriminatory purpose or effect under the Commerce Clause." *Intl Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 400 (9th Cir. 2015) (internal citation and marks omitted).

Because the prohibition on the sale of pork meat from an animal confined in a cruel manner applies to any "business owner or operator" selling "within the state," and makes no distinction between in-state and out-of-state business owners or operators, defendants contend Proposition 12 is not discriminatory on its face. MTD at 20.

As for discriminatory purpose, defendants argue that plaintiff inaccurately alleges that Proposition 12's sole purpose is to avoid negative fiscal impacts to the

State of California. FAC ¶ 211; MTD at 20. Defendants point to the language of Proposition 12 which states: "[t]he purpose of this act is 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." Prop. 12, § 2, as approved by voters, Gen. Elec. (Nov. 6, 2018).

As for discriminatory effect, defendants contend that plaintiff cannot plausibly allege that Proposition 12 discriminates against out-of-state producers on the grounds that in-state pork producers had more time to comply with the Turn Around Requirements than out-of-state producers. FAC ¶¶ 207-208; MTD at 21. Defendants emphasize that Proposition 12 merely applies the same standards to all pork sales in California, and because the Constitution does not reauire a state to give preferential treatment to out-of-state entities that sell their products in state, plaintiff cannot allege the statute discriminates against out-of-state entities. MTD at 21.

Plaintiff contends it has alleged that Proposition 12 is facially discriminatory in its purpose and effect. Opp. at 17-18. Plaintiff argues that, even if only in part, the purpose of the statute is still to prevent "negative fiscal impacts on the State of California," which discriminates against out-of-state commerce. *Id.* Plaintiff cites to the regulatory text which states: "[i]n-state farmers will find it more costly to compete with farms outside of the state when selling . . . whole pork meat to an out-of-state buyer compared to local farms located in states that do not have the same animal confinement standards as described in the Act." FAC ¶ 68; Opp. at 18.

In support of its argument, plaintiff cites to this Court's recent decision in *N. Am. Meat Inst. v. Becerra*, 420 F. Supp 3d 1014, 1028 n. 7 (CD. Cal. 2019). Therein, the Court stated:

> [B]ecause aspects of Proposition 12 that apply pre-existing provisions of Proposition 2 to out-of-state producers *may* give those out-of-state producers less lead time for compliance than Proposition 2 gave in-state producers, plaintiffs *could* have an arguable basis to claim that Proposition 12 discriminates against out-of-state commerce. However, as discussed below, the Court concludes that this argument is premature prior to the release of the relevant implementing regulations.

Id.

First, the Court finds that plaintiff cannot plausibly state a claim that Proposition 12 is facially discriminatory, because it makes no distinction between in-state and out-of-state pork producers. *See* Cal. Health & Safety Code § 25590 *et seq*. "[A] statute that treat[s] all private companies exactly the same does not discriminate against interstate commerce. . . This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses." *Eleveurs*, 729 F.3d at 948 (internal quotation marks and citations omitted). Further, with respect to discriminatory purpose, plaintiff has failed to plausibly allege that the purpose of Proposition 12, which the statute states is "to prevent animal cruelty by phasing out extreme methods of farm animal confinement," was motivated by economic protectionism. 2018 Cal. Legis. Serv. Prop. 12, § 2.

Finally, with respect to discriminatory effect, the Court finds that plaintiff cannot plausibly allege that the fact that in-state producers had six years to comply with the Turn Around Requirements under Proposition 2, while out-of-state producers subject to Proposition 12 only had six weeks to comply, violates the dormant Commerce Clause. In *North American Meat Institute v. Becerra, et al.* ("NAMI"), a previous case before this Court, a national trade association of meat packers and processors challenged, among other things, the constitutionality of Proposition 12, arguing that the statute discriminates against interstate commerce, and as such, violates the dormant Commerce Clause. 2020 WL 919153 (C.D. Cal. Feb. 24, 2020). While the Court acknowledges that it previously held in defendants' motion to dismiss in *NAMI* that "[Plaintiff] *could* prove—and had alleged—an unconstitutional discriminatory effect based on . . . the potential difference in compliance 'lead time' given to in-state producers relative to out-of-state producers," upon further review of the facts of this case, the Court is not convinced that the "lead time" discrepancy is sufficient to allege a claim at this juncture.

In light of the fact that plaintiff has now had three years to comply with the "lead time" requirements, the Court finds plaintiff cannot plausibly state a claim that Proposition 12 has a discriminatory effect. *Id.* Plaintiff's discriminatory effect argument is that a different law, passed ten years earlier, treated in-state companies differently in that it gave them more time to comply with the Turn Around Requirements. However, in *Eleveurs*, the Ninth Circuit found that "a statute that treats all private companies exactly the same" is not discriminatory "even when only out-of-state businesses are burdened because there are no comparable in-state businesses." *Eleveurs*, 729 F.3d at

948. Given that under *Eleveurs* there is no discriminatory burden on out-of-state businesses even where no comparably burdened in-state business exists, the Court fmds and concludes that plain- tiff cannot allege there is a discriminatory burden where in-state businesses are *already in compliance* with the same regulatory standards, even if in-state pork producers had more time to comply with Proposition 2 than out-of-state pork producers had to comply with Proposition 12.

Further, the Court finds the Ninth Circuit's recent decision in *National Pork Producers Council v. Ross*, which was decided a year after this Court's decision on defendants' motion to dismiss in *NAMI*, is informative. 6 F.4th, 1021, 1021 (9th Cir. 2021). Plaintiff in that case, the National Pork Producers Council, an organization representing pork producers, challenged the constitutionality of Proposition 12, arguing that it violates the dormant Commerce Clause. *Id.* Affirming the district court's dismissal of the complaint, the Ninth Circuit found that plaintiff had not stated a claim under the dormant Commerce Clause. *Id.* at 1032. Significantly, the Ninth Circuit decision addressed only whether plaintiff's complaint violated the dormant Commerce Clause with respect to whether Proposition 12 regulated extraterritorial conduct and imposed a substantial burden on interstate commerce. The Ninth Circuit did not address the question of whether Proposition 12 discriminates against interstate commerce in its effect. However, when determining that Proposition 12 does not place an undue burden on interstate commerce, the Ninth Circuit states that "even a state law that imposes heavy burdens on some out-of-state sellers does not place an impermissible burden on interstate commerce. . . . 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 plaintiffs complaint is unlikely to survive a motion to dismiss." *Id.* at 1033. Applying the Ninth Circuit's narrow reading of the dormant Commerce Clause here, the Court finds that even if the "lead time" discrepancy may have, in the past, caused some burden on out-of-state pork producers, the discrepancy is not sufficiently discriminatory to enable plaintiff to state a claim under the dormant Commerce Clause.

In sum, the Court finds that plaintiff has not alleged facts sufficient to state a claim under the discriminatory effect prong of the dormant Commerce Clause based on the difference in "lead time" given to in-state and out-of-state producers with regard to the Turn Around Requirements. Plaintiff filed this action almost three years after Proposition 12 was passed, and fails to provide any authority suggesting that the discriminatory burden of a particular law must be analyzed in connection with a previous statute. Accordingly, the Court grants defendants' motion to dismiss on plaintiffs discriminatory effect claim.

2. *Extraterritoriality*

Defendants further argue that plaintiffs claim that Proposition 12 unlawfully regulates "extraterritorial conduct wholly outside of California by placing onerous certification, registration, and recordkeeping requirements on out-of-state producers" is foreclosed by Ninth Circuit precedent. FAC ¶ 214-15; MTD at 21.

Any "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." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). "The critical inquiry is whether the practical effect of the regulation is to control the conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336, 109 S.Ct. 2491 (quoting *Brown*, 476 U.S. at 579, 106 S.Ct. 2080). "A statute that applies both to California entities and out-of-state entities does not target wholly extraterritorial activity." *National Pork Producers Council*, 456 F. Supp. 3d at 1207.

Plaintiff argues that it has adequately pled that Proposition 12 regulates wholly extraterritorial conduct in violation of the dormant Commerce Clause. Opp. at 20.

The Court finds that plaintiffs extraterritorial claim under the dormant Commerce Clause is barred by circuit precedent. In *National Pork Producers Council*, the Ninth Circuit held that "state laws that regulate only conduct in the state, including the sale of products in the state, do not have impermissible extraterritorial effects." *Nat'l Pork Producers Council* 6 F.4th at 1029. The Ninth Circuit found that because Proposition 12 precluded the sale within California of products produced by pigs not raised in accordance with the requirements of the statute, regardless of where the pigs were raised, it did not regulate wholly out-of-state conduct and did "not have an impermissible extraterritorial effect." *Id.* As such, the Court finds that here plaintiff has failed to state a claim that Proposition 12 has an impermissible extraterritorial effect under the dormant Commerce Clause.

3. *Substantial Burden*

Defendants argue that plaintiff cannot plausibly state a claim that the burdens imposed on interstate commerce by Proposition 12 outweigh any local benefits. MTD at 22; FAC ¶ 214-19.

Plaintiff argues that it has alleged facts to show that Proposition 12's excessive burdens on interstate commerce exceed any purported benefit. Opp. at 20. Plaintiff argues there are no local benefits because Proposition 12 "does not directly impact human health or welfare of California residents," whereas the burdens on interstate commerce are excessive and will have devasting effects on the national pork production market, including spikes in pork prices, and a shortage of pork available to California consumers. Opp. at 20.

Again, the Court finds that *Nat'l Pork Producers Council v. Ross* is controlling here. 6 F. 4th at 1021. In *National Pork Producers Council*, the Ninth Circuit affirmed defendants' motion to dismiss plaintiff's claim that Proposition 12 created a substantial burden on interstate commerce, holding that "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." *Id.* at 1034. Here, plaintiff has not offered any facts in its complaint that would lead this Court to reach a different outcome. As such, under the facts pled and under Ninth Circuit precedent, the Court grants defendant's motion to dismiss for failure to state a claim under the substantial burden prong of the dormant Commerce Clause.

E. Declaratory Relief

Fifth, defendants argue that because plaintiff has failed to plead any viable underlying claims, its claim for declaratory relief also fails. MTD at 2, 23; *Davis v. Zimmerman*, 2018 WL 1806101, at *6 (S.D. Cal. Apr. 17, 2018).

Plaintiff argues that defendants' entire basis for dismissing this claim is contingent on the Court's dismissal of other claims, and because each claim involves a justiciable question related to the parties' rights and obligations, the Court should not grant defendants' motion to dismiss plaintiff's declaratory relief claim. Opp. at 22-23.

Because the Court has found that plaintiff has failed to plead any viable underlying claims, the Court grants defendants' motion to dismiss plaintiff's declaratory relief claim. Davis, 2018 WL 1806101, at *6; *see* also *Javaheri v. JPMorgan Chase Bank, N.A.*, 2012 WL 6140962, at *8 (C.D. Cal. Dec. 11, 2012) ("Declaratory [] relief do[es] not lie where all other claims have been dismissed.").

F. Leave to Amend

Plaintiff states that if the Court grants defendants' motion to dismiss, the Court should grant plaintiff leave to amend. Opp. at 3. "Generally, the Ninth Circuit has a liberal policy favoring amendments, and thus, leave to amend should be freely granted." *Winebarger v. Pennsylvania Higher Educ. Assistance Agency*, 411 F. Supp. 3d 1070, 1082 (C.D. Cal. 2019); *see* also Fed. R. Civ. P. 15(a). Accordingly, the Court grants plaintiffs request for leave to amend its complaint.

V. CONCLUSION

In accordance with the foregoing, the Court:

1) GRANTS defendants' motion to dismiss as to plaintiff's Due Process Clause claims under the Fourteenth Amendment;

2) GRANTS defendants' motion to dismiss as to plaintiffs Privileges and Immunities Clause claims under Art. IV §

3) GRANTS defendants' motion to dismiss as to plaintiffs Preemption Claim under the Supremacy Clause, Art. VI, Cl. 2;

4) GRANTS defendants' motion to dismiss as to plaintiff's dormant Commerce Clause under Art. 1 § 8; and

5) GRANTS defendants' motion to dismiss as to plaintiff's claim for declaratory relief under Cal. Code of Civ. P. § 1060.

The Court permits plaintiff 14 days' leave to amend. IT IS SO ORDERED.

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APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL 'O'

Case No. 2 :21 -cv-09940-CAS (AFMx)

Date February 28, 2022

Title Iowa Pork Producers Association v. Rob Bonta et al.

Present: The Honorable CHRISTINA A. SNYDER

Catherine Jeang
Deputy Clerk

Sherri Kleeger
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs:

Willis Wagner
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Marnie Jensen

Attorneys Present for Defendants:

Marla Weston
Benjamin Glickman

Attorneys Present for Intervenors:

Rebecca Cary
Peter Brandt

Proceedings: PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (Dkt. 24, filed on December 16, 2022)

DEFENDANT-INTERVENORS' MOTION TO INTERVENE (Dkt. 66, filed on January 31, 2022)

I. INTRODUCTION

On November 9, 2021, plaintiff Iowa Pork Producers Association ("IPPA") filed suit in Fresno Superior Court against Rob Bonta, the Attorney General of California, Karen Ross, the Secretary of the California Department of Food and Agriculture ("CDFA"), and Tomas Aragon, the Director of the California Department of Public Health ("CDPH") (collectively, "defendants"). Dkt. 1. Plaintiff challenges the constitutionality and seeks to prevent the enforcement of California Health & Safety Code § 25990, *et seq.*, which California voters amended through the passage of Proposition 12 on November 6, 2018 ("Proposition 12"). Proposition 12 prohibits the sale of "whole pork meat" from a "covered animal" that was confined in a "cruel manner," or is the immediate offspring of a covered animal that was confined in a cruel manner. Cal. Health & Safety Code § 25990(b). The statute defines "confined in a cruel manner" to include confining any animal in a manner that "prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely," and "confining a breeding pig with less than 24 square feet of usable floorspace per pig." *Id.* at § 25991(e).

On November 16, 2021, defendants removed the case to the U.S. District Court for the Eastern District of California. *Id.* On December 16, 2021, plaintiff filed the operative first amended complaint. Dkt. 23 ("FAC").

Plaintiffs FAC asserts claims for: (1) violation of the Due Process Clause (facial and applied challenge); (2) violation of the Due Process Clause for failure to provide notice of Proposition 12's compliance requirements by September 1, 2019; (3) violation of the Privileges and Immunities Clause; (4) preemption by Packers and Stockyards Act; (5) violation of the Commerce Clause; and (6) Declaratory Relief pursuant to Cal. Code of Civ. P. § 1060. FAC ¶¶ 125230.

On December 16, 2021, plaintiff filed a motion for a preliminary injunction and alternative motion for temporary restraining order. Dkt. 24-1 ("PI Mot."). On December 27, 2021, the U.S. District Court for the Eastern District of California, the Hon. Dale A. Drozd presiding, issued an order granting plaintiffs request to transfer the case to the U.S. District Court for the Central District of California. Dkt. 28. On December 28, 2021, the case was assigned to this Court, which presides over the related case *North American Meat Institute v. Xavier Becerra et al*, Case No. 2:19-cv-08569-CAS-FFM. Dkt. 39.

On January 31, 2022, the Humane Society of the United States, the Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook (collectively, "proposed intervenors") filed a motion to intervene in the case. Dkt. 66 ("MTI").

On January 31, 2022, defendants filed their opposition to plaintiffs motion for a preliminary injunction. Dkt. 69 ("PI Opp."). On February 7, 2022, plaintiff filed its opposition to the proposed intervenors' motion to intervene. Dkt. 71 ("MTI Opp.").

On February 7, 2022, Perdue Premium Meat Company, Inc. d/b/a Niman Ranch ("Niman Ranch") moved for

leave to file an amicus memorandum in opposition to plaintiffs motion for a preliminary injunction.[1] Did. 74. On February 8, 2022, the Court granted Neman Ranch leave to file its amicus memorandum. Dkt. 76. On February 17, 2022, Niman Ranch filed its amicus memorandum. Dkt. 80-2 ("NR Am. Memr.").

On February 14, 2022, proposed intervenors filed their reply in support of their motion to intervene. Dkt. 77 ("MTI Reply"). Likewise, on February 14, 2022, plaintiff filed its reply in support of its motion for a preliminary injunction. Dkt. 79 ("PI Reply").

The Court held a hearing on February 28, 2022. Having carefully considered the parties' arguments and submissions, the Court finds and concludes as follows.

II. BACKGROUND

The following facts are taken from the FAC, the declarations and evidence submitted in support of the parties' PI briefing, the public record, and the submissions from amici.

A. California Voters Enact Proposition 2 (2008)

In the November 2008 election, California voters passed Proposition 2, a ballot initiative intended to "prohibit the cruel confinement of farm animals." *See* Cal. Prop. 2 at § 2, as approved by voters (Gen. Elec.

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[1] Niman Ranch is a network of over 650 independent family hog farmers, a third of which are located in Iowa. NR Am. Memr. at 6. Niman Ranch's farms are fully compliant with Proposition 12, and Niman Ranch offers its amicus memorandum as "an alternative industry voice to demonstrate that compliance [with Proposition 12] is straightforward and economically feasible, and that certain industry leaders have already implemented and satisfied compliance requirements." *Id.* at 6-7.

Nov. 4, 2008). The initiative passed with the support of 63.42% of California voters. *See* Cal. Sec'y State, Statement of Vote: 2008 General Election. Proposition 2 added §§ 25990-25994 to the California Health and Safety Code, and took effect on January 1, 2015. *See* Cal. Health & Safety Code §§ 25990-25994. The enacted provisions prohibit California farmers from tethering or confining pregnant pigs, veal calves, and egg-laying hens in a way that prevented them from lying down, standing up, fully extending their limbs, or turning around freely. *Id.* at §§ 25990, 25991(b). Out-of-state pork producers were not subject to these requirements. *Id*. at § 25990(a).

Proposition 2 gave California producers six years to comply with its confinement requirements, with an effective date of January 1, 2015. *See id.* at § 25990.

B. California Enacts Assembly Bill 1437 (2010)

The California legislature subsequently enacted Assembly Bill ("1437 CAB 1437") in 2010. AB 1437 added §§ 25995-97 to the Health and Safety Code. These provisions prohibit selling eggs in California that are produced by hens confined under conditions that do not meet the confinement requirements of Proposition 2. *See* Cal. Health & Safety Code §§ 25995-97. AB 1437 did not apply to calves raised for veal or to breeding pigs.

A coalition of states challenged AB 1437's sales ban pursuant to the commerce clause of the United States Constitution, but their action was dismissed on jurisdictional grounds. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017). The states then attempted to petition the Supreme Court pursuant to its original jurisdiction over disputes between states, *see* U.S. Const., Art. III, § 2, but were denied. *See*

Missouri v. California, No. 22-0-148 (filed U.S. Dec. 4, 2017).

C. California Enacts Proposition 12 (2018)

In the November 2018 election, California voters passed Proposition 12 to amend §§ 25990-93 of the California Health and Safety Code by adding § 25993.1. *See* Cal. Prop. 12 at § 1, as approved by voters (Gen. Elec. Nov. 6, 2018). The initiative passed with 62.7% of the vote. *See* Cal. Sec'y State, Statement of Vote: 2018 General Election.

As is relevant here, Proposition 12 prohibits the sale in California of "whole pork meat" that a seller "knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of the immediate offspring of a covered animal that was confined in a cruel manner." Cal. Health & Safety Code §§ 25990(b)(2). Confinement in a cruel manner refers to confining an animal in a manner that does not allow the animal to turn around freely, lie down, stand up, or fully extend their limbs (the "Turn Around Requirements"), and also, as of January 1, 2021, to confining a breeding pig in a space less than twenty-four square feet of usable floorspace per pig (the "Square Footage Requirements"). *Id.* at §§ 25990(a); 25991(e).

The prohibition deems that a sale occurs in California "where the buyer takes physical possession" of the meat at issue in California. *Id*. at § 25991(o). Any person who violates Proposition 12's sales prohibition is guilty of a misdemeanor punishable by a fine of up to $1,000 and up to 180 days imprisonment. *Id.* at § 25993(b). Moreover, violating Proposition 12 constitutes unfair competition, as defined by Cal. Bus. & Prof Code § 17200. Cal. Health & Safety Code § 25993(b).

According to the ballot language, Proposition 12 is intended "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." *See* Cal. Prop. 12 at § 1, as approved by voters (Gen. Elec. Nov. 6, 2018). Whereas Proposition 2 allowed in-state producers six years to comply with the Turn Around Requirements, the Turn Around Requirements imposed on out-of-state producers by Proposition 12 went into effect on December 19, 2018, six weeks after it was passed. The CDFA has acknowledged that, as a result of Proposition 12, "[i]n-state farms will find it more costly to compete with farms outside of the State when selling shell eggs, liquid eggs, whole veal meat, and whole pork meat to an out-of-state buyer compared to farms located in states that do not have the same animal confinement standards." 2021 CA REG TEXT 584571 (NS).

The State has yet to issue final regulations implementing Proposition 12 (the "Final Regulations"), despite the statutory language stating that "[Ole Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019." *Id.* at § 25993.[2]

On March 5, 2021, the CDFA issued FAQs that provided that pork meat that was not in compliance with the Square Footage Requirements, but was

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[2] On May 28, 2021, CDFA and CDPH published draft regulations, and on December 3, 2021, the CDFA published amended draft regulations. Dkt. 69-1 ("Jones Decl.") ¶¶ 9, 12. Accordingly, implementing regulations have been proposed and opened for public comment, but remain unfinalized.

already in inventory or in commerce by December 31, 2021, will remain legal to sell in California. *See* CDFA AHFSS Animal Care Program Prop 12 FAQ, (March 5, 2021), https://www.cdfa.ca.gov/AHFSS/pdfs/Prop_12_FAQ_March_2021.pdf ("Prop. 12 FAQs"). Plaintiff notes that the Prop. 12 FAQs do not provide any relief to pork producers who are not in compliance with the Turn Around Requirements. PI Mot. at 12-13. Accordingly, plaintiff argues that the relief from the Square Footage Requirements afforded by the Prop. 12 FAQs is meaningless to plaintiff's members, who remain out of compliance with the Turn Around Requirements, but is valuable to in-state pork producers, who have been in compliance with the Turn Around Requirements since January 1, 2015. *Id.*

D. The North American Meat Institute ("NAMI") Seeks to Enjoin Proposition 12 (2019)

On October 4, 2019, the North American Meat Institute, a national trade association of meat packers and processors, filed suit to challenge the constitutionality and prevent the enforcement of Proposition 12. Their motion for a preliminary injunction was denied by this Court on November 22, 2019, and the denial was affirmed by the Ninth Circuit on October 15, 2020. *See N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1017 (C.D. Cal. 2019), aff'd, 825 F. App'x 518 (9th Cir. 2020). The Supreme Court denied NAMI's petition for writ of certiorari on June 28, 2021. *See N. Am. Meat Inst. v. Bonta*, 141 S. Ct. 2854 (2021).[3]

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[3] Likewise, in a separate case, the U.S. District Court for the Southern District of California granted a motion to dismiss a dormant Commerce Clause challenge to Proposition 12. *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1210 (S.D. Cal. 2020), aff'd, 6 F.4th 1021 (9th Cir. 2021).

E. Plaintiff Files Suit, Alleging Constitutional Violations (2021)

On November 9, 2021, plaintiff filed suit challenging the constitutionality of Proposition 12, and seeking injunctive and declaratory relief. Dkt. 1. Plaintiff is a trade association that represents Iowa pork producers. FAC ¶ 26. Iowa is the leading pork producing state in the United States, and is also the leading state for pork exports. Dkt. 24-4 ("McGonegle Decl.") ¶¶ 6, 12.[4] Plaintiff contends that the economic impact of Proposition 12 will primarily fall on out-of-state producers, and that California cannot produce enough pork to meet its own pork demand. *Id.* ¶ 10.

Plaintiff's suit alleges that Proposition 12 is unconstitutionally vague, violates the dormant Commerce Clause, and threatens the nation's food supply. FAC ¶¶ 34-111. Moreover, plaintiff claims that because the vast majority of Iowa pork producers are not currently in compliance with Proposition 12, pork producers "would need to substantially alter their practices to come into compliance—either increasing the facility sizes, at a cost prohibitive to most farming operations, or substantially decreasing the number of pigs on their farms, which translates to crippling lost profits, waste and pork shortages." PI Mot. at 14 (citing McGonegle Decl. ¶¶ 16-17). However, Niman Ranch's amicus memorandum offers statements from many pork industry leaders wherein they claim that they are willing and able to comply with Proposition 12. NR Am. Memr. at 21-23. Accordingly, Niman Ranch

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[4] In 2020, pork sales in Iowa totaled $40.8 billion, and nearly 150,000 jobs in Iowa are associated with the Iowa Pork Industry. McGonegle Decl. ¶ 8; *id.*, Ex. A at 7. There are about 24 million total hogs and pigs on Iowa Farms. *Id.* ¶ 24.

contends that "[plaintiff's] concerns about widespread harm to the industry are self-serving and overblown." *Id.* at 23.

On February 2, 2022, the California Superior Court for the County of Sacramento, in *California Hispanic Chamber of Commerce v. Ross*, Case No. 34-2021-80003765 (Cal. Sup. Ct.), concluded that "the promulgation of joint regulations is a condition precedent to the enforcement of the square-footage requirement governing sales of whole pork meat pursuant to Sections 25990(b)(2) and 25591(e)(3)." *See* Dkt. 79-1 ("Sup. Ct. Ord.") at 17. The case was brought by "a meat processing operation and business associations whose members sell whole pork meat in California," who argued, on state statutory grounds, that "without regulations fleshing out a written certification system supporting a good faith defense pursuant to Section 25993.1,[5] they should not be subject to penalties associated with the sale of nonconforming whole pork meat." *Id.* at 13. The court held that Sections 25990(b)(2) and 25591(e)(3), which cover the Square Footage Requirement as applied to "business owners and operators . . knowingly engag[ing] in the sale within the state" of "[w]hole pork meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of

[5] Section 25993.1 states that "[i]t shall be a defense to any action to enforce subdivision (b) of Section 25990 that a business owner or operator relied in good faith upon a written certification by the supplier that the whole veal meat, whole pork meat, shell egg, or liquid eggs at issue was not derived from a covered animal who was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner." Cal. Health & Safety Code § 25993.1.

a covered animal who was confined in a cruel manner," would not be enforceable until 180 days after the Final Regulations are enacted. Sup. Ct. Ord. at 18; *see also* Cal. Health & Safety Code §§ 25990(b)(2), 25591(e)(3).

III. LEGAL STANDARD

A. Motion to Intervene

A party may intervene pursuant to Federal Rule of Civil Procedure 24 either as of right, or with permission of the Court. "A party seeking to intervene as of right must meet four requirements: (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). A party who satisfies each of these requirements must be permitted to intervene. *Id.*

By contrast, "[a] motion for permissive intervention pursuant to Rule 24(b) is directed to the sound discretion of the district court." *San Jose Mercury News, Inc v. U.S. Dist. Ct.*, 187 F.3d 1096, 1100 (9th Cir. 1999). The Ninth Circuit has set forth three prerequisites that an applicant seeking permissive intervention under Rule 24(b) must establish: "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Id.* (internal quotation omitted).

B. Preliminary Injunction

A preliminary injunction is an "extraordinary remedy." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Ninth Circuit summarized the Supreme Court's clarification of the standard for granting preliminary injunctions in *Winter* as follows: "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *see also Cal Pharms. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009). Alternatively, "'serious questions going to the merits' and a hardship balance that tips sharply towards the plaintiff can support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1053 (9th Cir. 2010). Serious questions are those "which cannot be resolved one way or the other at the hearing on the injunction." *Bernhardt v. Los Angeles Cty.*, 339 F.3d 920, 926 (9th Cir. 2003) (quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988)).

IV. DISCUSSION

Before the Court are proposed intervenors' motion to intervene, and plaintiffs motion for a preliminary injunction. The Court addresses these motions in turn.

A. Proposed Intervenors' Motion to Intervene

The proposed intervenors argue that they are entitled to intervene in this action as of right, and in the alternative, permissively. *See* MTI. Plaintiff argues

that the proposed intervenors are not entitled to intervene as of right because their interests are adequately represented by defendants. MTI Opp. at 3-5. While plaintiff acknowledges that the proposed intervenors meet the requirements for permissive intervention, it argues that the Court should nevertheless use its discretion to deny permissive intervention because intervention would cause undue delay and prejudice the adjudication of the original parties' rights. *Id.* at 5-6.

The Court need not address intervention as of right, as the Court, in accordance with the parties, finds that the intervenors have established the three elements necessary to intervene with the Court's permission pursuant to Rule 24(b): (1) the proposed intervenors' application—filed less than a month after this action was transferred to this Court—is timely; (2) there are independent grounds for jurisdiction because this is a federal question case and the intervenors do not propose to raise any new claims, *see Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011); and (3) there are questions of law and fact in common between the proposed intervenors defense, which is "based solely on legal arguments as to the insufficiency of Plaintiff's claims," MTI at 25, and the main action. *See San Jose Mercury News, Inc.*, 187 F.3d at 1100.

Accordingly, the court GRANTS the proposed intervenors' motion to intervene.[6]

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[6] At oral argument, counsel for proposed intervenors confirmed that the proposed intervenors will make joint filings, and that proposed intervenors' joint filings will be separate from defendants' filings.

B. Plaintiff's Motion for a Preliminary Injunction

Plaintiff moves for a preliminary injunction on its Due Process Clause and Commerce Clause claims. PI Mot. at 16-29.[7]

Plaintiff seeks a preliminary injunction "prohibiting the enforcement of Proposition 12, its policies, practices and customs by Defendants, employees and agents, and all persons acting in privity and/or in concert with them (including private enforcers bringing claims pursuant to the Unfair Competition Law or any other applicable law)" pending resolution of the merits of this case, or until further order of this Court. Dkt. 24 at 13. At a minimum, plaintiff requests relief from enforcement of both the Turn Around Requirements and the Square Footage Requirements until 180 days after the Final Regulations are promulgated; relief that it argues is in line with the California Superior Court's ruling in *California Hispanic Chamber of Commerce v. Ross*, Case No. 34-2021-80003765 (Cal. Sup. Ct.). *See* PI Reply at 6.

1. *Likelihood of Success on the Merits*

To prevail on its motion for a preliminary injunction, IPPA must at a minimum establish that there are "serious questions" on the merits of at least one of its claims for relief. *Cottrell*, 622 F.3d at 1053. As discussed below, the Court finds and concludes that plaintiff fails to raise serious questions as to the merits of its claims.

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[7] Plaintiffs notice of motion suggests that it was considering arguing that it was likely to succeed on its Privileges and Immunities Clause claim, and a claim that Proposition 12 is preempted by the Packer and Stockyards Act, *see* Dkt. 24 at 10-11, but plaintiff makes neither argument in its memorandum and its reply. Accordingly, the Court declines to assess whether plaintiff is likely to succeed on these claims.

a. Due Process Clause Claims

Plaintiff argues that Proposition 12 violates the Due Process Clause, both on its face and as applied, in that it is unconstitutionally vague. "The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 576 U.S. 591, 595-96 (2015) (internal citations and quotation marks omitted).

"The void-for-vagueness doctrine prohibits the government from imposing sanctions under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Welch v. United States*, 578 U.S. 120, 124 (2016) (internal citations and quotation marks omitted). In an as applied challenge, a statute is void for vagueness and thus unconstitutional if the statute "'(1) does not define the conduct it prohibits with sufficient definiteness and (2) does not establish minimal guidelines to govern law enforcement.'" *United States v. Shetler*, 665 F.3d 1150, 1164 (9th Cir. 2011) (quoting *United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005)).

(1) Facial Challenge

Plaintiff contends that Proposition 12 is unconstitutionally vague in that it prohibits business owners and operators from "knowingly engag[ing] in the sale" of non-compliant whole pork meat, but fails to define the meaning of "engage in the sale." PI Mot. at 1718 (citing California. Cal. Health & Safety Code §§ 25990-91). Plaintiff also argues that the statute "does not define when the violation occurs or who throughout the supply chain can be criminally prosecuted."

PI Mot. at 18. Finally, plaintiff argues that Proposition 12 fails to give fair notice as to what constitutes a violation of the Turn Around Requirements and the Square Footage Requirements, as evidenced by the necessity of the Final Regulations, which plaintiff claims represents "a per se admission of the statute's vagueness." *Id.*

In opposition, defendants argue that "engaged in the sale" is not vague when read in the context of the statute, which makes clear that if a producer does not sell pork products in California, it has not engaged in a sale in the state. PI Opp. at 16. Likewise, defendants contends that the Turn Around Requirements and the Square Footage Requirements are clearly defined by the statute's plain text. *Id.* at 17.

In reply, plaintiff reiterates that "engaged in" is impermissibly vague. PI Reply at 16. As evidence of Proposition 12's purported vagueness, plaintiff claims that defendants in this case and the California Superior Court in *California Hispanic Chamber of Commerce v. Ross* have different interpretations of whether Proposition 12 prohibits persons within the supply chain of knowingly engaging in sales in California, and that these different interpretations are the result of Proposition 12's inherent vagueness. PI Reply at 16-17.

The Court finds and concludes that Proposition 12 is not facially vague. With respect to the Turn Around Requirements, the statute clearly states that confinement in a cruel manner refers to "confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely." Cal. Health & Safety Code § 25991(e)(1). Likewise, with respect to the Square Footage Requirements, the statute explicitly states

that, "[a]fter December 31, 2021, confining a breeding pig with less than 24 square feet of usable floorspace per pig" also constitutes confinement in a cruel manner. *Id.* § 25991(0(3). These proscriptions clearly define the activity prohibited by Proposition 12.

Accordingly, the gravamen of plaintiff's facial challenge is whether Proposition 12 is vague with respect to the circumstances in which producers must comply with its confinement standards. By the statute's plain terms, a violation of Proposition 12 could only occur if a member were to "engage in the sale within the state [of California]." Cal. Health & Safety Code § 25990(b). In the "definitions" section, the statute adds that "a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 25990." *Id.* § 25991(o). Accordingly, the statute makes clear that an out-of-state producer is subject to Proposition 12 only if it "engage[s] in a sale" to a buyer who "takes physical possession" in California of an item covered by Proposition 12. This is not unduly vague.

The California Superior Court's ruling in *California Hispanic Chamber of Commerce v. Ross* is not to the contrary. Plaintiff contends that the Superior Court's ruling offered a "distinct interpretation[] for whether 'engaged in' the sale meant potential enforcement against all those throughout the supply chain." PI Reply at 17. However, the language plaintiff cites to in support of its argument is merely the Superior Court's statement that "[t]he Act [] prohibits persons in the supply chain from *knowingly* engaging in *intrastate* sales of food where such persons know or should know that the food is derived from a covered animal — whether originating within or outside California — that is confined in a cruel manner." Sup. Ct. Ord. at 17

(citing Cal. Health & Safety Code § 25990(b)). The Superior Court's understanding that only producers who *knowingly* "engage in the sale" *within California* are subject to Proposition 12 does not suggest any vagueness. Rather, it confirms that Proposition 12 sufficiently defines the conduct it prohibits. *Shetler*, 665 F.3d at 1164.

In accordance with the foregoing, the Court concludes that plaintiff fails to raise any serious questions regarding the merits of its facial Due Process Clause challenge to Proposition 12.

(2) As Applied Challenge

With respect to its as applied challenge, plaintiff argues that Proposition 12 fails to address how producers can comply with both the Turn Around Requirements and Square Footage Requirements in actual real-world practice because the group housing environments "will result in breeding sows being placed in large group pens together where they cannot turn around freely without touching the sides of an enclosure or another animal." PI Mot. at 19 (citing Dkt. 24-2 ("Johnson Decl.") ¶ 21). Plaintiff also argues that Proposition 12 does not establish any minimum guidelines to govern law enforcement, and therefore invites arbitrary enforcement. PI Mot. at 19 (citing *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011)). Additionally, plaintiff claims that Proposition 12 will result in arbitrary and inconsistent enforcement against out-of-state producers because California producers were given six years to comply with the Turn Around Requirements by Proposition 2, whereas Proposition 12 gave out-of-state producers only six weeks before the Turn Around Requirements went into effect on December 19, 2018. Id. at 20-21. Plaintiff argues that this discrepancy "renders the vast

majority of the industry's pork illegal to sell into California and exposes out-of-state producers and processors to criminal exposure and penalties that in-state California producers and processors will not face." *Id.* at 21.

In opposition, defendants argue that "there is nothing contradictory about Proposition 12's requirement that breeding pigs have adequate square footage to move about and turn around freely," and that, in any event, there is no "requirement in the statute that producers house breeding pigs in group housing (or any other particular type of housing)." PI Opp. at 18. Defendants also argue that Proposition 12 "is not vague as to whether Iowa producers who do not sell pork into California are in violation of the statute." *Id.* With respect to plaintiff's argument regarding the additional time afforded to in-state producers to comply with the Turn Around Requirements pursuant to Proposition 2, defendants respond that the argument "appears to be a reframing of Plaintiff's Commerce Clause discrimination claim rather than a Due Process Clause issue." *Id.* at 19.

In reply, plaintiff adds that its members produce pork that is part of the complex national pork supply chain, and often have no say on where their pork is sold due to the nature of the pork processing industry. PI Reply at 18-19. Given this situation, plaintiff claims that "out-of-state producers [are left to] guess whether they face enforcement (including potential imprisonment) by law enforcement who themselves are left to guess at whether a producer's conduct is prohibited." *Id.* Finally, plaintiff reiterates that "Proposition 12 fails to identify how producers are to comply with both Turn Around Requirements and Square Footage Requirements in actual, real-world practice," and that "[t]he uncertainty

and ambiguity in Proposition 12's terms culminate with the failure to properly — if at all — guide enforcement officials on how enforce the Act." *Id.* at 19-20.

The Court finds that plaintiff's as-applied Due Process Clause challenge also fails. For the reasons identified above, the Court does not agree that out-of-state producers are left to guess regarding whether their conduct is prohibited. Rather, the Turn Around Requirements and the Square Footage Requirements are clear, and they apply to sales that are knowingly made within the state of California. Cal. Health & Safety Code §§ 25990(b), 25991(e)(1). Moreover, plaintiffs argument that Proposition 12 fails to provide guidance on how producers can concurrently comply with the Turn Around Requirements and the Square Footage Requirements does not represent an as-applied Due Process violation. As defendants correctly point out, "there is nothing contradictory about Proposition 12's requirement that breeding pigs have adequate square footage to move about and turn around freely." PI Opp. at 18.

Plaintiff contends that Proposition 12's vague language invites arbitrary enforcement, and claims that a similar regulation was struck down in *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011). *See* PI Mot. at 19-20. In *Hunt*, the plaintiff challenged vending ordinances that applied to the Venice Beach Boardwalk. *Hunt*, 638 F.3d at 706. The Ninth Circuit found that ordinance language that permitted individuals to sell "merchandise constituting, carrying or making a religious, political, philosophical or ideological message or statement which is inextricably intertwined with the merchandise' invited arbitrary enforcement because "a police officer would have to engage in a 'highly fact-specific analysis' to determine whether a person

selling merchandise is relaying a message, whether that message qualifies as being religious, political, philosophical, or ideological, and whether that message is inextricably intertwined with the products being sold. . . . Without any clear guidance from [the ordinance] on these issues, such determinations would necessarily be left to the subjective judgment of the officer." *Id.* at 712.

Here, Proposition 12 presents no analogous issues, as neither "highly fact-specific analysis" nor "subjective judgment" is required in enforcing it given that, as discussed, Proposition 12 defines the conduct it prohibits with sufficient definitiveness. *Shetler*, 665 F.3d at 1164. Moreover, Proposition 12 establishes minimum guidelines to govern law enforcement, as it only proscribes "knowingly engaging in the sale within the state [of California]," which, for example, precludes enforcement of Proposition 12 against plaintiffs members for out-of-state sales made to pork processors. Cal. Health & Safety Code § 25990(1)). In *Shelter*, the Ninth Circuit favorably cited the Eleventh Circuit's statement in *United States v. Clavis*, 956 F.2d 1079, 1094 (11th Cir. 1992), that "[t]he presence of the two intent elements, 'knowingly' and 'for the purpose' does much to eliminate the contention of vagueness or unfairness in application." *See Shetler*, 665 F.3d at 1164. The same reasoning applies here, given the "knowingly" language present in Proposition 12.

Finally, the Court will assess plaintiff's lead-time discrepancy argument as a Commerce Clause discrimination claim. In sum, plaintiff has not raised any serious questions on the merits of its as applied Due Process Clause claim.

(3) *Failure to Promulgate the Final Regulations*

Plaintiff argues that the State's failure to promulgate the Final Regulations, despite the statutory deadline of September 1, 2019, violates the Due Process Clause "by failing to provide individuals of ordinary intelligence a reasonable opportunity to know what conduct is actually prohibited, so they may act to avoid criminal prosecution." PI Mot. at 22.

In opposition, defendants argue that "where a statute is sufficiently clear, a lack of implementing regulations does not invalidate the statute on due process pounds." PI Opp. at 19 (citing *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019)). Defendants add that Proposition 12 is sufficiently clear based on the statute's text, which provides clear notice of what producers must do to comply with the statute. PI Opp. at 20.

In plaintiffs reply, which followed the California Superior Court's ruling in *California Hispanic Chamber of Commerce v. Ross*, plaintiff argues that "[t]he plain language of Proposition 12 required CDFA and CDPH to write regulations to implement its requirements (Section 25993(a)) before the enforcement mechanisms (Section 25993(b)) became available." PI Reply at 12. In support of this argument, plaintiff notes that "before it mentions enforcement for any violation, Proposition 12 requires the promulgation of 'rules and regulations for the implementation' of the Act." *Id.* Plaintiff argues that defendants' failure to issue the Final Regulations "renders enforcement of Proposition 12 unconstitutional until at least after California complies with the regulations mandate," because without the implementing regulations, ordinary

people do not have fair notice of the conduct that Proposition 12 punishes. *Id.* at 14.

Even though the Final Regulations remain pending well after the statutory deadline, the Court finds that Proposition 12, as applied to plaintiff's members, is not unconstitutionally vague. While plaintiff relies on *California Hispanic Chamber of Commerce* in support of its argument that implementing regulations are required before enforcement of the statue, that case concerned "a meat processing operation and business associations whose members sell whole pork meat in California," whose challenge to Proposition 12 was focused on the lack of regulations "fleshing out a written certification system supporting a good faith defense pursuant to Section 25993.1," and the petitioners' argument that "without a system tracking pork from farms of origin . . . suppliers cannot furnish reliable assurances that their pork products derive from pigs confined with at least 24 square feet per pig." Sup. Ct. Ord. at 13-14. Here, plaintiffs members, as out-of-state producers of pork products, are not situated similarly to the petitioners in *California Hispanic Chamber of Commerce*, including because Section 25993.1's good faith defense, which applies to "a business owner or operator [who] relied in good faith upon a written certification by the supplier that the . . . whole pork meat . . . at issue was not derived from a covered animal who was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner," by its terms does not apply to pork producers (such as plaintiff's members), who have direct knowledge of their covered animals' confinement conditions.

With respect to plaintiff's members, there is no Due Process Clause issue presented by the lack of Final

Regulations. "[T]he Constitution only requires that [a party] receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations." *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 908 (9th Cir. 2019). Plaintiff cites no authority suggesting that a lack of implementing regulations, even when required by the statute, constitutes an as-applied void for vagueness Due Process Clause violation where the statute itself "give[s] fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).[8]

Here, there is no question that Proposition 12 requires that "the Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019," and that, to this point, the Final Regulations are not complete. However, despite the lack of Final Regulations, the provisions of Proposition 12 that apply to plaintiff's members are plain from the statute's text, as are the applicable enforcement standards. Accordingly, plaintiff has not raised any serious questions on the merits of its as applied Due Process Clause challenge to Proposition 12 to the extent the challenge is based upon defendants' failure to timely promulgate the Final Regulations. *See Shetler*, 665 F.3d at 1164; *see also Robles*, 913 F.3d at 909.

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[8] For example, while plaintiff cites *Taylor v. Madigan*, 53 Cal. App. 3d 943, 950-51 (1975) and *People v. Vega-Hernandez*, 179 Cal. App. 3d 1084, 1092 (1986), those cases merely stand for the proposition that rights established by California constitutional provisions that require implementing legislation from the Legislature are not self-executing.

b. Commerce Clause Claim

The Constitution extends to Congress the power to "regulate Commerce . . . among the several states." U.S. Const., Art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) *("Optometrists II")* (quoting *South—Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984)). "This limitation on the states to regulate commerce is 'known as the dormant Commerce Clause.'" *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 947 (9th Cir. 2013) (quoting *Optometrists II*, 682 F.3d at 1148). "The primary purpose of the dormant Commerce Clause is to prohibit 'statutes that discriminate against interstate commerce' by providing benefits to 'in-state economic interests' while 'burdening out-of-state competitors.'" *Id.* at 947 (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) and *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008)).

"The Supreme Court has adopted a 'two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Eleveurs*, 729 F.3d at 948 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986)). On the one hand, state regulations that (1) "discriminate against interstate commerce" or (2) "directly regulat[e] extra-territorial conduct" are generally "struck down . . . without further inquiry." *Id.* at 948-49 (quoting *Brown-Forman); see also Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (explaining that such laws "face

a virtually *per se* rule of invalidity"). However, state regulations that (3) "regulate 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." *Wayfair, Inc.*, 138 S. Ct. at 2091 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)); *see also Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015) (Gorsuch, J.) (explaining that "dormant commerce clause cases are said to come in [these] three varieties").

Plaintiff contends that Proposition 12 is unconstitutional on all three grounds.

(1) Discriminatory Purpose and Effect

Discrimination against out of state commerce "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). "The party challenging a regulation" on this basis "bears the burden of establishing that a challenged statute has a discriminatory purpose or effect under the Commerce Clause." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 400 (9th Cir. 2015) (internal citation and marks omitted).

Plaintiff contends that Proposition 12 facially discriminates against its members because it targets out-of-state entities in a manner that benefits in-state interests at the expense of out-of-state interests, in the face of controlling authority holding that laws motivated by economic protectionism "'are subject to a virtually per se rule of invalidity.'" PI Mot. at 23-24 (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007)).

Plaintiff points to the six years afforded to in-state producers to comply with the Turn Around Requirements pursuant to Proposition 2, in contrast with the six weeks afforded to out-of-state producers pursuant to Proposition 12, as well as the fact that the stated "purpose" of Proposition 12 is to prevent "negative fiscal impacts on the state of California," in asserting that Proposition 12 is discriminatory on its face and in its purpose. PI Mot. at 24 (citing 2018 Cal. Legis. Serv. Prop. 12 (PROPOSITION 12) (WEST)). With respect to discriminatory effect, plaintiff again highlights the "lead time" differences between Proposition 2 and Proposition 12. PI Mot. at 25. Plaintiff also points to the Prop. 12 FAQs, which it argues "will only benefit the California producers and be meaningless to out of state producers." *Id.*

In opposition, defendants note that Proposition 12 is neutral on its face, and that "[t]he prohibition on the sale of whole pork meat from an animal confined in a cruel manner applies to any 'business owner or operator' selling 'within the state.'" PI Opp. at 22 (citing Cal. Health & Safety Code §§ 25590-91). As to discriminatory purpose, defendants argue that neither the text of Proposition 12 nor anything else suggest that Proposition 12 was motivated by a discriminatory intent. PI Opp. at 23. Finally, with respect to discriminatory effect, defendants argue that, by now, plaintiff has had over three years to come into compliance with the Turn Around Requirements, and that their argument that the Prop. 12 FAQs will only benefit California producers is "nonsensical" because "[a]ll producers wishing to sell their whole pork meat into California, whether located inside or outside of the state, must comply with the Square Footage Requirements as of January 1, 2022." *Id.* at 24.

In reply, plaintiff reiterates its argument that the "lead time" discrepancy between Proposition 2 (in-state producers) and Proposition 12 (out-of-state producers) has had a discriminatory effect on out-of-state producers. PI Reply at 21-22. Plaintiff adds that the Prop. 12 FAQs "exacerbate an already discriminatory law, effectively ignoring the fact that no legal sell through is allowed for whole pork meat that violates the Turn Around Requirements after the effective date of the Act." *Id.* at 23.

As a preliminary matter, Proposition 12 is facially neutral. As defendants correctly argue, "[t]he prohibition on the sale of whole pork meat from an animal confined in a cruel manner applies to any 'business owner or operator' selling 'within the state.'" PI Opp. at 22 (citing Cal. Health & Safety Code §§ 25590-91). Proposition 12 makes no distinction whatsoever between in-state and out-of-state pork producers. *See* Cal. Health & Safety Code § 25590 *et seq*. "[A] statute that treat[s] all private companies exactly the same does not discriminate against interstate commerce. . . . This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses." *Eleveurs*, 729 F.3d at 948 (internal quotation marks and citations omitted).

With respect to discriminatory purpose, plaintiff first argues that "the 'purpose' language [of Proposition 12] expressly states that it is designed to prevent "negative fiscal impacts on the State of California." PI Mot. at 24 (citing 2018 Cal. Legis. Serv. Prop. 12 (PROPOSITION 12) (WEST)). However, plaintiffs partial quote of Proposition 12's "purpose" language is misleading. In full, the purpose of Proposition 12 is "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." 2018 Cal. Legis. Serv. Prop. 12, § 2. This language is not evidence that Proposition 12 was "motivated by 'simple economic protectionism.' *United Haulers*, 550 U.S. at 338 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Rather, it suggests that Proposition 12 represents an effort to prevent animal cruelty, and to prevent negative fiscal impacts on the state of California "associated" with "the risk of foodborne illness." 2018 Cal. Legis. Serv. Prop. 12, § 2. Plaintiff offers no other evidence that suggests that Proposition 12 was motivated by economic protectionism or an effort to benefit in-state producers at the expense of out-of-state producers.

Finally, with respect to discriminatory effect, plaintiff emphasizes that while in-state producers had six years to comply with the Turn Around Requirements pursuant to Proposition 2, out-of-state producers subject to Proposition 12 had only six weeks.

Plaintiff also argues that the Prop. 12 FAQs—which provide that pork meat that was not in compliance with the Square Footage Requirements, but was already in inventory or in commerce by December 31, 2021, will remain legal to sell in California—have a discriminatory effect because they fail to provide out-of-state producers relief from the Turn Around Requirements.

In *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014 (C.D. Cal. 2019), aff'd, 825 F. App'x 518 (9th Cir. 2020), this Court noted that the "lead time" discrepancy between Proposition 2 and Proposition 12 with respect to the Turn Around Requirements *"could* [represent] an arguable basis to claim that Proposition 12

discriminates against out-of-state commerce," because in *Eleveurs* "the sales prohibition came into effect against instate and out-of-state producers at the same time, so the 'lead time' allotted for compliance was not an issue in the discrimination analysis." *N. Am. Meat Inst*, 420 F. Supp. 3d at 1028 n. 7.

However, upon further review of *Eleveurs*, the Court is not convinced that the "lead time" discrepancy raises a serious question that Proposition 12 has a discriminatory effect. In *Eleveurs*, the Ninth Circuit found that "a statute that treats all private companies exactly the same" is not discriminatory "even when only out-of-state businesses are burdened because there are no comparable in-state businesses." *Eleveurs*, 729 F.3d at 948. Here, as previously noted, Proposition 12 treats all companies the same. Plaintiff's discriminatory effect argument is that a different law, passed ten years earlier, treated in-state companies differently in that it gave them more time to comply with the Turn Around Requirements. However, given that under *Eleveurs* there is no discriminatory burden on out-of-state businesses even where no comparably burdened instate business exists, the Court finds and concludes that there is also likely no discriminatory burden where in-state business are *already in compliance* with the same regulatory standards, even if in-state pork producers had more time to comply with Proposition 2 than out-of-state pork producers had to comply with Proposition 12.

Moreover, plaintiff's argument that the "lead-time" discrepancy has had a discriminatory effect on its members is belied by the fact that plaintiff filed this action almost three years after Proposition 12 was passed. Plaintiff fails to provide any authority suggesting that the discriminatory burden of a particular law

must be analyzed in connection with previous regulations. Even in *N. Am. Meat Inst. v. Becerra*, this Court stated that it was "less than sanguine about the merits of [plaintiffs] 'lead time' argument" because, like the IPPA here, NAMI "cite[d] no case law for the proposition that a statute can have a discriminatory effect if a prior statute, imposing the same regulatory obligations, [gave] in-state entities more time to comply." *N. Am. Meat Inst*, 420 F. Supp. 3d at 1029 n. 9.

In sum, on the record before it, the Court finds that Proposition 12 is not discriminatory because it "treats all private companies exactly the same." *Eleveurs*, 729 F.3d at 948. Accordingly, the Court concludes that plaintiff's discriminatory effect claim fails to raise any questions on the merits that would support the issuance of a preliminary injunction.

(2) *Direct Regulation of Extraterritorial Conduct*

Plaintiff next claims that "Proposition 12 seeks to create a national regulation on sow confinement practices," in violation of the extraterritoriality doctrine. PI Mot. at 28. Plaintiff adds that the practical effect of Proposition 12 will be an increase in pork prices. *Id.*

Despite plaintiff's argument, "state laws that regulate only conduct in the state, including the sale of products in the state, do not have impermissible extraterritorial effects." *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1029 (9th Cir. 2021). "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" unless they "directly regulate[] conduct that is wholly out of state." *Id.*

In *Nat'l Pork Producers Council*, the Ninth Circuit upheld the grant of a motion to dismiss a claim challenging Proposition 12 on dormant Commerce Clause grounds. Therein, the Ninth Circuit noted 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 instate products to out-of-state prices,'" and 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." *Nat'l Pork Producers* Council, 6 F.4th at 1028 (quoting *Eleveurs*, 729 F.3d at 951). Similarly, in *N. Am. Meat Inst. v. Becerra*, which affirmed the denial of a preliminary injunction, the Ninth Circuit stated that "the district court did not abuse its discretion in concluding that Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute." 825 F. App'x 518, 520 (9th Cir. 2020).

While plaintiff "respectfully submits that extraterritoriality rulings" in *Nat'l Pork Producers Council* and *N. Am. Meat Inst.* were incorrect, it acknowledges that those cases are "currently binding over corresponding claims in this Court." PI Reply at 23-24. Accordingly, plaintiff has not raised any serious questions on the merits of its extraterritoriality claim.

(3) *Substantial Burden on Interstate Commerce*

Plaintiff claims that Proposition 12 will advance no real health or safety benefit, and that the ballot initiative record was devoid of evidence that Proposition 12 will protect farm animals from cruel confinement practices. PI Mot. at 27. Plaintiff also argues that "[i]t is widely accepted that longstanding industry best

practices of individual gestation confinement is better for the health and safety of both breeding pigs and their offspring." *Id.* (citing Johnson Decl., ¶ 70). Additionally, plaintiff claims that "Proposition 12's only theoretical benefit is the unconstitutional leveling of the economic playing field for in-state producers, which is not a legitimate interest." PI Mot. at 27. Finally, plaintiff argues that even if Proposition 12 served a legitimate state interest, the fiscal impacts on interstate commerce, including the possibility of a 4 percent increase in nationwide pork prices, and/or pork shortages, are excessive to any such interest. *Id.* at 27-28.

Pursuant to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a statute may violate the Commerce Clause if "the burden [it] impose[s] on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. "[U]nder *Pike*, a plaintiff must first show that the statute imposes a substantial burden before the court will 'determine whether the benefits of the challenged laws are illusory,' or otherwise inadequate, to justify the burden. *Eleveurs*, 729 F.3d at 951-52 (quoting *Optometrists H*, 682 F.3d at 1155).

"[M]ost statutes that impose a substantial burden on interstate commerce do so because they are discriminatory" or purport to regulate extraterritorially, as discussed above. *Eleveurs*, 729 F.3d at 952 (citing *Optometrists II*, 682 F.3d at 1150). "[L]ess typically," courts have found that non-discriminatory, non-extraterritorial statutes may still "impose significant burdens on interstate commerce" when they cause the "'inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Eleveurs*, 729 F.3d at 952 (quoting *Optometrists II*, 682 F.3d at 1148). The need for

uniformity generally arises in challenges to laws affecting "interstate transportation," as well as cases involving sports leagues. *See Eleveurs*, 729 F.3d at 952 (observing that "examples of 'courts finding uniformity necessary' fall into the categories of 'transportation' or 'professional sports leaves') (citing *Valley Bank of Nevada v. Plus Sys., Inc.*, 914 F.2d 1186, 1192 (9th Cir. 1990)). The Ninth Circuit has held that "a regulation [which] does not regulate activities that inherently require a uniform system of regulation and does not otherwise impair the free flow of materials and products across state borders . . . is not a significant burden on interstate commerce." *Optometrists II*, 682 F.3d at 1154-55.

While IPPA argues that Proposition 12 will have negative financial impacts on plaintiffs members and on consumers through increased prices, "[d]emonstrating that state regulations impose substantial costs on interstate operations is not sufficient to establish a burden calling for balancing under *Pike*." *S. Pac. Transp. Co. v. Pub. Utilities Comm'n of State of Cal.*, 647 F. Supp. 1220, 1227 (N.D. Cal. 1986), aff'd, 820 F.2d 1111 (9th Cir. 1987) (citing *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526 (1959) and *Burlington Northern Railroad Co. v. Department of Public Service*, 763 F.2d 1106, 1114 (9th Cir. 1985) ("The claims by *Burlington Northern* that operation of the Browning station results in a loss to the company does not, without more, suggest that the Montana statute impedes substantially the free flow of commerce from state to state."); *see also Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 127-28 (1978) ("[T]he [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

Moreover, the Ninth Circuit's recent rulings in *Nat'l Pork Producers Council* and *N. Am. Meat Inst.* are again controlling. While plaintiff argues that longstanding pork production industry practices are best, "a non-discriminatory regulation that 'precludes a preferred, more profitable method of operating in a retail market' does not place a significant burden on interstate commerce. *Nat'l Pork Producers Council*, 6 F.4th at 1032 (citing *Optometrists II*, 682 F.3d at 1154-55). Discussing Proposition 12 directly, the Ninth Circuit has stated that "[e]ven 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 . . [n]or do higher costs to consumers qualify as a substantial burden on interstate commerce." *Nat'l Pork Producers Council*, 6 F.4th at 1033. Given this controlling authority, the Court "'need not determine whether the benefits of the challenged law are illusory.'" *Id.* at 1033 (citing *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019)).

Because there is no serious argument that Proposition 12 imposes any substantial burden on interstate commerce, the Court concludes that plaintiff has not raised a serious question as to its *Pike* claim.

2. Remaining Preliminary Injunction Factors

The Court recognizes that complying with Proposition 12 could impose potentially significant costs upon plaintiffs members, including increased production costs and facility renovations. *See* Dkt. 24-3 ("Tonsor Decl.") ¶¶ 8-23. In opposition, defendants argue that plaintiffs delay in bringing this action (filing suit almost three years after Proposition 12 was approved) implies a lack of urgency and a concomitant lack of irreparable harm.

Since the Eleventh Amendment may prevent the recovery of plaintiff's compliance costs, these potentially noncompensable money damages can constitute irreparable injury. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), *vacated on other grounds*, 565 U.S. 606 (2012) (holding that money damages are irreparable where a plaintiff can "obtain no remedy in damages against the state because of the Eleventh Amendment"); *accord Video Gaming Techs., Inc. v. Bureau of Gambling Control*, 356 F. App'x 89, 93 (9th Cir. 2009) (holding that "monetary injuries may be irreparable if Eleventh Amendment sovereign immunity will bar a party from ever recovering those damages in federal court").

However, in light of the Court's conclusion that there are no serious questions regarding the merits of plaintiff's constitutional challenges, the Court declines to address plaintiffs arguments on the remaining irreparable harm and balance of hardships factors. *See Global Horizons, Inc. v. United States DOL*, 510 F.3d 1054, 1058 (9th Cir. 2007) ("Once a court determines a complete lack of probability on the success or serious questions going to the merits, its analysis may end, and no further findings are necessary.").

V. CONCLUSION

In accordance with the foregoing, the Court GRANTS proposed intervenors' motion to intervene and DENIES plaintiff's motion for a preliminary injunction.

IT IS SO ORDERED.

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

2:21-cv-09940-CAS (AFMx)

IOWA PORK PRODUCERS ASSOCIATION,

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and TOMAS ARAGON, is official capacity as Director of the California Department of Public Health,

Defendants,

THE HUMANE SOCIETY OF THE UNITED STATES; ANIMAL LEGAL DEFENSE FUND; ANIMAL EQUALITY; THE HUMANE LEAGUE; FARM SANCTUARY; COMPASSION IN WORLD FARMING USA; ANIMAL OUTLOOK,

Defendants-Intervenors.

FINAL JUDGMENT

JUDGMENT

On March 2, 2022, the Court served its order granting defendant's motion to dismiss plaintiffs first amended complaint in its entirety, and permitting plaintiff 14 days' leave to amend. Dkt. 83. On March

18, 2022, plaintiff filed a notice of intent not to amend the complaint. Dkt. 85.

Accordingly, the Court ORDERS, ADJUDGES, AND DECREES that judgment be, and hereby is, entered in favor of defendants. The Court enters judgment dismissing plaintiffs first amended complaint for preliminary and injunctive and declaratory relief with prejudice.

IT IS SO ORDERED.

Dated: March 29, 2022

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. 1:21-cv-01663

IOWA PO RK PRODUCERS ASSOCIATION,

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and TOMAS ARAGON, in his official capacity as Director of the California Department of Public Health,

Defendants.

Unlimited Civil Case

Dept.:
Judge:
Trial Date: Not Assigned

Action Filed:

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Attorneys for Plaintiff
Iowa Pork Producers Association

FIRST AMENDED VERIFIED COMPLAINT
FOR PRELIMINARY AND PERMANENT
INJUNCTIVE AND DECLARATO RY RELIEF

Plaintiff Iowa Pork Producers Association, in a representative capacity for its members, ("IPPA" or "Plaintiff"), by and through its counsel of record, for its First Amended Complaint for Declaratory and Injunctive Relief against Defendants Rob Bonta, in his official capacity as Attorney General of California ("Bonta"), Karen Ross, in her official capacity as Secretary of the

California Department of Food and Agriculture ("Ross"), and Tomas Aragon, in his official capacity as Director of the California Department of Public Health ("Aragon") (collectively, "Defendants"), respectfully states to the Court as follows:

INTRODUCTION

1. This case challenges the constitutionality of California's Proposition 12 Farm Animal Confinement Initiative ("Proposition 12" or "Prop 12" or the "Act"), which imposes confinement requirements on out-of-state pork producers and prohibits the sale of pork meat within the state of California from animals confined in a manner inconsistent with California's requirements, regardless of where in the nation the animal was raised.

2. Proposition 12 poses a current and imminent risk of criminal prosecution and civil enforcement against Plaintiff's members, as the Act imposes both criminal and civil penalties on any non-compliant business owner or operator who is "engaged in the sale" of whole pork meat within California.

3. Iowa, where Plaintiff and its members are located, is the largest pork producing state in the United States and is the leading state for pork exports.

4. California residents consume an estimated 13-15% of the overall national pork consumption in the U.S.

5. Despite its behemoth status as a consumer of pork, California has as few as 8,000 breeding pigs in the entire state. Only approximately 1,500 of these breeding pigs are used in commercial breeding in the state and are situated in a handful of very small farms. This equates to California production making up less

than 1% of the total U.S. pork production. If California were to meet its own in-state pork demand, it would require production from approximately 673,000 breeding pigs annually. In other words, California cannot feed itself without massive agricultural imports from other states, including, most importantly, from Iowa and Plaintiff's members.

6. On November 6, 2008, California voters passed Proposition 2. Proposition 2 created confinement requirements for in-state producers in California. Proposition 2 required that breeding pigs in California be housed in a manner that permits the animals to "turn around freely, lie down, stand up, and fully extend their limbs," subject to limited exceptions (the "Turn Around Requirements"). Prop 2 provided in-state producers more than six years to comply with the Turn Around Requirements, as the effective date was set at January 1, 2015.

7. On November 6, 2018, California voters passed Proposition 12 and extended these Turn Around Requirements that California producers were now in compliance with to be effective upon out-of-state producers, making them effective on December 19, 2018. This gave the rest of the country's pork producers only six *weeks* to comply with the same requirements that California had provided over six years to in-state-producers.

8. Proposition 12 also added a second requirement, the square footage requirements, and specified an effective date of "after December 31, 2021" for breeding pigs. These separate requirements state that a breeding pig must be provided with at least 24 square feet of usable floorspace per pig (the "Square Footage Requirements").

9. Recognizing the vagueness of the Act, Proposition 12 required that California's Department of Food and Agriculture ("CDFA") and Department of Public Health ("CDPH") jointly promulgate rules and regulations to implement Proposition 12 and provide adequate notice of compliance requirements to those subject to Proposition 12 by September 1, 2019 ("Final Regulations").

10. However, while Proposition 12 mandated Final Regulations for the *entirety* of the Act, the December 19, 2018 effective date of the Turn Around Requirements was immediate and left no time for the CDFA and CDPH to promulgate the Final Regulations and certainly no time for out-of-state producers to comply.

11. Further, Proposition 12's mandated deadline of September 19, 2019 for the Final Regulations passed without even draft regulations issued, let alone Final Regulations.

12. Just this year, on May 28, 2021, the CDFA finally published draft rules and regulations to consider for Proposition 12, one year and nine months past the voters' statutory deadline (the "Proposed Regulations").

13. Proposition 12 allows for criminal and civil penalties for any person found to be in violation of either the Turn Around Requirements or the Square Footage Requirements, or any provisions of the Act, including criminal misdemeanor convictions, with penalties of a fine of up to $1,000 or 180 days imprisonment. These criminal penalties can be assessed against both business owners and operators who are non-compliant with Proposition 12 who choose to

"engage in a sale" of non-compliant pork meat within California.

14. It will take years and cost at least tens of millions of dollars for Plaintiff's members to come into compliance with Proposition 12's Final Regulations once they are finally known.

15. In the meantime – and even according to Defendants – any district attorney or local prosecutor in the state of California, in addition to the Attorney General's Office, can prosecute Proposition 12 now even without the Final Regulations and without leaving the industry any time to comply. Owners, operators – and anyone who "aids and abets" or "conspires" with them within the food chain, is at imminent risk for criminal prosecution.

16. Proposition 12's Turn Around Requirements and Square Footage Requirements are inconsistent with pork industry practices and standards, generations of producer experience, scientific research, and the consensus standards of other states. Proposition 12 will impose costly mandates that substantially interfere with commerce among the states in hogs and whole pork meat markets. It will impose enormous costs on Iowa pork producers, ultimately having a direct impact on the price of pork for all Americans, the vast majority of whom had no say in Proposition 12.

17. Most breeding pigs that will produce hogs sold as meat product in 2022 *are already alive* at Iowa farms. The breeding cycle of the pigs is four months, followed by the piglets being raised for three to four weeks before they are weaned and ultimately, farrow to finish takes approximately 24-26 weeks.

18. Proposition 12 will force the unnecessary slaughter of these breeding pigs, the same pigs that California voters were told Proposition 12 will help.

19. Through Proposition 12, California seeks to unilaterally impose sweeping changes across the national pork production industry and subject out-of-state individuals in the production market to criminal penalties. Currently, an estimated 4% of pork producers nationwide could satisfy California's onerous standards. California also cannot meet its state's pork demand or feed itself. Due to the proportion of the national pork supply destined for California—and the significant integration and coordination of national pork production and distribution system—it is neither feasible nor practical for producers to segregate their product from California markets. Not selling to California is not an option. As a result, California has attempted to create a national regulation on breeding pig housing through the passage of Proposition 12.

20. Proposition 12's assertion that non-compliant pork meat "threatens the health and safety of California consumers, and increases the risk of foodborne illness" is false and inconsistent with scientific studies surrounding housing breeding pigs in group pen settings. In fact, by California's own admission, Proposition 12 provides no real health or safety benefit to residents. *See* 2021 CA REG TEXT 584571 (NS) at 6, 11 ("This proposal does not directly impact human health and welfare of California residents, worker safety, or the State's environment.").

21. Within the Standardized Regulatory Impact Assessment (the "SRIA") of Proposition 12, it was confirmed there is no conclusive, scientific link between animal housing space allocation and human food-borne illness, or other human health or safety.

22. Economic research indicates implementation of Proposition 12 will actually have *adverse* fiscal impacts on residents in California. California residents comprise a large market of pork consumers who will face higher pork prices following implementation of Proposition 12. Thus, any alleged negative fiscal impact that led to the passage of Proposition 12 lacks support.

23. Currently in the United States, an estimated 42 million people may experience food insecurity in 2021. Pork ranks third in the United States for meat consumption. Proposition 12 threatens to significantly increase the cost of pork for consumers, which will make it even more difficult for economically-distressed families and those already facing food insecurity to afford this critical source of protein.

24. Proposition 12 also threatens the public supply of pork within California, which is necessary to satisfy the needs of the businesses and state facilities, including hospitals, schools, and prisons.

25. Without immediate and permanent injunctive relief from this Court, Proposition 12 will unconstitutionally and irreparably risk and injure breeding pigs, piglets, and Iowa pork producers, their livelihoods, liberty and their property.

PARTIES

26. Plaintiff IPPA serves as a unified voice for its Iowa pork producer members. It is a grassroots organization that consists of approximately 70 structured county associations across the state, with more than 4,000 affiliated and associate members that are overwhelmingly individual producers. Every producer-member, regardless of size, has a voice in IPPA through a county-elected delegate system. IPPA has members in nearly every county within Iowa.

27. Plaintiff's members produce the whole pork that their processors and packers sell directly into California.

28. Defendant Bonta is the Attorney General of the State of California. Bonta is responsible for the enforcement of Proposition 12 and is sued in his official capacity only.

29. Defendant Ross is the Secretary of the California Department of Food and Agriculture, which is responsible for implementation of Proposition 12. Ross is sued in her official capacity only.

30. Defendant Aragon is the Director of the California Department of Public Health, which is responsible for implementation of Proposition 12. Aragon is sued in his official capacity only.

JURISDICTION AND VENUE

31. This Court has jurisdiction over this complaint for declaratory and injunctive relief pursuant to sections 525, 526, and 1060 of the California Code of Civil Procedure.

32. The Court has authority to enjoin enforcement of Proposition 12's sales ban under 42 U.S.C. § 1983 and state law.

33. Venue is proper in this county pursuant to sections 395 and 401 of the California Code of Civil Procedure because this is an action against the State, or a department, officer or other agency thereof, that may be commenced in the County of Sacramento, and therefore may also be commenced in any county in which the California Attorney General has an office. The California Attorney General has an office in this county.

BACKGROUND ON PROPOSITION 12

34. In 2008, California enacted California Health and Safety Code Section 25990 through ballot initiative Proposition 2, for California *in-state* pork producers to require breeding pigs in California be housed in a manner that permitted the animals to "turn around freely, lie down, stand up, and fully extend their limbs," subject to limited exceptions known as the Turn Around Requirements.

35. Proposition 2 provided in-state producers more than six years to comply with these Turn Around Requirements, as the requirements did not go into effect for California in-state pork producers and packers until January 1, 2015. Cal. Health & Safety Code § 25990(a).

36. On November 6, 2018, California enacted another amendment to California Health and Safety Code Section 25990-25993 through ballot initiative, Proposition 12. Proposition 12, in stark contrast to the time allowed for California in-state producers and packers, went into effect just six *weeks* later on December 19, 2018 for out-of-state producers. Cal. Health & Safety Code §§ 25990(a) – 25994.

37. The California Constitution, Article II, Section 10, provides that unless a statute otherwise specifies a date, a ballot initiative "takes effect on the fifth day after the Secretary of State files the statement of the vote for the election at which the measure is voted on, but the measure may provide that it becomes operative after its effective date." According to the Defendants, Proposition 12's Turn Around Requirements do not have a separately specified effective date and the Turn Around Requirements went into effect December 19,

2018 and are in effect now. Cal. Health & Safety Code § 25991(e)(1).

38. After California allowed over six years for their own in-state producers and packers to comply, for the first time, California's Turn Around Requirements were *immediately* imposed upon the entire out-of-state industry to sell whole pork meat within the state of California, regardless of where the hog was raised and regardless of providing the pork industry almost no time to comply. It immediately became a crime for the Plaintiff's members –and the out-of-state pork industry to sell into California.

39. Proposition 12 also added a second set of requirements, the Square Footage Requirements, and specified an effective date of "after December 31, 2021." These separate requirements state that a breeding pig must be provided with at least 24 square feet of usable floorspace per pig. Cal. Health & Safety Code § 25991(e)(3).

40. The limited exceptions as applicable here include only the five-day period prior to the expected date of giving birth, during nursing, and for only temporary periods of less than six hours for breeding purposes. Cal. Health & Safety Code § 25992.

41. Proposition 12 is both a criminal and civil statute. The statute imposes criminal exposure on any person found to be in violation of either the Turn Around Requirements or the Square Footage Requirements, or any provisions of the Act, including penalties against individuals and entities for criminal misdemeanor convictions, a fine of up to $1,000 and/or 180 days imprisonment. Cal. Health & Safety Code § 25993.

42. These criminal penalties can be assessed against both business owners and operators who are non-compliant with Proposition 12 who choose to "engage in a sale" of pork meat into California. Cal. Health & Safety Code § 25990(a) and (b)(2).

43. The California Penal Code further permits prosecution of individuals outside the state of California who aid and abet those engaged in the sale of meat in violation of Proposition 12. Under, California Penal Code Section 27(a)(1), "being without this state, cause or aid, advise or encourage, another person to commit a crime within [California], and are afterwards found therein" ... "are liable to punishment under the laws of [California]." Under California Penal Code Section 31, any person aiding and abetting in the commission of a misdemeanor may be charged as a principal of the crime.

44. The California Penal Code also permits prosecution of individuals outside the state of California who conspire with those engaged in the sale of meat in violation of Proposition 12. Under California Penal Code Section 181, if two or more persons conspire to commit "any act injurious to the public health, the public morals ... or the due administration of the laws" they could be punished by imprisonment in county jail for up to one year or by a fine not exceeding $10,000 or by both the imprisonment and fine.

45. Under California Penal Code Section 184, "[n]o agreement amounts to a conspiracy, unless some act, beside such agreement, be done within [California] to effect the object thereof, by one or more of the parties to such agreement . . .."

46. Proposition 12 does not define what it means for an individual to be "engaged in" a sale within the State

of California, and by Proposition 12's plain language, an out-of-state producer is potentially subject to criminal prosecution for being "engaged in" the chain of sale of noncompliant pork meat into the State of California. Cal. Health & Safety Code § 25990(a) and (b)(2).

47. Facilities and housing conditions for breeding pigs and piglets are complex animal care conditions and based on years of continuous scientific improvement. Proposition 12 does not define what it means for facilities to comply with one or either of the two requirements.

48. Proposition 12 does not clearly define whether the requirements apply to the life of the breeding pig or whether moving a breeding pig to a new compliant facility will suffice for the production of compliant whole pork for sale into California.

49. Further, Proposition 12 does not define what qualifies as specific violation of the Act. For example, it remains vague as to whether a single violation is based on each sale, each pound or piece of meat, or each breeding pig.

50. Due to the vagueness of these requirements in the Proposition 12 statute – and the nuances of the appliable exceptions – Proposition 12 mandated that "the Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019." Cal. Health & Safety Code § 25993.

51. Additionally, the sale of non-compliant pork meat qualifies as unfair competition, as defined in Section 17200 of the Business and Professions Code, and is punishable as prescribed in Chapter 5

(commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code. It provides violators are separately subject to a $2,500 fine per violation under the state Consumer Protection Act. Cal. Health & Safety Code § 25993.

52. Unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code. Cal. Bus. & Prof. Code § 17200.

53. The California Business and Professions Code permits the California attorney general, any district attorney, county counsel, city attorney, city prosecutor, and even *any person* who can meet standing requirements to file a lawsuit to enforce the provisions of the chapter. Cal. Bus. & Prof. Code § 17203.

54. While Proposition 12 mandated Final Regulations for the Act, the Turn Around Requirements' effective date of December 19, 2018 was immediate and left no time for the CDFA and CDPH to promulgate the rules and regulations, let alone time for Plaintiff's members or the out-of-state pork industry to comply.

55. Proposition 12's mandated deadline of September 1, 2019 for the Final Regulations passed without even *draft* rules or regulations published, let alone Final Regulations.

56. On March 5, 2021 of this year, CDFA issued FAQs to the public. *See* CDFA AHFSS Animal Care Program Prop 112 FAQ, (March 5, 2021), https://www.cdfa.ca.gov/AHFSS/pdfs/Prop 12 FAQ March 2021.pdf. These FAQs did not address the most material questions by Plaintiffs or the industry ("CDFA FAQs").

The short document failed to provide any guidance needed for compliance with Proposition 12.

57. Within the CDFA FAQs, a question was posed regarding potential sell through of whole pork meat that was non-compliant with the Square Footage Requirements. CDFA stated that because the effective date of the Square Footage Requirements goes into effect on January 1, 2022, pork meat in inventory or commerce on December 31, 2021 would be legal to sell in California. However, this month CDFA has consistently said to the public that their position, like their FAQ answer, only applies to the Square Footage Requirements and that whole pork meat cannot be sold into California now or after January 1, 2022 that is not incompliance with the Turn Around Requirements as of December 19, 2018. This requirement renders all current whole pork meat for out-of-state producers non-compliant, not even allowing legal sell through for current pigs born prior to January 1, 2022, currently alive on farms or within the supply chain.

58. One year and nine months past the statutory deadline, just this year, on May 28, 2021, the CDFA published the Proposed Regulations to consider for Proposition 12.

59. Defendants published the Revised Regulations on December 3, 2021 that they have characterized as "not substantial" changes to the Proposed Regulations that were published May 28, 2021. The Revised Proposed Regulations are subject to a fifteen (15) day public written comment period and no opportunity for public hearing has been provided. The earliest date the Revised Proposed Regulations will be *effective and enforceable* is April 1, 2022.

60. In the meantime, the threat of enforcement of the Act remains and is imminent, as any district attorney, local prosecutor or the Attorney General's office, can criminally indict those selling – or involved in the food supply chain selling – into California. Further, the risk of civil enforcement and private party claims under the California Business & Professions Code also are imminent risks. On information and belief, no statutory enforcer of Proposition 12 has disclaimed its authority or ability to initiate criminal or civil actions.

61. Even the Proposed and Revised Regulations demonstrate the discriminatory intent of Defendants as they threaten to impose onerous registration and certification requirements on out-of-state producers and directly regulate extraterritorial conduct. For example, California has made clear that it intends to require out-of-state producers to comply with certification requirements through private third-party certifiers, and to keep up with recordkeeping and reporting requirements including annual distributor registration and renewal forms submitted to the department in order to sell into the state. *See* 2021 CA REG TEXT 584571 (NS) at 13.

62. Not only are out-of-state producers required to comply with registration and certification requirements according to the current Revised Regulations, but any producer wishing to sell into the state will be subject to the Departments' "routine and risk-based audits and inspections of farms." This means that California currently plans to have California state officials or direct third-party certifiers go on to out-of-state farms to ensure that they are in compliance with Proposition 12.

63. Proposition 12's vague language and CDFA and CDPH's failure to publish the Final Regulations, unquestionably leaves the law vague for any reasonable compliance by Plaintiff's members and anyone selling or supplying whole pork for sale into California.

64. Because California producers were already required to comply with the Turn Around Requirements since the passage of Proposition 2, Proposition 12 targeted and applied Turn Around Requirements only for *out-of-state* producers.

65. The California Legislature recognized that out-of-state producers were at an advantage within the California market and thus enacted Assembly Bill 1437 ("AB1437") with the protectionist intent of leveling the playing field and imposing California's confinement requirements for egg-laying hens on out-of-state producers as well.

66. AB1437 did *not* apply to pork meat.

67. After AB1437 was enacted, California proposed Proposition 12, drafted and primarily sponsored by the Humane Society of the United States, which would, like AB1437, regulate pork produced outside of California and, for the first time, subject out-of-state pork producers to California's Turn Around Requirements for breeding pigs if the producer, business owner, or operator desired to sell whole pork meat into or within California.

68. By California's own admission, if California did not impose Proposition 12's confinement requirements on out-of-state producers as well, in-state farms would "find it more costly to compete with farms outside of the state when selling...whole pork meat..." *See* 2021 CA REG TEXT 584571 (NS) at 10.

69. Proposition 12 also unquestionably directly and intentionally targeted out-of-state activity, and directly regulates extraterritorial activity, both through the confinement, inspection, and registration requirements and by stifling interstate commerce through the prohibition of sale of non-compliant pork meat into and within California.

IMMEDIATE IMPACTS OF PROPOSITION 12 ON THE IOWA PORK PRODUCTION INDUSTRY

70. Nearly one-third of the nation's hogs are raised in Iowa—more than twice the amount of its runner up state—and Iowa has more than 5,400 hog farms, with producers in nearly every county.

71. In 2020, Iowa sales for the pork industry including hog production totaled $40.8 billion. It also generated $893 million in state and local taxes and $1.3 billion in federal taxes.

72. In 2020, Iowa had 960,000 breeding pigs and more than 22 million hogs and pigs total on Iowa farms.

73. The Iowa hog inventory has been growing at a rate of 3% annually for the past decade, compared to a 2% growth rate nationally in the United States market.

74. As of 2017, 45% of farming operations in Iowa are on farms with between 1,000 and 5,000 hogs and pigs.

75. The number of smaller farming operations in Iowa has been dwindling since 1997.

76. Nearly 150,000 jobs within Iowa are associated with the Iowa pork industry, and nearly 1 in 10 working Iowans have a job tied to the pork industry.

77. Compliance with Proposition 12 requires significant and extremely costly changes to the farming operations of Iowa's pork producers, including Plaintiff's members.

78. Sows are female pigs utilized for breeding and give birth to the piglets that ultimately become hogs sent to market. Sows are usually maintained on sow-specific farms that are commonly separated from other hog facilities, to prevent the spread of disease, for the safety of the sows, and to increase efficiency. Sows are generally artificially inseminated, litters of piglets are born, and the piglets are raised for three to four weeks before they are weaned.

79. An overwhelming majority of sow farms use some type of indoor confinement for sow operations, utilizing the benefit of year-round production and protection from seasonal weather changes, disease exposure, and external predators.

80. Only a small portion of the pigs that are harvested for meat are sows that have been kept for reproduction.

81. Pursuant to decades of scientific research, industry practice is that the vast majority of all producers house pregnant sows in individual stalls for insemination, throughout pregnancy, and for the first 30 to 40 days after weaning. This practice helps prevent pregnancy loss, critically permits the attachment of embryos, and guards against the high risk of loss of pregnancy caused by aggressive behavior that commonly occurs within larger pens or open/group housing.

82. The individual stalls also permit sows to recover from weaning, experience reduced stress levels, and receive a proper amount of individualized nutrition at a time when they are vulnerable.

83. Specifically, housing sows in individual stalls permits producers to carefully provide each sow with the right amount of feed to achieve optimal nutrition. This is difficult in a group housing system and is especially critical to maintain the appropriate body condition right after weaning.

84. Housing sows in a group pen also threatens worker safety, given the large size of the animals and the need for farm hands to enter the pens with multiple 400-pound animals.

85. Proposition 12 imposes restrictions that are contrary to current time-tested, science-based, best practices for pork production. Proposition 12, in practical effect, bans the use of individual stalls during breeding and most of the gestation period.

86. Further, one interpretation of Proposition 12 means that, after December 31, 2021, Proposition 12 requires that each breeding pig must be allotted at least 24 square feet of usable floor space in the group pen, per pig, subject to limited exceptions.

87. The offspring of sows are raised to market weight in separate, specialized production facilities, including: (1) feeder pig producers or nurseries; (2) feeder pig finishers; and (3) farrow-to-finish operations. Farrow to finish takes approximately 24-26 weeks.

88. Once hogs reach harvest weight, they are sent to packing facilities throughout the country. Packing facilities receive hogs from multiple farms, in multiple locations, operated by multiple producers.

89. A packing facility typically harvests thousands, or even tens of thousands, of hogs daily. Packers process the harvested pigs into whole pork cuts or send them to separate processing facilities. The meat is

packed and delivered to wholesale or to large retail customers throughout the entire country and abroad.

90. Pork product from one hog is cut into many different cuts of meat and shipped to many end users across the country and internationally.

91. Thus, it is not currently possible to segregate only the pork meat that will ultimately make it to the California market, because packing facilities receive meat from producers nationally, and each hog is cut into many different cuts of meat.

92. Further, this means that it would be impossible for certain producers to forego the California market because packing facilities cannot track which hogs came from producers complying with Proposition 12. Packing facilities cannot realistically track meat that should go to California, just as it cannot track which meat should not go to California. Practically speaking, this means that packing facilities will need to obtain either all Proposition 12-compliant meat or stop providing pork to California.

93. Proposition 12 confinement restrictions would require significant changes to the vast majority of pork production operations throughout Iowa, including significant structural changes and the requirement to reduce the number of pigs at the facility. At this time, only an estimated 4% of breeding pigs in the United States are confined in a manner consistent with Proposition 12.

94. Proposition 12 will also create negative impacts on the breeding pigs that are confined within a group pen, likely resulting in significant health risks and piglet loss.

95. Group confinement requirements mandated by Proposition 12 create significant ongoing harm to breeding pigs. Breeding pigs are subject to physical aggression, abuse, losing fetuses in utero, lameness and the inability to obtain proper nutrition when confined in group systems.

96. Due to not being able to build new barns or retrofit existing barns, it will not be feasible for many members to ever come into compliance with Proposition 12 requirements for a variety of reasons, including lack of space and financial inability. It is expected that smaller pork producers will be those unable to comply with Proposition 12, pushing smaller producers, which are often family farms, out of the industry. This will result in a consolidation of the industry into large producers and will significantly harm many small producers located in Iowa.

97. Small farm operations are already threatened by bigger producers and small producers have been on the decline for the last twenty-five years. *See* Table, 2020 Iowa Pork Industry Report, May 2020, 21:

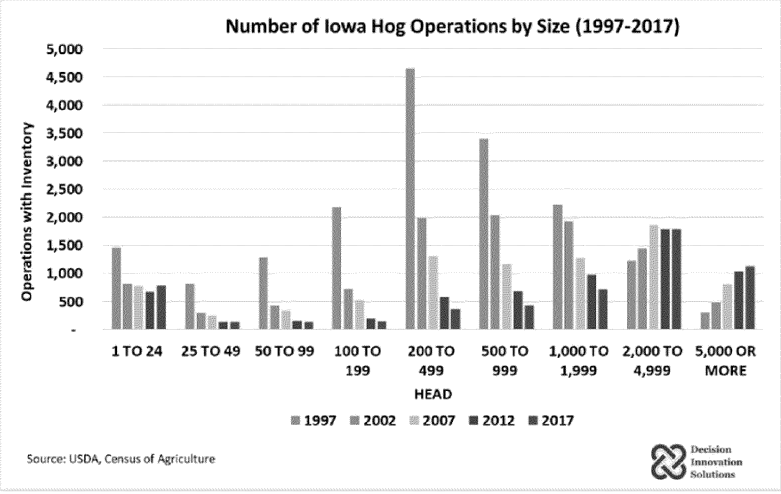

Figure 18, Number of Iowa Hog Operations by Size (1997-2017)

98. Producers cannot realistically forego the California market, as the California market makes up 13-15% of the nation's pork consumption market. If forced to exit the California market, many farmers' operations will become cost prohibitive based on loss in revenue from California consumers. Any increased price of pork in California will not be sufficient to offset the cost to come into compliance with Proposition 12. This is because it is impossible to segregate which portions of meat will be sold into the California market alone.

99. For the minority of producers who may be able to come into compliance, it is estimated that it will cost these producers an increase in capital costs of approximately 50% reflecting the shift from 16 to 24 square feet. Conservatively presuming changes in feed costs, labor costs, herd health, and other expenses besides capital costs, it has been estimated that costs overall would increase by 21% for farrowing operations in Iowa who convert production systems.

100. In comparison, California producers who already converted sow housing to be compliant with Turn Around Requirements benefitted from the lead time allowed through implementation of Proposition 2. For example, the SRIA (2020) report admitted that California producers who must transition their operations from 20 (the average turn around stall) to 24 square feet only face a 4% increase in total costs and only a 20% increase in capital costs.

101. Combining the cost of farrow-to-wean operations in Iowa of $33.59 per weaned pig, with the increased percentage costs for compliance with Proposition 12, a conservative estimate results in the cost of producing a weaned pig in Iowa compliant with Proposition 12 to increase by at least $7.05 per weaned pig.

102. Considering the aggregate number of weaned pigs being 25 million per year in Iowa, this results in an annual approximate aggregate cost impact to Iowa pork producers of at least $176 million.

103. This increased cost cannot be recovered from Defendants due to California's sovereign immunity, precluding the recovery of monetary damages by Plaintiff's members.

104. Or, alternatively, to come into compliance, many producers will need to limit their supply so that their pigs will have more space, as many do not have the option to buy more real estate. This means that the national pork supply will drop.

IMMEDIATE NATIONWIDE IMPACTS OF PROPOSITION 12 ON PORK PRODUCTION INDUSTRY

105. Proposition 12's application to out-of-state producers will have a direct impact on nationwide pricing of pork, the national pork supply and consumers nationwide.

106. The sale of whole pork meat is a nationwide, regulated commodity, which requires nationwide regulation rather than state-by-state mandates.

107. The implementation and enforcement of Proposition 12 would result in higher pork prices for consumers nationwide and less pork being available for purchase.

108. Annual consumer losses of over $34 million would occur across four California retail pork markets, in comparison to $303 million dollars in annual consumer losses across 47 examined U.S. markets outside of California, directly as a result of Proposition 12 being implemented.

109. Even if producers were able to forego the California market, there would be drastic impacts on the nationwide pork industry and further irreparable harm to small pork producers. The remaining nation would need to absorb the additional supply of pork, which would result in a 25% reduction in farm receipts. Again, the smaller producers are most threatened, likely unable to sustain the losses and would be forever forced out of the market.

110. Plaintiff's members are further at risk of being subject to conflicting laws throughout the remaining United States. The conduct that California seeks to prohibit actually occurs primarily out of state, and for the Plaintiff members, it occurs primarily in Iowa. Plaintiff members' sow housing is not subject to Turn Around Requirements or Square Footage Requirements in Iowa. As a result, California is attempting to regulate sow confinement everywhere in the country because of the nature of the pork industry where pork processors are dividing cuts of a hog into multiple different cuts that are sent to multiple different locations nationwide. This necessarily creates a national regulation that invites inconsistent regulation of activities that are inherently national or require a uniform system of regulation.

111. Thus, Plaintiff's members face immediate and irreparable harm if Proposition 12 continues to go into effect as planned and further enforced. Injunctive relief will remedy this harm.[1]

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[1] Plaintiff will separately file a Motion for Preliminary and Permanent Injunction following service on Defendants.

STANDING

112. IPPA brings this suit on behalf of its members. Plaintiff's members have suffered, and will continue to suffer, concrete and particularized injuries that are a direct result of Proposition 12. Their injuries will be redressed by a decision of this Court.

113. IPPA has associational standing to challenge Proposition 12 on behalf of its members and on behalf of the entity itself.

114. One or more IPPA members has standing to bring this action in their own right. Thousands of IPPA members are directly subject to Proposition 12 because they breed or raise pigs that are being sold into and within California.

115. The interests Plaintiff seeks to protect are germane to Plaintiff's mission statement and purpose.

116. Individual participation by Plaintiff's members is not required for the claims asserted or the relief requested.

117. Plaintiff's members supply pork to be sold into and within California, and expect to continue to do so after January 1, 2022. A criminal prosecution or enforcement by Defendants against Plaintiff's members is not required to challenge the constitutionality of Proposition 12. A person or entity is not required to suffer the irreparable harm of being criminally accused and charged before raising a challenge to unconstitutionally vague law.

118. The vast majority of Plaintiff's members are currently raising breeding pigs that do not meet Proposition 12's requirements.

119. Plaintiff's members cannot realistically change the confinement of these breeding pigs to come into

compliance with Proposition 12's Square Footage Requirements or Turn Around Requirements as required on or before December 31, 2021.

120. In California, meat cannot be sold if it comes from a breeding pig that has been in confinement contrary to Proposition 12.

121. Plaintiff's members thus face imminent and irreparable Hobson's choice of: (1) being forced to harvest their breeding pigs in order to enter the California market, which makes up 13-15% of the national market, (2) ceasing operations, or (3) being forced to forgo one of the largest pork consumption markets in the nation at crippling expense.

122. California has admitted the Turn Around Requirements went into effect December 19, 2018, thereby creating immediate risk for criminal and civil prosecution for all of Plaintiff's members.

123. Further, the entire national market for pork is threatened to be irreparably harmed if Proposition 12 goes into effect, with impacts on nationwide consumers who had no involvement in the passage of Proposition 12.

124. These injuries will be remedied by the relief sought in this action.

FIRST CAUSE OF ACTION
VIOLATION OF THE DUE PROCESS CLAUSE
(42 U.S.C. § 1983)
(FACIAL AND AS APPLIED CHALLENGE)

125. Plaintiff incorporates the facts set forth in Paragraph Nos. 1-124 as though fully set forth herein.

126. Defendants, acting under color of state law, have committed, and will continue to commit, multiple constitutional torts against Plaintiff, including by

violating Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

127. Proposition 12 violates the Due Process Clause because it is unconstitutionally vague on its face and criminalizes behavior without giving individuals of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, so that they may act accordingly.

128. Proposition 12 is also unconstitutionally vague as applied to Plaintiff's members' specific conduct in pig production, because under the plain text of the Act, it is unclear whether Plaintiff's members' specific actions are currently subject to criminal prosecution and penalties if their pork is sold into California.

129. Proposition 12 does not define the conduct it prohibits with sufficient definiteness and does not establish minimum guidelines to govern law enforcement.

130. Proposition 12 fails to define the material words and terminology in the statute so that Plaintiff's members and the pork industry can comply with the legal requirements and not inadvertently violate the law.

131. For a statute to be unconstitutional for due process, a criminal prosecution or enforcement is not required, enforcement must just be imminent or the legal authority to enforce must be available to the law enforcement authorities. A person and entity is not required to suffer the irreparable harm of being criminally accused and charged before raising a challenge to an unconstitutionally vague law.

132. Proposition 12 itself recognized the vagueness of the Act and mandated the CDFA and CDPH to

jointly promulgate rules and regulations for the implementation of the Act by September 1, 2019.

133. Proposition 12's mandate for the promulgation of the Final Regulations functions as its own admission of the vagueness of the Act.

134. Because the Turn Around Requirements went into effect just six weeks after Proposition 12 passed by ballot imitative, CDFA and CDPH did not have time to promulgate the rules.

135. Proposition 12's effective date of December 19, 2018 is contradictory to its own mandate to promulgate Final Regulations for the entirety of "this Act," i.e. both requirements of the Act, by December 19, 2018.

136. Proposition 12's Turn Around Requirements went into immediate effect without giving the public, including the Plaintiff, an opportunity to be heard in the rule and regulation process.

137. Proposition 12's Turn Around Requirements went into immediate effect without allowing time for compliance or time for the promulgation of the needed rules to cure the underlying vague statute so that out-of-state producers could comply.

138. The CDFA and CDPH further failed to implement the mandated rules and regulations by the Act's deadline September 1, 2019.

139. On January 1, 2022, just weeks away, the Square Footage Requirements will go into effect without the Final Regulations to cure the unconstitutionally vague Act.

140. Proposition 12 is a criminal statute. The text of Proposition 12 provides that "any person who violates any of the provisions of this chapter is guilty of a misdemeanor" and subjects those persons upon

conviction to a fine of up to $1,000 or by imprisonment for a period not to exceed 180 days.

141. Proposition 12 threatens to criminally punish conduct in which the Plaintiff's members are engaged.

142. California aiding, abetting and conspiracy statutes further extend the enforcement capabilities of the Act to unknown persons and parties.

143. The current Revised Regulations, at a minimum, make clear of Defendants' intent to reach well into the supply chain and down into the farms of the Plaintiff's members, directly reaching beyond its borders.

144. Any district attorney, local prosecutor or the Attorney General's Office can enforce Proposition 12. CDFA itself has warned of this imminent risk of prosecution and enforcement by law enforcement agencies, despite the Final Regulations not yet being issued.

145. Defendant CDFA has no control over these enforcement agencies who have authority under the Act for enforcement of Proposition 12.

146. Further, Defendant CDFA's Animal Care Program (ACP), which was formed to implement Proposition 12, issued FAQs on March 5, 2021, *See* CDFA AHFSS Animal Care Program Prop 112 FAQ, (March 5, 2021), https://www.cdfa.ca.gov/AHFSS/pdfs/Prop_12_FAQ_March_2021.pdf. Within the FAQs, a question was posed regarding potential sell through of whole pork meat that was non-compliant with the Square Footage Requirements. It states, Q. "Will inventory of shell eggs, liquid eggs and pork meat already in stock prior to January 1, 2022 need to be discarded if this covered product originated from animals not raised according to the confinement

standards of cage-free for hens and twenty-four square feet per breeding pig?" A. "No. The definition of "confined in a cruel manner" changes at the end of the day on December 31, 2021 for egg-laying hens and breeding pigs. Therefore, the shell eggs, liquid eggs and pork meat already in inventory or commerce on December 31, 2021 will still be legal to sell in California." While this FAQ speaks to the Square Footage Requirements, it does not speak to the Turn Around Requirements. Defendant CDFA's position is that pork not compliant with the Turn Around Requirements cannot be sold now or after January 1, 2022. Thus, this sell through allowed for existing inventory that is not compliant with the Square Footage Requirements is meaningless to Plaintiff's members, as only California in-state producers are in compliance with the Turn Around Requirements. Yet, there is confusion amongst Plaintiff's members and the industry.

147. The Defendants do not have the authority to amend the effective dates of the Act. The effective dates of both the two Proposition 12 requirements can only be changed by a vote of 4/5ths of the legislature, and even that is arguably not possible, as Proposition 12 states that "any amendment of this act shall be consistent with and further the purposes of this act."

148. As of the date of filing this Complaint, no pending bill exists before the California Legislature to amend the effective date of either the Turn Around Requirements or Square Footage Requirements.

149. Despite the failure to promulgate the rules, CDFA's ACP informed the public that "with the respect to a delay in enforcement, ACP does not have authority to extend the compliance deadlines provided for in the

statute established under Proposition 12 for covered animals and covered products."

150. Proposition 12 allows for arbitrary, inconsistent, and discriminatory enforcement by Defendants, by other parties, and law enforcement authorities who are left to determine who and when they can prosecute the Act. Each can proceed without the promulgation of the Final Regulations.

151. California has failed to cure the unconstitutional vagueness of Proposition 12 with the promulgation of the rules. Due to CDFA and CDPH's failure to promulgate the rules as mandated by Proposition 12, and due to the length of time involved in the breeding cycle for sows and the time from farrowing to finish for pork processing, a person of ordinary intelligence does not have adequate notice of or time to comply with either the Turn Around Requirements that CDFA states are in effect now or the Square Footage Requirements going into effect on January 1, 2022.

152. As a result of CDFA and CDPH's failure to promulgate the Final Regulations as mandated by its own ballot initiative passed by its citizens, Proposition 12 lacks sufficient definiteness and specificity to inform those who may be subject to the law to avoid violating the law or provide persons of ordinary intelligence adequate notice to know what conduct is criminalized and what constitutes a violation of the statute.

153. Plaintiff's members have a constitutional right to liberty to be free from the risk of imminent criminal prosecution and the consequences of the enforcement of a facially vague law.

SECOND CAUSE OF ACTION
VIOLATION OF THE DUE PROCESS CLAUSE
(42 U.S.C. § 1983) (FAILURE TO PROMULGATE
THE RULES AS MANDATED)

154. Plaintiff incorporates the facts set forth in Paragraph Nos. 1-153 as though fully set forth herein.

155. Defendants, acting under color of state law, have committed, and will continue to commit, multiple constitutional torts against Plaintiff, including by violating Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

156. Proposition 12 violates the Due Process Clause because the CDFA and CDPH failed to promulgate the Final Regulations as of the date of this filing as mandated by the Act and required by law.

157. The Turn Around Requirements went into immediate effect on December 19, 2018 and the Square Footage Requirements will go into effect on January 1, 2022 without the mandated promulgation of the Final Regulations or allowing any period of time for Plaintiff's members or the industry to comply.

158. Proposition 12 mandated CDFA and CDPH to jointly promulgate the Final Regulations for the implementation of the Act by September 1, 2019.

159. Yet, because the Turn Around Requirements went into effect just six weeks after Proposition 12 passed by ballot initiative, CDFA and CDPH did not have time to promulgate the Final Regulations.

160. Proposition 12's effective date of December 19, 2018 for the Turn Around Requirements is contradictory to its own mandate to promulgate Final Regulations

for the entirety of "this Act," i.e. *both* requirements of the Act, by September 1, 2019.

161. Proposition 12's Turn Around Requirements went into immediate effect without giving the public, including the Plaintiff, an opportunity to be heard in the required rule and regulation making process. Proposition 12's Turn Around Requirements also went into immediate effect without allowing time for compliance with the Act or any forthcoming Final Regulations.

162. The CDFA and CDPH further failed to implement the mandated Final Regulations by the Act's deadline of September 1, 2019. The deadline passed without CDFA or CDPH even issuing draft Proposed Regulations.

163. On May 28, 2021, CDFA and CDPH issued draft Proposed Regulations. On December 3, 2021, Defendants published new, Revised Regulations that they have characterized as "not substantial" changes to the Proposed Regulations.

164. Comments on the Revised Regulations are due to CDFA on Friday, December 17, 2021. Following the closure of the comment period, CDFA may make additional changes to the regulations, which can take an indeterminate amount of time. This would necessitate the opening of an additional 15-day comment period. Should CDFA make no changes to the regulations, CDFA will close the rulemaking record.

165. Upon completion of the regulations and closure of the rulemaking record, CDFA must submit the rulemaking to the California Office of Administrative Law ("OAL") prior to the regulation being effective. OAL has 30 working days to review the rulemaking record to ensure that the requirements of the California Administrative Procedures Act and OAL's

regulations are met. If the requirements are met, OAL will file the regulation with the Secretary of State so it can become effective.

166. Regulations in California only become effective on a quarterly basis. Because the regulations will likely be filed with the California Secretary of State between December 1, 2021 and February 29, 2022 the regulations will not become effective until April 1, 2022 at the earliest. However, it is more likely that the regulations will be filed with the California Secretary of State after February 29, 2022 and will then become effective July 1, 2022 if filed between March 1 and May 31.

167. CDFA and CDPH failed to promulgate the Final Regulations as of the date of this filing.

168. On January 1, 2022, just weeks away, Proposition 12's second requirement, the Square Footage Requirements, will go into effect without the required Final Regulations.

169. Even just for the Square Footage Requirements, California voters approved Proposition 12 with the mandate that an absolute minimum of two years and four months be given to pork producers to comply after the Final Regulations were published.

170. However, because of the Act's contradictory nature of an immediate effective date of the Turn Around Requirements – and because CDFA and CDPH failed to otherwise promulgate the Final Regulations by the Act's deadline or even by the Square Footage Requirements' effective date, the entire Act will be in effect without the Final Regulations and without giving Plaintiff's members or the pork industry any time to comply, providing any district attorney, local prosecutor or the Attorney General's Office the

authority to enforce Proposition 12 against the Plaintiff's members or those producing and selling meat into California throughout the industry.

171. The Defendants do not have the authority to amend the effective dates of the Act. The effective dates of Proposition 12 requirements can only be changed by a vote of 4/5ths of the legislature, and even that is arguably not possible, as Proposition 12 states that "any amendment of this act shall be consistent with and further the purposes of this act." Cal. Health & Safety Code 25993.

172. As of the date of filing this Complaint, no pending bill exists before the California Legislature to amend the effective date of either the Turn Around Requirements or Square Footage Requirements.

173. Despite the failure to promulgate the Final Regulations, CDFA informed the public that "with the respect to a delay in enforcement, [CDFA] does not have authority to extend the compliance deadlines provided for in the statute established under Proposition 12 for covered animals and covered products."

THIRD CAUSE OF ACTION
VIOLATION OF THE PRIVILEGES AND IMMUNITIES CLAUSE (42 U.S.C. § 1983)

174. Plaintiff incorporates the facts set forth in Paragraph Nos. 1-173 as though fully set forth herein.

175. Defendants, acting under color of state law, have committed, and will continue to commit, multiple constitutional torts against IPPA individual members, including by violating these individual members' rights under the Privileges and Immunities Clause at Article IV, Section 2 of the United States Constitution.

176. Article IV, § 2 of United States Constitution states "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

177. The right to pursue a common calling, such as to pursue a trade, practice an occupation, or pursue a common calling within the state is a fundamental right protected by the Privileges and Immunities Clause.

178. Prior to the passage of Proposition 12, pork producers within California had already been subject to the Turn Around Requirements since 2015 through the enactment of Proposition 2.

179. Proposition 12 was passed on November 18, 2018, and for the first time targeted out-of-state producers by subjecting them to the onerous Turn Around Requirements and additional Square Footage Requirements in order to sell pork into and within California.

180. Proposition 12 discriminates against out-of-state producers by immediately prohibiting the sale of whole pork within California that does not comply with the Turn Around Requirements, without providing out-of-state producers with the same six years to come into compliance with these Turn Around Requirements that was afforded to in-state producers.

181. Proposition 12 thus serves as a proxy for differential treatment and discriminates in practical effect against out-of-state producers.

182. Proposition 12 further carries a facial discriminatory purpose in avoiding "negative fiscal impacts" to the State of California.

183. Proposition 12 was designed to take away an economic advantage that out-of-state pork producers had by not being required to comply with the Turn Around Requirements in order to sell whole pork meat into California. Proposition 12 favors in-state pork producers, who had been subject to Turn Around Requirements since January 1, 2015, and on notice of the Turn Around Requirements since 2008, by giving them an advantage in the California market to continue to sell pork while having a significantly longer time to come into compliance.

184. Proposition 12, on its face, does not delay the enforcement of the Turn Around Requirements for breeding pigs or their offspring sold within California to out-of-state producers.

185. Accordingly, Proposition 12 provided no time for out-of-state producers to come into compliance with the Turn Around Requirements allowed to in-state producers.

186. Sufficient justification does not exist to discriminate against out-of-state producers.

FOURTH CAUSE OF ACTION
PREEMPTION BY PACKERS AND STOCKYARDS ACT (42 U.S.C. § 1983)

187. Plaintiff incorporates the facts set forth in Paragraph Nos. 1-186 as though fully set forth herein.

188. Defendants, acting under color of state law, have committed, and will continue to commit, multiple constitutional torts against Plaintiff's members, including by violating Plaintiff's members' rights under the Supremacy Clause at Article VI, Clause 2 of the United States Constitution.

189. The Supremacy Clause of the United States Constitution provides that the laws of Congress are the "Supreme Law of the Land." A state may not enact a statute that conflicts with a federal law.

190. A state law conflicts with federal law and thus is preempted when it is not possible for an individual to comply with both state and federal law.

191. California enacted Proposition 12 on November 6, 2018, which prohibits the sale of meat by any business owner or operator from an animal that was not confined in accordance with Proposition 12.

192. California pork producers have been on notice since 2008 that they will need to come into compliance with the Turn Around Requirements.

193. Out-of-state pork producers are unable to come into compliance and thus will not be able to sell their meat into or within the California market.

194. Proposition 12 therefore requires business owners and operators engaged in the sale of meat to favor in-state producers who were allowed six years to come into compliance with Proposition 2 Turn Around Requirements.

195. This favoritism toward California producers will create unfair competition with out-of-state producers, potentially regardless of the price of meat.

196. The Packers and Stockyards Act, 7 U.S.C. § 192(b) prohibits any wholesaler of meat from providing any preference to a particular locality and from subjecting any particular locality to a "disadvantage" in the sale of meat.

197. Proposition 12 directly requires wholesalers to favor in-state pork producers and to disadvantage the out-of-state pork producers who have not had as

much time to come into compliance with the Turn Around Requirements and now, the Square Footage Requirements.

198. Thus, it is impossible for a wholesaler to comply with both Proposition 12 and the Packers and Stockyards Act.

199. At a minimum, Proposition 12 creates hurdles to comply with the Packers and Stockyards Act and Proposition 12.

200. Further, the Packers and Stockyards Act prohibits wholesalers from taking action that will result in a restraint on Trade, 7 U.S.C. §§ 192 (c)-(e).

201. By refusing to sell meat from animals that were not confined in accordance with Proposition 12, wholesalers will be engaged in conduct that restrains trade based on the impacts on interstate commerce in the pork industry. These impacts include forcing small businesses out of the market, passing along increased costs to consumers, and reducing the supply of pork meat in the market.

202. Proposition 12 is therefore preempted by the Packers and Stockyards Act.

FIFTH CAUSE OF ACTION VIOLATION OF THE COMMERCE CLAUSE (42 U.S.C. § 1983)

203. Plaintiff incorporates the facts set forth in Paragraph Nos. 1-202 as though fully set forth herein.

204. Defendants, acting under color of state law, have committed, and will continue to commit, multiple constitutional torts against Plaintiff, including by violating Plaintiff's rights under the Commerce Clause at Article I, Section 8 of the United States Constitution.

205. Proposition 12 violates the Commerce Clause, as it includes both a discriminatory purpose and effect.

Proposition 12 Discriminates Against Out-of-State Producers in Practical Effect

206. California enacted Proposition 12 on November 6, 2018, which, for the first time, prohibits business owners and operators from engaging in the sale of whole pork meat from animals confined in a cruel manner, regardless of where the animal was confined.

207. Prior to the passage of Proposition 12, pork producers within California were already subject to the Turn Around Requirements through the enactment of Proposition 2.

208. Proposition 12's effect thus unlawfully favors in-state pork producers, who had been on notice of the Turn Around Requirements since 2008, by giving them an advantage in the California market to continue to sell pork while having until 2015 to come into compliance with the Turn Around Requirements.

Proposition 12's Purpose is to Discriminate Against Out-of-State Producers, and it is Facially Discriminatory

209. The Revised Regulations acknowledge Proposition 12 is a protectionist trade barrier with a discriminatory purpose.

210. For example, the CDFA explicitly noted that, unless out-of-state farmers are required to comply with the confinement requirements as well, "[i]n-state farms will find it more costly to compete with farms outside of the state when selling...whole pork meat to an out of state buyer compared to farms located in states that do not have the same animal confinement

standards as described in the Act." 2021 CA REG TEXT 584571 (NS) at 10.

211. This, combined with one singular stated purpose within the Act to "avoid negative fiscal impacts to the State of California," portrays the discriminatory purpose.

212. Further, the ballot initiative record was devoid of actual proof that Proposition 12 would actually accomplish the goals it intended (i.e. to protect farm animals from cruel confinement practices, avoid foodborne illness and negate negative fiscal impacts to California).

213. By California's own admission, Proposition 12 provides no real health or safety benefit to its residents. See 2021 CA REG TEXT 584571 (NS) at 6, 11 ("This proposal does not directly impact human health and welfare of California residents, worker safety, or the State's environment.").

Proposition 12 Unlawfully Regulates Conduct Extraterritorially and Any Local Benefits are Outweighed by the Burdens Imposed on Interstate Commerce

214. The Act and corresponding Revised Regulations directly regulate extraterritorial conduct wholly outside of California by placing onerous certification, registration, and recordkeeping requirements on out-of-state producers to force out-of-state merchant[s] to seek regulatory approval [within California] before undertaking a transaction in California.

215. Even further, the Revised Regulations also require out-of-state producers to open up their farms—regardless of where in the country they are located—to inspections by California officials and potentially

third-party certifiers. The Proposed and Revised Regulations, indicate just how far beyond California's borders Proposition 12 intends to reach.

216. The Act itself further targets and regulates extraterritorial conduct through having a direct impact on both the price of pork and the pork consumer, nationwide.

217. Proposition 12 has other impacts on out-of-state commerce in a manner that wholly regulates conduct that occurs extra-territorially. If Proposition 12 goes into effect, it will have an impact on the national market of pork production, including: decreasing supply, forcing small pork producers out of the market, consolidating pork production into large producers, altering sales in all remaining states to conform to Proposition 12 confinement standards, altering packers' practices to conform to Proposition 12 confinement standards, and ultimately resulting in nationwide increases in the costs of pork meat that will be passed along to consumers nationwide.

218. In effect, California is forcing the entire nation's pork production chain to adopt its regulations for pork production and is no longer permitting each state to set its own regulatory scheme.

219. These burdens on commerce, which impact all stages of the pork production market, clearly outweigh any local benefit—which benefit does not exist.

SIXTH CAUSE OF ACTION DECLARATORY RELIEF (CALIFORNIA CODE OF CIVIL PROCEDURE § 1060)

220. Plaintiff incorporates the facts set forth in Paragraph Nos. 1-219 as though fully set forth herein.

221. An actual controversy has arisen and now exists between Plaintiff's members and Defendants concerning whether Proposition 12 violates Plaintiff's members' due process rights both facially and as applied as set forth in the First Cause of Action, both under the U.S. Constitution's Due Process Clause and under Article 1, Section 7 of the California Constitution.

222. An actual controversy has arisen and now exists between Plaintiff's members and Defendants concerning whether because Proposition 12 is already in effect, and the Square Footage Requirements go into effect January 1, 2022, Defendants' failure to promulgate Final Regulations as mandated by September 1, 2019 violates Plaintiff's members' due process rights as set forth in the Second Cause of Action, both under the U.S. Constitution's Due Process Clause and under Article 1, Section 7 of the California Constitution.

223. An actual controversy has arisen and now exists between Plaintiff's members and Defendants concerning whether Proposition 12 violates Plaintiff's members' privileges and immunities as set forth in the Third Cause of Action, both under the U.S. Constitution's Privileges and Immunities Clause and under Article 3, Section 1 of the California Constitution.

224. An actual controversy has arisen and now exists between Plaintiff's members and Defendants concerning whether Proposition 12 is preempted by federal law as set forth in the Fourth Cause of Action, both under the U.S. Constitution's Supremacy Clause and under Article 3, Section 1 of the California Constitution.

225. An actual controversy has arisen and now exists between Plaintiff's members and Defendants concerning whether Proposition 12 is a violation of the

dormant Commerce Clause as set forth in the Fifth Cause of Action, both under the U.S. Constitution's Commerce Clause and under Article 3, Section 1 of the California Constitution.

226. An actual controversy has arisen and now exists between Plaintiff's members and Defendants concerning Proposition 12 enforcement, as the Defendants' position is that Proposition 12 can be immediately enforced—and the requisite enforcement agencies and private parties have the authority to enforce currently any violations of the Turn Around Requirements; and will have the expanded authority to enforce the Square Footage Requirements after January 1, 2022.

227. When California voters approved Proposition 12, the statutory text stated that CDFA and CDPH "shall" promulgate regulations by September 1, 2019 for "this Act." Yet, the Turn Around Requirements went into effect almost immediately for out-of-state producers and no time was given to allow for the Final Regulations to be published to guide those "engaged in the sale" of whole pork meat. The voters also clearly contemplated allowing *at least* two years and four months for compliance with Square Footage Requirements by mandating publication of the Final Regulations by September 1, 2019 and not having the Square Footage Requirements effective until January 1, 2022. Yet, California did not promulgate the Final Regulations by September 1, 2019, or even by the date of this filing, and have stated that Final Regulations will not be published by January 1, 2022 when the second provision of Proposition 12, the Square Footage Requirements, now goes into effect.

228. Given Defendants' failure to promulgate Final Regulations by the statutory deadline, let alone even

by the Square Footage Requirement effective date, those affected by Proposition 12, including Plaintiff's members, will not have regulations in place to know what constitutes a violation of Proposition 12, not to mention the two years and four months the voters specifically approved. The Plaintiff's members—and those they partner with within the supply chain—are left fully exposed against the risk of immediate enforcement of the Act.

229. Plaintiff's members have no plain, speedy, and adequate remedy in the ordinary course of law.

230. Plaintiff's members are therefore entitled to a judicial declaration of their rights and the duties of Defendants under Section 1060 of the Code of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court set this matter for hearing on a preliminary injunction following review of Plaintiff's separate Motion for Preliminary and Permanent Injunction, and award the following relief:

1. At a minimum, issue an immediate stay of enforcement of Proposition 12 for a minimum period of two years and four months from the date the Final Regulations are promulgated.

2. Issue a preliminary and permanent injunction prohibiting the enforcement of Proposition 12, its policies, practices and customs by Defendants, employees and agents, and all persons acting in privity and/or in concert with them (including private enforcers bringing claims pursuant to the Unfair Competition Law or any other applicable law);

3. Issue an emergency restraining order temporarily enjoining the enforcement of Proposition 12 if the preliminary injunction hearing cannot occur prior to January 1, 2022;

4. Enter judgment declaring that Proposition 12 and related policies, practices and customs of the Defendants violate the United States Constitution and may not be lawfully enforced, both now and in the future;

5. Grant Plaintiff reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and Section 1021.5 of the California Code of Civil Procedure; and

6. Any further relief that the Court deems just and equitable. Dated: December 16, 2021.

IOWA PORK PRODUCERS ASSOCIATION, Plaintiff.

By: */s/ Marnie A. Jensen*

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Attorneys for Iowa Pork Producers Association

VERIFICATION

I, Pat McGonegle, am the Chief Executive Officer of Plaintiff Iowa Pork Producers Association. I have read the foregoing Verified Complaint for Preliminary and Permanent Injunctive and Declaratory Relief ("Complaint") and am familiar with its contents. I am informed and believe that the matters set forth in the Complaint are true and on that ground allege them to be true.

I declare under penalty of perjury under the laws of the State of California that this verification is true and correct and was executed by me on December 15, 2021, in Clive, Iowa.

/s/ Pat McGonegle
Pat McGonegle, IPPA Chief Executive Officer

APPENDIX G

§ 17200. Unfair competition; prohibited activities

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

§ 17203. Injunctive Relief—Court Orders[1]

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

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[1] Section caption supplied by Prop. 64.

§ 17206. Civil Penalty for Violation of Chapter[1]

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, or by a county counsel of any county within which a city has a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c)(1) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the

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[1] Section caption supplied by Stats.2021, c. 140 (5.B.461).

treasurer of the county in which the judgment was entered, and one-half to the General Fund.

(2) If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered.

(3)(A) Except as provided in subparagraph (B) and subdivision (e), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(B) If the action is brought by the City Attorney of San Diego, the penalty collected shall be paid to the treasurer of the City of San Diego.

(4) The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.

(d) The Unfair Competition Law Fund is hereby created as a special account within the General Fund in the State Treasury. The portion of penalties that is payable to the General Fund or to the Treasurer recovered by the Attorney General from an action or settlement of a claim made by the Attorney General pursuant to this chapter or Chapter 1 (commencing with Section 17500) of Part 3 shall be deposited into this fund. Moneys in this fund, upon appropriation by the Legislature, shall be used by the Attorney General to support investigations and prosecutions of California's consumer protection laws, including implementation of judgments obtained from such prosecutions or investigations and other activities which

are in furtherance of this chapter or Chapter 1 (commencing with Section 17500) of Part 3. Notwithstanding Section 13340 of the Government Code, any civil penalties deposited in the fund pursuant to the National Mortgage Settlement, as provided in Section 12531 of the Government Code, are continuously appropriated to the Department of Justice for the purpose of offsetting General Fund costs incurred by the Department of Justice.

(e) If the action is brought at the request of aboard within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(f) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered for the exclusive use by the city attorney for the enforcement of consumer protection laws. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the

Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

§ 25990. Prohibitions[1]

In addition to other applicable provisions of law:

(a) A farm owner or operator within the state shall not knowingly cause any covered animal to be confined in a cruel manner.

(b) A business owner or operator shall not knowingly engage in the sale within the state of any of the following:

(1) Whole veal meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner.

(2) Whole pork meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner.

(3) Shell egg that the business owner or operator knows or should know is the product of a covered animal who was confined in a cruel manner.

(4) Liquid eggs that the business owner or operator knows or should know are the product of a covered animal who was confined in a cruel manner.

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[1] Section caption supplied by Prop. 12.

§ 25991. Definitions[1]

For the purposes of this chapter, the following terms have the following meanings:

(a) "Breeding pig" means any female pig of the porcine species kept for the purpose of commercial breeding who is six months or older or pregnant.

(b) "Business owner or operator" means any person who owns or controls the operations of a business.

(c) "Cage-free housing system" means an indoor or outdoor controlled environment for egg-laying hens within which hens are free to roam unrestricted; are provided enrichments that allow them to exhibit natural behaviors, including, at a minimum, scratch areas, perches, nest boxes, and dust bathing areas; and within which farm employees can provide care while standing within the hens' usable floorspace. Cage-free housing systems include, to the extent they comply with the requirements of this subdivision, the following:

(1) Multitiered aviaries, in which hens have access to multiple elevated platforms that provide hens with usable floorspace both on top of and underneath the platforms.

(2) Partially slatted systems, in which hens have access to elevated flat platforms under which manure drops through the flooring to a pit or litter removal belt below.

(3) Single-level all-litter floor systems bedded with litter, in which hens have limited or no access to elevated flat platforms.

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[1] Section caption supplied by Prop. 12.

(4) Any future systems that comply with the requirements of this subdivision.

(d) "Calf raised for veal" means any calf of the bovine species kept for the purpose of producing the food product described as veal.

(e) "Confined in a cruel manner" means any one of the following acts:

(1) Confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely.

(2) After December 31, 2019, confining a calf raised for veal with less than 43 square feet of usable floorspace per calf.

(3) After December 31, 2021, confining a breeding pig with less than 24 square feet of usable floorspace per pig.

(4) After December 31, 2019, confining an egg-laying hen with less than 144 square inches of usable floorspace per hen.

(5) After December 31, 2021, confining an egg-laying hen with less than the amount of usable floorspace per hen required by the 2017 edition of the United Egg Producers' Animal Husbandry Guidelines for U.S. Egg-Laying Flocks: Guidelines for Cage-Free Housing or in an enclosure other than a cage-free housing system.

(f) "Covered animal" means any calf raised for veal, breeding pig, or egg-laying hen who is kept on a farm.

(g) "Egg-laying hen" means any female domesticated chicken, turkey, duck, goose, or guineafowl kept for the purpose of egg production.

(h) "Enclosure" means a structure used to confine a covered animal or animals.

(i) "Farm" means the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber; and does not include live animal markets, establishments at which mandatory inspection is provided under the Federal Meat Inspection Act (21 U.S.C. Sec. 601 et seq.), or official plants at which mandatory inspection is maintained under the federal Egg Products Inspection Act (21 U.S.C. Sec. 1031 et seq.).

(j) "Farm owner or operator" means any person who owns or controls the operations of a farm.

(k) "Fully extending the animal's limbs" means fully extending all limbs without touching the side of an enclosure, or another animal.

(l) "Liquid eggs" means eggs of an egg-laying hen broken from the shells, intended for human food, with the yolks and whites in their natural proportions, or with the yolks and whites separated, mixed, or mixed and strained. Liquid eggs do not include combination food products, including pancake mixes, cake mixes, cookies, pizzas, cookie dough, ice cream, or similar processed or prepared food products, that are comprised of more than liquid eggs, sugar, salt, water, seasoning, coloring, flavoring, preservatives, stabilizers, and similar food additives.

(m) "Person" means any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate.

(n) "Pork meat" means meat, as defined in Section 900 of Title 3 of the California Code of Regulations as of

August 2017, of a pig of the porcine species, intended for use as human food.

(o) "Sale" means a commercial sale by a business that sells any item covered by this chapter, but does not include any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act (21 U.S.C. Sec. 601 et seq.), or any sale undertaken at an official plant at which mandatory inspection is maintained under the federal Egg Products Inspection Act (21 U.S.C. Sec. 1031 et seq.). For purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 25990.

(p) "Shell egg" means a whole egg of an egg-laying hen in its shell form, intended for use as human food.

(q) "Turning around freely" means turning in a complete circle without any impediment, including a tether, and without touching the side of an enclosure or another animal.

(r) "Uncooked" means requiring cooking prior to human consumption.

(s) "Usable floorspace" means the total square footage of floorspace provided to each covered animal, as calculated by dividing the total square footage of floorspace provided to the animals in an enclosure by the number of animals in that enclosure. In the case of egg-laying hens, usable floorspace shall include both groundspace and elevated level flat platforms upon which hens can roost, but shall not include perches or ramps.

(t) "Veal meat" means meat, as defined in Section 900 of Title 3 of the California Code of Regulations as of

August 2017, of a calf raised for veal intended for use as human food.

(u) "Whole pork meat" means any uncooked cut of pork, including bacon, ham, chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin, or cutlet, that is comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives. Whole pork meat does not include combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products, that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.

(v) "Whole veal meat" means any uncooked cut of veal, including chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin, or cutlet, that is comprised entirely of veal meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives. Whole veal meat does not include combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products, that are comprised of more than veal meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.

§ 25993. Enforcement[1]

(a) The Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019.

(b) Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to

[1] Section caption supplied by Prop. 12.

exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment. In addition, a violation of subdivision (b) of Section 25990 constitutes unfair competition, as defined in Section 17200 of the Business and Professions Code, and is punishable as prescribed in Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code.

(c) The provisions of this chapter relating to cruel confinement of covered animals and sale of products shall supersede any conflicting regulations, including conflicting regulations in Chapter 6 (commencing with Section 40601) of Subdivision 6 of Division 2 of Title 22 of the California Code of Regulations.

§ 25994. Construction of chapter[1]

The provisions of this chapter are in addition to, and not in lieu of, any other laws protecting animal welfare, including the California Penal Code. This chapter shall not be construed to limit any state law or regulations protecting the welfare of animals, nor shall anything in this chapter prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations.

§ 27. Persons liable to punishment

(a) The following persons are liable to punishment under the laws of this state:

(1) All persons who commit, in whole or in part, any crime within this state.

(2) All who commit any offense without this state which, if committed within this state, would be

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[1] Section caption supplied by Prop. 2.

larceny, carjacking, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state.

(3) All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.

(b) Perjury, in violation of Section 118, is punishable also when committed outside of California to the extent provided in Section 118.

§ 182. Definition; punishment; venue; evidence necessary to support conviction

(a) If two or more persons conspire:

(1) To commit any crime.

(2) Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

(3) Falsely to move or maintain any suit, action, or proceeding.

(4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.

(5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

(6) To commit any crime against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States

justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in paragraph (6), they are guilty of a felony and are punishable by imprisonment pursuant to subdivision (h) of Section 1170 for five, seven, or nine years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony the defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of those felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in paragraph (4), they shall be punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine not exceeding ten thousand dollars ($10,000), or by both that imprisonment and fine.

When they conspire to do any of the other acts described in this section, they shall be punishable by imprisonment in a county jail for not more than one year, or pursuant to subdivision (h) of Section 1170, or by a fine not exceeding ten thousand dollars ($10,000), or by both that imprisonment and fine. When they receive a felony conviction for conspiring to commit identity theft, as defined in Section 530.5, the court may impose a fine of up to twenty-five thousand dollars ($25,000).

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done.

(b) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.

§ 184. Overt act; venue

No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done.

3 CCR § 1322.2. Pork Distributor Registration.

(a) Commencing January 1, 2023, any in-state or out-of-state person engaged in a commercial sale into or within the state as a pork distributor, shall hold a valid registration with the Department pursuant to this Article.

(b) Any person registering pursuant to (a) of this section shall submit an application for registration provided by the Department that contains the following information: Business name, physical address of distribution operation, mailing address, phone number, email address, website address, federal tax identification number, and name, phone number and email of person authorized to act on the applicant's behalf.

(c) The registration shall not be transferable to any person and shall be applicable only to the location for which originally issued.

(d) A registration is required for each facility location from which whole pork meat is sold, distributed, or otherwise supplied to the location of an end-user.

(e) A pork distributor shall not engage in the commercial sale of whole pork meat within, or into, California unless such person has obtained and holds a valid registration from the Department pursuant to this section for each facility location.

(f) Any change in ownership, change of business name, change in business location, closure of business, or change of name, address, phone number or email of person authorized to act on behalf of the registered distributor must be reported to the Department within 30 calendar days of such change.

(g) All information set forth on applications for registrations and renewals for registrations, including but not limited to any documentation of certification required by (1) of this section, shall be truthful and not misleading.

(h) Initial or renewal of a registration will be issued after the Department reviews the application and accompanying certificate of compliance, described in

(l) of this section, to ensure information is complete and accurate.

(i) Every registration expires 12 months from the date of issue.

(j) A registration may be renewed each 12-month period by the Department in response to an application for renewal by a pork distributor if the business of the facility applying for renewal was conducted in accordance with the requirements of this Article and sections 25990 and 25991 of the Health and Safety Code during the preceding registration period for which the renewal is requested.

(k) A registration will remain in effect pending review and approval by the Department of an application for registration renewal, provided the application for renewal is received prior to expiration of current registration.

(l) An application to the Department by a pork distributor for initial registration, or for purposes of renewal, shall be accompanied by documentation of valid certification pursuant to Article 5 of this Chapter for each location where registration is being sought. A registration shall not be issued for any facility location for which the valid certification required by this section has not been submitted to the Department.

(m) For purposes of the valid certification required in (l) of this section, a self-certification by a pork distributor that they comply with all applicable requirements of sections 1322.4 and 1322.5 of this Article, and distributes whole pork meat within or into California only from pork producers that comply with section 1322.1 of this Article, will be accepted by the Department prior to January 1, 2024.

(n) An establishment at which mandatory inspection is provided under the Federal Meat Inspection Act (21 U.S.C. Sec. 601 et seq.) and that holds an establishment number (prefix "M") granted by the Food Safety Inspection Service of the United States Department of Agriculture with prefix of "M" is excluded from mandatory registration pursuant to this section.

3 CCR § 1322.6. Inspection of Conveyances.

(a) Every pork distributor by submitting an application for registration agrees as a condition of registration to provide the Department or a certifying agent, access to inspect in California any vehicle or other conveyance under the registrant's operation or control that is transporting whole pork meat into or within the state.

(b) Every person shall stop at the request of the Department at any California Border Protection Station for purposes of inspection of cargo and any accompanying shipping documents, manifests, and bills of lading, any vehicle or other conveyance transporting into or within the state whole pork meat.

(c) The Department may deny entry to or order diversion from the state any vehicle or other conveyance transporting whole pork meat intended for commercial sale that was produced, packaged, identified, or shipped in violation of the requirements of sections 25990-25992 of the Health and Safety Code, or the provisions of this Article, including but not limited to shipping document requirements specified in section 1322.4 of this Article.

3 CCR § 1322.7. Tagging and Seizure of Whole Pork Meat.

(a) The Department may affix a warning tag or notice to shipping documents, manifests, containers, sub-containers, lots, or loads of whole pork meat which have been produced, packaged, stored, labeled, marked, identified, transported, delivered, or sold in violation of the requirements of sections 25990-25992 of the Health and Safety Code, or the provisions of this Article. When a warning tag or notice is issued, the Department shall give written notice of such violation to the pork producer, pork distributor, owner, or other person in possession of the whole pork meat.

(b) No person shall remove a warning tag or notice from the place it is affixed except upon written permission or specific direction of the Department.

(c) The Department may seize and hold any containers, sub-containers, lots or loads of whole pork meat in California which they have reasonable suspicion to believe is in violation of the provisions of sections 25990-25992 of the Health and Safety Code, or the provisions of this Article. If the Department seizes any container, sub-container, lot, or load of whole pork meat, a written hold notice shall be issued to the person that has control of the whole pork meat, and a tag or notice may be affixed to the container, sub-container, lot, or load which states it is so held.

(d) Any whole pork meat for which a hold notice is issued shall be held by the person having control of the whole pork meat and shall not be disturbed, moved, diverted, or offered for sale except under the specific directions of the Department.

(e) A person may request an informal hearing to contest tagging, hold notice, or seizure of whole pork meat pursuant to section 1327.1 of this Chapter.

No. _____

IN THE

Supreme Court of the United States

IOWA PORK PRODUCERS ASSOCIATION,

Petitioner,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,995 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sworn to and subscribed before me this 3rd day of January 2025.

GUSTAVO MARULANDA
NOTARY PUBLIC
District of Columbia

My commission expires January 1, 2027.

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No. ____

IOWA PORK PRODUCERS ASSOCIATION,

Petitioner,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on January 3, 2025, three (3) copies of the PETITION FOR A WRIT OF CERTIORARI in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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Sworn to and subscribed before me this 3rd day of January 2025.

GUSTAVO MARULANDA
NOTARY PUBLIC
District of Columbia
My commission expires January 1, 2027.