No. 22-55336

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IOWA PORK PRODUCERS ASSOCIATION
Plaintiff-Appellant,

v.

ROB BONTA, in his official capacity as Attorney General of California, et al.,
Defendants-Appellees,

THE HUMANE SOCIETY OF THE UNITED STATES, ET AL.,
Intervenor-Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 2:21-CV-09940-CAS-AFM (Hon. Christina A. Snyder)

BRIEF FOR APPELLEES-INTERVENORS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

None of the Appellees-Intervenors has a parent corporation. No publicly held company owns more than ten percent of stock in any of Appellees-Intervenors' organizations.

INTRODUCTION

The pork industry is capitalizing on the old adage that "if at first you don't succeed, try, try again." This is the fourth in a series of duplicative cases brought by pork industry trade groups to overturn Proposition 12—a hugely popular voter-approved law which prohibits anyone choosing to do business in California from selling certain unsafe farm animal products in California that are produced through animal cruelty. This Court has twice considered and rejected substantially similar challenges to Proposition 12. And, the Supreme Court rejected one such challenge this year in a case involving the same core claims anchoring this case. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 371(2023) ("*Ross*"). Unable or unwilling to accept the loss in the Supreme Court, Appellant Iowa Pork Producers Association ("IPPA" or "Appellant") clings to selective quotations from the *Ross* concurrences and dissents in a vain attempt to revive the industry's failed claims.

Many of IPPA's claims fail here because they proceed from the same faulty premise—that the U.S. Constitution precludes state laws with upstream practical effects on out-of-state market participants whose products are sold in the regulating state. However, there simply is no constitutional guarantee of the right to engage in commerce in every state, free from regulation, nor does such regulation amount to *per se* unconstitutional discrimination. Moreover, the pork industry's apocalyptic predictions of the financial doom that will befall it and its members (and consumers,

generally) are belied by the complaint's allegations as well as the on-the-ground reality following Proposition 12's enactment.

For all of these reasons, the district court properly denied IPPA's motion for a preliminary injunction, finding that IPPA had "fail[ed] to raise serious questions as to the merits of its claims." ER-12. The district court was similarly correct to find that IPPA had failed to state a claim and grant the dismissal of the case. ER-53. This Court should affirm both decisions.

JURISDICTIONAL STATEMENT

Appellees-Intervenors agree with IPPA's jurisdictional statement contained in its opening brief ("Op. Br.") at page 5.

ISSUES PRESENTED

1. Did the district court err in applying existing Ninth Circuit and Supreme Court precedent to dismiss the pork industry's latest challenge to Proposition 12?

2. Did the district court abuse its discretion in denying IPPA's request for a preliminary injunction?

STATEMENT OF THE CASE

A. California's Prior Farm Animal Welfare Legislation

The challenged law, Cal. Health & Safety Code § 25990 ("Proposition 12")—recently upheld by the Supreme Court, rejecting claims mirroring the core claims in this case—builds upon California's rich history of animal protection and of ridding local markets of dangerous and inhumane products. Proposition 12 amended an

established farm animal production and sales framework in California to limit the sale within the State of products resulting from some of the most extreme and cruel forms of farm animal confinement.

Prior to Proposition 12's passage, California had taken initial steps toward excluding products of cruel intensive confinement from its marketplace through the enactment of two laws—"Proposition 2" and Assembly Bill 1437 ("AB 1437"). These, respectively, addressed in-state production of certain eggs, pork and veal products, and in-state sales of eggs produced by animals subject to severe cruelty. Proposition 2, enacted by voters in 2008, required certain farm animals in California to be able to lie down, stand up, fully extend their limbs, and turn around freely. Cal. Health & Safety Code § 25991. Proposition 2 did not include any specific numeric space requirements for covered animals, nor did it include any sales restrictions on products derived from animals who were not raised in the way that Proposition 2 mandated. In 2010, the legislature passed AB 1437 "to protect California consumers from the deleterious health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease and pathogens including salmonella." *Id.* at § 25995(e). AB 1437 required that all eggs sold in the state come from hens kept in Proposition 2-compliant conditions—wherever the eggs were produced. *Id.* at § 25996.

Proposition 2 and AB 1437 reflect California's interests in ensuring that farm animals are not treated in a cruel manner, that the products of cruelty are not sold in California stores, that unsafe products are not sold in the State, and that the California market does not subsidize or encourage cruelty—particularly in the form of intensive confinement that threatens public health. Subsequent to California's legislative action, multiple other states followed suit, including Colorado, Colo. Rev. Stat. Ann. § 35-21-203; Massachusetts, Mass. Gen. Laws, Ch. 129 App., § 1-1 *et seq*.; Michigan, Mich. Comp. Laws Ann. § 287.746; Oregon, 2019 Ore. Laws, Ch. 686 (SB 1019); and Washington, 2019 Wa. Laws, ch. 276 (HB 2049).

Thus, prior to the 2018 passage of Proposition 12, and via a combination of the 2008 ballot initiative and the 2010 legislative action, California required behavioral (not specific numeric space requirement) standards for animals raised by in-state producers, and required that all eggs sold in the state—regardless of where they were produced—were sourced from hens raised in compliance with those standards.

Proposition 2 and AB 1437 withstood multiple state and federal constitutional challenges. *See, e.g., Cramer v. Brown,* No. CV 12-3130-JFW (JEMx), 2012 WL 13059699 (C.D. Cal. Sept. 12, 2012), *aff'd sub. nom. Cramer v. Harris*, 591 Fed. App'x. 634 (9th Cir. 2015); *JS West Milling Co., Inc. v. California*, No. 10-04225 (Cal. Sup. Ct. Fresno County 2010); *Ass'n of Cal. Egg Farms v. State of California,*

et al., No. 12-CECG-03695 (Cal. Super. Ct. Aug. 22, 2013). In addition, a coalition of states challenged AB 1437 on grounds which included the dormant Commerce Clause arguments advanced here. That challenge was dismissed for lack of standing, but the Ninth Circuit affirmed that "the Shell Egg Laws are not discriminatory." *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655 (9th Cir. 2017), *cert denied sub. nom., Missouri ex rel. v. Becerra*, 137 S.Ct. 2188 (2017).

A similar coalition of states also tried to invoke the Supreme Court's original jurisdiction to revive their dormant Commerce Clause claim against, among other laws, AB 1437. The Trump administration's Solicitor General ("SG"), responding to the Court's call for its views, asserted unequivocally that the Court should not consider the case, in part because "the California Egg Laws do not discriminate; California treats alike all eggs sold in that State, without any preference for local producers or local products." Brief for the United States as *Amicus Curiae* in *Missouri v. California*, No. 148, Original, at 21 (Nov. 2018).[1] The SG also told the Supreme Court that the industry's predictions of widespread disruption and cost increases failed to "disaggregate trends attributable to California's Egg Laws from those attributable to increased consumer demand for 'cage free' or similarly farmed

[1] Available at http://www.supremecourt.gov/DocketPDF/22/22O148/73669/20181129155455478_Orig.%20148%20State%20of%20Missouri%20v.%20Cal.pdf (last visited Sept. 5, 2023).

eggs." *Id.* at 12-13. The Supreme Court denied the States permission to file the suit. *See Missouri v. California,* 139 S.Ct. 859 (2019).

B. Voters Upgrade California's Humane Legislative Framework

In November 2018, California voters enacted Proposition 12, which sets a higher bar than Proposition 2 for products sold in California. The explicitly stated purpose of the ballot measure "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." Prevention of Cruelty to Farm Animals Act, Prop. 12 § 2. Proposition 12 provides that "farm owner[s] or operator[s] *within the State of California*" cannot knowingly confine covered animals "in a cruel manner." Cal. Health & Safety Code § 25990(a) (emphasis added). Pursuant to Proposition 12, animals are not "confined in a cruel manner" if they can engage in the same behavioral standards of Proposition 2 (*i.e.*, lying down, standing up, fully extending limbs, and turning around freely), and if they also have access to modest specific amounts of usable floor space set out in the statute. *Id.* § 25991(e)(1)-(3). Prior to Proposition 12's enactment, California imposed no numeric space requirement per animal; Proposition 12 added those standards to the pre-existing behavior-based standards.

Proposition 12's sales provision parallels AB 1437 by prohibiting business owners and operators from knowingly engaging in the sale *within the State* of any, as relevant here:

> 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.

Id. § 25990(b)(2). By the law's terms, the behavior-based part of the sales provision standard went into effect upon the law's passage in 2018, while the numeric space standard part of the same provision was set to go into effect January 1. 2022.

C. Prior Failed Constitutional Challenges to Proposition 12

The pork industry has filed a litany of failed lawsuits challenging Proposition 12. In October 2019, the North American Meat Institute ("NAMI") filed a complaint on behalf of pork and veal producers in the Central District of California, challenging Proposition 12 on dormant Commerce Clause grounds (including discrimination, extraterritoriality, and substantial burden) and moving for a preliminary injunction. *N. Am. Meat Inst. v. Becerra*, No. 2:19-cv-08569 (C.D. Cal. Oct. 4, 2019). The district court denied the motion, finding that NAMI had "fail[ed] to raise any questions on the merits of its three commerce clause claims," and this Court affirmed. *See N. Am. Meat Inst. v. Becerra*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied sub nom. N. Am. Meat Inst. v. Bonta*, 141 S.Ct. 2854 (2021) ("*NAMI*"). The district court also partially granted defendants' subsequent motions to dismiss and

for judgment on the pleadings. *N. Am. Meat Inst*, 2020 WL 919153, at *1 (C.D. Cal. Feb. 24. 2020). In June 2023, NAMI voluntarily dismissed the case after the Supreme Court upheld Proposition 12 in *Ross*. Stip. of Dismissal, *Id.*, Dkt. 83 (June 15, 2023).

Less than two months after NAMI's lawsuit was filed, the National Pork Producers Council ("NPPC"), together with the American Farm Bureau Federation, filed another challenge to Proposition 12 on dormant Commerce Clause grounds. *Nat'l Pork Producers Council v. Ross*, Case No. 3:19-cv-02324 (S.D. Cal. Dec. 5, 2019). The district court granted defendants' motions to dismiss and for judgment on the pleadings, and this Court affirmed, holding that (1) Proposition 12 does not have an impermissible extraterritorial effect on interstate commerce and (2) plaintiffs had not sufficiently alleged that Proposition 12 imposed a substantial burden on interstate commerce. *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1031, 1033 (9th Cir. 2021).

The Supreme Court affirmed, unanimously rejecting NPPC's theory that laws that have the practical effect of controlling commerce outside the state "even when those laws do not purposely discriminate against out-of-state economic interests" are *per se* violations of the dormant Commerce Clause. *Ross*, 598 U.S. at 371. In so doing, the Court noted that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial

behavior." *Id.* at 374 (internal citation omitted). And a plurality of the Court determined that the industry had not alleged a substantial burden on the interstate market itself. *Ross*, 598 U.S. at 383-89 (Part IV-C).[2]

D. Procedural History

In November 2021, IPPA filed the pork industry's *fourth* action on behalf of its members, seeking declaratory and injunctive relief regarding Proposition 12 on the grounds that it allegedly violates the dormant Commerce Clause, and several other constitutional provisions. ER-504-544.[3] In December 2021, IPPA filed a motion for a preliminary injunction based on only two of its constitutional claims (dormant Commerce Clause and due process). District Court Dkt. No. 15. Appellees-Defendants, along with Appellees-Intervenors (animal welfare organizations

[2] In addition to these California challenges to Proposition 12, pork producers (represented by the same firm that represents IPPA here) recently challenged the Massachusetts equivalent of Proposition 12—Question 3—in a case that mirrors the majority of IPPA's claims here. *Triumph Foods v. Campbell,* No. 23-cv-11671-WGY (D. Mass July 31, 2023).

[3] IPPA first filed in Iowa state court—*three years* after Proposition 12 passed, a case which the district court found was "largely identical" to this case. District Court Dkt. No. 21 at 3. That case was removed and subsequently dismissed for lack of personal jurisdiction, *Iowa Pork Producers Ass'n v. Bonta*, Case No. 3:21-cv-3018, 2021 WL 4465968, at *13 (N.D. Iowa Aug. 23, 2021); IPPA waited ten more weeks to file the same claims in Fresno Superior Court, and that case was "subsequently (and unsurprisingly) removed" to federal court seven days later. District Court Dkt. No. 21 at 3.

integral to the drafting and passage of Proposition 12), opposed this motion and filed motions to dismiss and for judgment on the pleadings.

In February 2022, the district court granted Appellees-Defendants' Motion to Dismiss and Appellees-Intervenors' Motion for Judgment on the Pleadings, and denied IPPA's motion for a preliminary injunction. ER-2-53. Regarding the motion for preliminary injunction, the district court found that IPPA "fail[ed] to raise serious questions as to the merits of its claims.". ER-12. The district court similarly found that IPPA had failed to state a claim, and dismissed the case. ER-53. This appeal followed. This Court stayed proceedings in the case pending the resolution of *Ross* in the Supreme Court. ECF No. 11.

SUMMARY OF ARGUMENT

The pork industry's latest attempt to overturn Proposition 12 continues to blur the critical distinction between state lawmaking that a litigant simply disagrees with and those rare cases in which it actually violates the United States Constitution. *See Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994) ("[C]ourts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation.") (quotation omitted). IPPA ignores the substantial precedent in this Circuit specifically regarding Proposition 12, and attempts to inject space for its tired claims in the recent *Ross* decision where there is none.

The district court correctly dismissed IPPA's claims and denied its request for a preliminary injunction. IPPA's dormant Commerce Clause claims are foreclosed by Ninth Circuit precedent—including cases dismissing identical challenges to Proposition 12—and the Supreme Court's recent decision in *Ross*. The district court rightly held that IPPA failed to plausibly allege that Proposition 12 discriminates against interstate commerce on its face, in its purpose, or by its effect, ER-46-50, and that IPPA failed to raise any questions on the merits that would support a preliminary injunction. ER-23. This Court previously rejected the pork industry's bid for a preliminary injunction of this same law based in part on an identical discrimination claim three years ago, and that decision is controlling here. *NAMI*, 825 F. App'x 518.

The district court also correctly held that IPPA failed to plausibly allege that Proposition 12 imposes a substantial burden on interstate commerce, ER-52, or deserved a preliminary injunction. ER-26. In doing so, the district court noted this Court's controlling precedent in *Ross*, which was affirmed by the Supreme Court.

IPPA argues that Proposition 12 is discriminatory—despite the fact that NAMI abandoned the same claim long ago and NPPC declined to pursue that claim altogether in the Supreme Court—and that it imposes a substantial burden on interstate commerce—despite the fact that its allegations mirror those found to be

insufficient in *Ross*, and despite the fact that a majority of the Court held that "*Pike* balancing" is inappropriate for a review of Proposition 12 in the first place.

IPPA's remaining claims are similarly foreclosed. The district court was correct to find that IPPA failed to state a preemption claim, ER-46, because it is not impossible to comply with both Proposition 12 and the Packers and Stockyards Act, nor does the former stand as an obstacle to the latter. Likewise, the district court was correct to find that IPPA failed to state a due process claim, and that it had not raised any serious questions on that claim that would warrant a preliminary injunction. ER-13, 14, 18-19. Having abandoned all but one of its vagueness arguments on appeal, IPPA has failed to allege how Proposition 12 is vague in any, let alone all, applications.

IPPA's failure to raise any legitimate merits arguments is fatal to its request for a preliminary injunction and, since Proposition 12 has been *largely in effect for years* without the apocalyptic doom predicted by the pork industry, IPPA's claims of irreparable harm are undeniably untrue.

ARGUMENT

I. STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is reviewed *de novo*, and all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Sprewell v. Golden State*

Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, the Court is not "required to accept as true all allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.* (internal citations omitted); *see also Moss v. U.S. Secret Serv.,* 572 F.3d 962, 969 (9th Cir. 2009).

This Court reviews a district court's "grant or denial of a preliminary injunction for abuse of discretion." *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The district court abuses its discretion "when it bases its decision on an erroneous legal standard or clearly erroneous findings of fact." *Id.* (*quoting Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007)). This Court reviews findings of fact for clear error and conclusions of law *de novo*. *Id*; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 428 (2006).

II. PROPOSITION 12 DOES NOT IMPERMISSIBLY REGULATE EXTRATERRITORIALLY

As an initial matter, while IPPA appears to have dropped its claim that Proposition 12 is *per se* extraterritorial, it nevertheless continues to frame its remaining dormant Commerce Clause arguments through an extraterritoriality lens foreclosed by the Supreme Court.[4]

[4] IPPA continues to complain of Proposition 12's extraterritorial effects despite the fact that IPPA itself has noted that the *Ross* and *NAMI* rulings on extraterritoriality are "currently binding over corresponding claims in this Court." ER-24.

Indeed, the *first two sentences* of IPPA's brief make assumptions the Supreme Court has recognized to be flatly untrue (including that Proposition 12 "dictat[es] how pork sold to California consumers must be farmed nationwide" and "requires pig farmers—*on a nationwide basis*—to raise breeding pigs [consistent with Proposition 12]"). Op. Br. at 1. Such statements boil down to a fallacious argument that Proposition 12—which regulates only the sale of products *in California*—extraterritorially regulates beyond the State's borders. But the *Ross* Court recognized that Proposition 12 does not actually regulate behavior outside the state just because it has incidental effects there, *if* businesses *choose* to sell *in California*. The Supreme Court "unanimously disavow[ed] petitioners' 'almost *per se*' rule against laws with extraterritorial effects." *Ross*, 598 U.S. at 389 n.4 (internal citations omitted). In so doing, the Court noted that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Id.* at 374 (internal citation omitted). That some pork producers may *choose* to alter their farming practices to sell in California does not mean that the law *requires it*, nor—as the Supreme Court recognized—is it a constitutional problem. "While the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list." *Id.* at 364.

III. PROPOSITION 12 DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

As *Ross* made clear, the dormant Commerce Clause is focused on preventing economic protectionism, that is, discrimination against interstate commerce. *Ross*, 598 U.S. at 370 (dormant Commerce Clause operates principally to "safeguard against state protectionism") (citation omitted). IPPA continues to advance a claim that Proposition 12 discriminates against interstate commerce, a claim so outlandish that one of the nation's largest pork producer trade associations abandoned it in district court, and another considered it too frivolous to advance before the Supreme Court. Indeed, while the *Ross* Court did not directly consider whether Proposition 12 was discriminatory—because NPPC never raised such a claim—neither did any justice raise the possibility that Proposition 12 does discriminate, despite the many concurrences and dissents. Instead, all the justices proceeded from the assumption that Proposition 12, an even-handed law that treats in-state and out-of-state entities the same, is nondiscriminatory as a constitutional matter.

Courts have identified three general ways of discriminating against interstate commerce: a statute may facially discriminate against interstate commerce, it may be facially neutral but have a discriminatory purpose, or it may be facially neutral but have a discriminatory effect. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087-88 (9th Cir. 2013). IPPA incorrectly asserts that Proposition 12 is facially discriminatory. This argument relies on a comparison of Proposition 12 to

its predecessor, Proposition 2. Op. Br. at 30. This "lead time" argument is really a discriminatory effects argument, addressed below. By its terms, Proposition 12 does not give California producers any advantage over their out-of-state counterparts; it simply evenhandedly bans the sale of certain products whether or not the seller is an in-state or out-of-state entity. Cal. Health & Safety Code § 25990(b)(1)-(4). It is therefore facially neutral. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013), *cert. denied*, 135 S.Ct. 398 (2014) ("*Eleveurs*") ("[A] statute that treats all private companies exactly the same does not discriminate against interstate commerce. . . .") (internal citation omitted). Indeed, in *NAMI*, the pork producers' trade association "acknowledge[d] that Proposition 12 is not facially discriminatory." *NAMI*, 825 F. App'x at 519.

Neither does Proposition 12 discriminate in purpose. This Circuit has already considered and rejected this very argument about this very law. *NAMI*, 825 F. App'x at 519 (finding that there is a "lack of evidence that the state had a protectionist intent" in passing Proposition 12). Nothing that IPPA raises counsels a different result here. Tellingly, IPPA does not cite anything specific for its unfounded assertion that California "targeted out-of-state producers under the guise of 'leveling the playing field [for California producers].'" Op. Br. at 29.[5]

[5] IPPA has abandoned its absurd argument that there is something inherently discriminatory about a state passing a law to avoid negative fiscal (and health)

Instead, IPPA points generally to California's Proposition 2, reasoning that the mere existence of the earlier law regulating in-state production somehow must mean that California's later Proposition 12—which applies equally to any in-state or out-of-state producer choosing to sell its products in California—was intended to target out-of-state producers. However, in addition to the fact that this Court has already rejected this argument, the very statement IPPA points to in support of its discriminatory purpose argument actually undermines it. The post-enactment statement IPPA believes to evidence discriminatory intent, Op. Br. at 28-29, actually acknowledges that Proposition 12 imposes a competitive *disadvantage* for in-state producers, not because of Proposition 2, but because Proposition 12's confinement standards (which apply only to covered products produced in California) apply to them wherever they sell their products. 22-Z Cal. Regulatory Notice Reg. 594 (May 28, 2021). In other words, while a producer in Iowa can produce cruelly-produced pork for sale in many markets, California producers cannot produce that type of pork in the first place, and are in that way disadvantaged as compared to out-of-state producers. Thus, if anything, California's law *disadvantages* California producers.[6]

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impacts. There is nothing "discriminatory" about a state seeking to keep its residents out of the hospital for foodborne illness, exactly the sort of impacts contemplated by Proposition 12. Prop. 12, § 2.

[6] Moreover, if California pork producers benefitted from Proposition 12, those producers surely would be singing the law's praises. Instead, the California Pork

Finally, Proposition 12 does not have a discriminatory effect. This argument parrots the *NAMI* pork producers' narrow discrimination claim challenging Proposition 12 as generating a "lead time" advantage for in-state producers—tellingly, an argument NAMI voluntarily dismissed following the *Ross* decision upholding Proposition 12. Stip. of Dismissal, *N. American Meat Inst. v. Becerra*, No. 19-cv-08569, Dkt. 83 (June 15, 2023). As in *NAMI*, this argument leans heavily on the false notion that in-state producers had more time to comply with the behavioral standards of Proposition 12, thereby disadvantaging out-of-state producers. ER-537. This argument fails for three reasons.

First, this argument turns the burdens analysis on its head. A burden faced only by in-state businesses for years (via confinement restrictions) does not suddenly become a retroactive advantage to those businesses because a separate law is enacted that applies to both in-state and out-of-state businesses' activity. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."). To cry constitutional foul any time certain compliance obligations fall on in-state entities

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Producers Association has consistently opposed the law, and has joined efforts to delay it. *See* Lisa Heald, Is the Pork Industry Using Food Justice to Stall California's New Animal Welfare Law?, Civil Eats, Sept. 27, 2021, https://civileats.com/2021/09/27/is-the-pork-industry-using-food-justice-to-stall-californias-new-animal-welfare-law-prop-12-prop-2-pork-gestation-crates/ (last visited Sept. 5, 2023).

before additional obligations fall on both in-state and out-of-state entities would lead to absurd results.[7]

Second, compliance with the prior confinement restrictions does not ensure compliance with the new standards of Proposition 12. All producers, whether in-state or out-of-state, had the exact same amount of time to comply with the sales provision of Proposition 12. While part of that sales provision does include behavioral standards which in-state producers were previously required to comply with, Proposition 12 marks the first time all producers choosing to *sell* their covered products in California must meet certain standards. Moreover, those standards contain *entirely new* components—including numeric space standards. Cal. Health & Safety Code § 25991(e)(3). IPPA points to the unremarkable possibility that California producers *may* have fewer costs associated with complying with Proposition 12's sales standards than out-of-state producers because they were already in compliance with the behavioral confinement standards. Op. Br. at 31 n.4. But nothing in the record indicates that California producers did not incur the exact

[7] For example, if a state banned the in-state production of bottled water containing more than 15mcg/L of lead, and subsequently banned the in-state sale of bottled water—regardless of where it was produced—containing more than 10 mcg/L of lead, IPPA would complain that this gives in-state producers an unfair advantage. By that twisted logic, any health and safety laws regulating the in-state production and subsequent sale of toxic chemicals would constitute unconstitutional "lead time" over states with lesser standards.

same costs as out-of-state producers when they previously modified their sow housing to comply with the earlier Proposition 2 provisions.

Third, IPPA's own allegations fatally betray its argument that in-state producers are unfairly advantaged by Proposition 12. While IPPA contends that the district court erred because it ignored comparable in-state businesses, Op. Br. at 33, the complaint does not identify any California pork producers who are specifically advantaged by the law. Rather, IPPA's factual allegations, taken as true, state that "California has as few as 8,000 breeding pigs" and that "[o]nly 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." ER-505-506 (also contending that "California *cannot feed itself* without massive agricultural imports from . . . [IPPA's] members") (emphasis added). IPPA has acknowledged that, if anything, these California producers are disadvantaged by Proposition 12. Op Br. at 28 (citing state agency's statement on how in-state producers will find it more costly to compete out-of-state because of Proposition 12). Consequently, IPPA fails to make credible allegations of "actual or prospective competition" in the same market (California's pork sales market) between in-state interests and their out-of-state counterparts. *Pharm. Rsch. & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1042 (9th Cir. 2014), *citing Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298, 299–300 (1997) ("Conceptually, of course, any notion of discrimination assumes comparison of substantially similar

entities.") (footnote omitted). The district court was therefore correct in rejecting IPPA's discriminatory effects argument based on *Eleveurs*. ER-22-23 ("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 businesses") (citing *Eleveurs*, 729 F.3d at 948).

IPPA strains to salvage its discriminatory effects argument by misconstruing a 2021 California Department of Food and Agriculture ("CDFA") guidance document, which simply explained that pork which was already in stock prior to 2022 could still be sold in the state—without regard to origin. IPPA falsely asserts that CDFA allowed in-state producers to sell noncompliant products "without providing such an opportunity to out-of-state producers." Op. Br. at 31. This contention is erroneous for multiple reasons. As an initial matter, the CDFA's guidance document cannot itself create an advantage for in-state producers, as guidance documents do not themselves have legally binding effect.[8] But also, the information provided by CDFA in the guidance document does not indicate that in-

[8] *Lesher Commcn's, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 543 (1990) ("we presume that the voters intend the meaning apparent on the face of an initiative measure" and courts should not look outside the law to "add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language"). Thus, the change-of-law cases IPPA cites, Op. Br. at 31 n.5, are inapplicable.

state producers are treated different than out-of-state producers, as is plain from the text IPPA references.[9]

IPPA imagines the 2021 CDFA guidance *creates a new exception* (which they call a "sell through option") to allow products "already in stock" as of January 1, 2022 to continue to be sold even if they do not comply with the new numeric space standards that went into effect on that date. IPPA imagines further that this creates an advantage for in-state producers, because the products already stocked for sale as of January 1, 2022 were required to meet the behavior-based space requirements in effect prior to that date. But CDFA did not create a new exception (through the guidance document or otherwise)—it simply explained that the numeric space standards established by Proposition 12 apply to products sold or offered for sale *beginning on* January 1, 2022, and, thus, products already on offer for sale before

[9] The Q&A section IPPA refers to asks whether "pork meat already in stock" in California before January 1, 2022 (the date Proposition 12's numeric space standards would become operational) needs to be discarded if it was sourced from animals "not raised according to the confinement standards of . . . twenty-four square feet per breeding pig." https://www.cdfa.ca.gov/AHFSS/pdfs/Prop_12_FAQ_March_2021.pdf (at p. 1, question 4). CDFA answered in the negative, without regard to the origin of the pork in question, and reasoned that because the definition of "confined in a cruel manner" changes at the end of the day on December 31, 2021—per the terms of the statute—products "in inventory or commerce" before that date (but that were not sourced from pigs with access to at least 24 square feet of space) "will still be legal to sell in California." *Id.* In other words, such products were not illegal when they were brought into the state, and so—unremarkably—they could also be sold in the state without any legal liability.

that date are not subject to the new numeric space standards. Moreover, the fact that products "already in stock" before January 1, 2022 were required to meet the behavior-based space requirements is not discriminatory. Those requirements had been in effect since 2018 *for all sellers,* whether their pork originated in-state or out-of-state. The ability of retailers to sell through existing stocks does not create a preference for in-state pork.[10] IPPA's argument about the ability of retailers to continue to "sell through" products meeting the behavior-based space requirements that were already in stock as of December 31, 2021 is at most a rehash of its flawed "lead time" argument (in-state producers had more time to create pork meeting the behavior-based space standards prior to 2018), which fails for the reasons discussed above.[11]

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[10] In fact, according to IPPA's own allegations, the vast majority of the pork sold in California (and so, the pork in stock) comes from *outside the state*. ER-505. If CDFA's guidance could benefit anyone here, it is therefore mostly out-of-state producers. Pork that did not meet Proposition 12's behavior-based space standards was *not* legal to sell at any time after the behavioral standards went into effect in 2018 (as IPPA acknowledges). For that reason, CDFA would have no need to explain in a 2021 guidance document what effect the January 1, 2022 effective date for the new numeric space standards would have on pork that was illegal since 2018 because it did not meet the behavioral standards; that issue had nothing to do with this answer.

[11] IPPA suggests it wants CDFA to allow retailers to be able to sell products that do not comply with the *behavioral* standards of Proposition 12, even though all sellers have been prohibited from doing so for years. Even assuming that CDFA could do what IPPA wants, IPPA does not explain how that would cure the imagined discriminatory effect. If this lead time argument had any merit, and it does not, such

IV. ANY INCIDENTAL BURDEN IMPOSED BY PROPOSITION 12 ON INTERSTATE COMMERCE IS INSUBSTANTIAL AND DOES NOT OUTWEIGH THE PUTATIVE IN-STATE BENEFITS OF THE LAW

IPPA also fails to state a claim under the test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), under which a law unconstitutionally burdens interstate commerce only if it is "clearly excessive" as compared to the law's putative benefits. *See also Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). This Circuit, applying *Pike*, has held a reviewing court should not engage in the kind of freewheeling speculation about the in-state benefits of Proposition 12 that IPPA asks this Court to perform. Instead, the Court should engage in a two-step analysis. "[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." *Pharm. Research*, 768 F.3d at 1044 (citation omitted) (emphasis added).[12] The *Ross* decision is in accord. *Ross*, 598 U.S. at 386-91 (*citing Exxon*, 437 U.S. at 127) (rejecting *Pike* claim and finding NPPC alleged no substantial burden on the market itself, but on specific operators and their preferred

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a "sell through option" would not alter the imagined discrepancy between in-state and out-of-state producers.

[12] This Court has repeatedly emphasized that there are only a "small number" of cases invalidating "genuinely nondiscriminatory" state laws under the dormant Commerce Clause, and that these cases "address state regulation of activities that are inherently national or require a uniform system of regulation—most typically, interstate transportation." *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146-47 (9th Cir. 2015) (quotations and citations omitted).

method of operation). Only upon such a showing should the Court even proceed to examine the putative in-state benefits.

Here, the Court need not engage in any *Pike* balancing, because *Ross* precludes the application of *Pike* to this case. A majority of the Court agreed that *Pike* has no role to play in any challenge to Proposition 12—because a burden on a particular method of doing business is not a burden on commerce (J. Gorsuch, J. Thomas, J. Sotomayor & J. Kagan), and because moral benefits cannot be balanced against economic costs (J. Gorsuch, J. Thomas and J. Barrett). *Ross*, 598 U.S. at 379-87 (Parts IV-B and IV-C).

It is therefore of no moment that IPPA asserts that it has more detailed *Pike* allegations than the NPPC did in *Ross,* Op. Br. at 2, because *Ross* rejected the *type* of allegations as legally insufficient. The Court rejected NPPC's *Pike* challenge without a remand for factual development of the industry's allegations—which it took as true for purposes of NPPC's motion to dismiss—that the stated purposes of Proposition 12 could not be achieved through the measure and that Proposition 12 would have huge impacts on the industry, just as IPPA has alleged here. Though IPPA attempts to obscure the *Ross* court's ultimate *Pike* conclusion with citations to concurrences and dissents, the plurality opinion of the Court determined that the industry had not alleged a substantial burden on the interstate market itself. *Ross*, 598 U.S. at 386-87 (Part IV-C) ("the facts pleaded in this complaint merely allege

harm to some producers' favored methods of operation" and "substantial harm to interstate commerce remains nothing more than a speculative possibility") (internal quotations omitted). And the decision to affirm the dismissal of the *Pike* claim was supported by Justice Barrett, who indicated that the alleged economic burdens to industry operators and the non-economic benefits to California are "incommensurable" and cannot possibility be weighed against each other under *Pike*. *Id*. at 392-93 (Barrett, J., concurring in part); *see also id.* at 380-83, 387-89 (Parts IV-B and IV-D of the opinion, which J. Barrett joined).[13]

Regardless, IPPA has failed to plead a claim that Proposition 12 imposes a substantial burden on interstate commerce that outweighs the in-state benefits, as its allegations mirror those found to be insufficient in *Ross*.

A. IPPA Does Not and Cannot Show That Proposition 12 Substantially Burdens Interstate Commerce.

The primary purpose of the *Pike* test is to determine if "a law's practical effects may also disclose the presence of a discriminatory purpose." *Ross*, 598 U.S.

[13] It is telling that IPPA relies on Justice Kavanaugh's dissent for this sleight of hand, in precisely the way Justices Gorsuch, Thomas and Barrett warned against: "But the dissents are just that—dissents. Their glosses do not speak for the Court." *Ross,* 598 U.S. at 389 n.4. Instead, "[w]hen it comes to *Pike*, a majority ... rejects any effort to expand *Pike*'s domain to cover cases like this one, some of us for reasons found in Part IV–B, others of us for reasons discussed in Part IV–C. Today's decision depends equally on the analysis found in both of these sections; without either, there is no explaining the Court's judgment affirming the decision below." *Id.*

at 377. Here, Proposition 12's practical effects show no discrimination and IPPA's "substantial burden" allegations are insufficient under *Ross*.

A *Pike* claim fails if the burdens alleged are those of particular producers and their preferred methods of operation. *Id*. at 384 (*quoting Exxon*, 437 U.S. at 127-28) ("the dormant Commerce Clause protects the 'interstate market … from prohibitive or burdensome regulations,' … it does not protect 'particular … firms' or 'particular structure[s] or methods of operation'"). And IPPA's cited declarations are nearly identical to those rejected in *Ross*. *See* ER-539 (Amended Complaint) (alleging that Proposition 12 will have the effect of "forcing small pork producers out of the market" and "consolidating pork production into large producers"; ER-202-07 (Tonsor Decl.); District Court Dkt. No. 15-1 at 40 (Memo ISO Mot. for a Preliminary Injunction) (*producers* will "bear [] the brunt of alleged increased costs").[14] Proposition 12, like any law, may require IPPA's members to expend some resources to comply, but only to the extent *they choose* to sell their products in California. While IPPA (just like NPPC) has alleged that it is not "practical for producers to segregate their product from California markets," IPPA concedes this is a result of its preferred business methods, not a feature of Proposition 12. ER-508. Thus, IPPA

[14] *Cf. Ross*, 598 U.S. at 386-87 (finding that "the facts pleaded in this complaint merely allege harm to some producers' favored 'methods of operation'" and that "substantial harm to interstate commerce remains nothing more than a speculative possibility" (citation omitted)).

at most asserts in conclusory fashion that Proposition 12 will result in a shift in pork production methods, not that compliance is impossible. ER-109 (¶21). However, the dormant Commerce Clause is not a protection against shifts in the current market share of individual firms selling products to a specific market. *Ross*, 598 U.S. at 384-85; *Minnesota v. Clover Leaf Creamery* Co, 449 U.S. 456, 473 (1981).

IPPA supposedly fears pork supply shortages and pork price increases because of Proposition 12. Op. Br. at 42-43. But this rank speculation is hardly "uncontroverted," *id.*, and, as in *Ross*, cannot support a finding that IPPA's *Pike* claim is likely to succeed or has been adequately pled. *Ross*, 598 U.S. at 384-86. Producers undeniably retain the ability to choose whether to sell in the California market.[15] Under IPPA's theory, every single state restriction on the sale of a commodity would be unconstitutional if it *might* influence supply and pricing. The Supreme Court rejects that notion. *See Ross*, 598 U.S. at 377-87 (Parts IV.A-IV.C).

Besides being legally insufficient, IPPA's allegations have been proven untrue: the pork industry's primary trade group has indicated that just under forty

[15] For instance, major pork producer, Seaboard Foods, has reportedly decided not to send products to California—a choice that is entirely the company's to make. *See* Janelle Bitker, *Has the 'Great California Bacon Crisis' arrived? Not yet — but here's what might happen in the Bay Area*, SAN FRANCISCO CHRONICLE (Jan. 13, 2022), available at https://www.sfchronicle.com/food/article/California-s-Prop-12-hasn-t-resulted-in-a-16771372.php ("Some major pork producers ... have already cut off California.") (last visited Sept. 5, 2023).

percent of pork production has now shifted away from using the cruelest confinement methods, and practices continue to trend toward Proposition 12 standards.[16] The pork industry's own economists explained in an amicus brief filed in support of *neither* party in *Ross* that principles of economics indicate that pork prices will increase only modestly, and only in the jurisdictions where voters chose to enact such laws, and that prices would likely decrease a very small amount everywhere else. Brief of Agricultural and Resource Economics Professors and Amicus Curiae, *NPPC v. Ross*, No. 21-468, at 6, 15-23 (June 17, 2022).[17] Moreover, Proposition 12's initial confinement-related sales restrictions began in 2022, and

[16] Tom Johnston, *Concerns Grow as Prop 12 Stews*, MEATINGPLACE (Oct. 19, 2022) *at* https://www.meatingplace.com/Industry/News/Details/106857 (quoting NPPC's director of animal health: "many companies have transitioned to group sow housing, which now makes up some 38% of U.S. pork production," though many of these companies "will take awhile" to meet consumer demand for crate-free pork) (last visited Sept. 5, 2023). This trend may be driven by the financial interests of producers, as research economists have found it can be more affordable for producers to raise pigs outside of restrictive gestation crates. Iowa State University, *Alternatives to Sow Gestation Stalls Researched at Iowa State* (Apr. 9, 2007), *available at* https://www.cals.iastate.edu/news/2007/alternatives-sow-gestation-stalls-researched-iowa-state ("group housing ... resulted in a weaned pig cost that was 11 percent less") (last visited Sept. 5, 2023).

[17] Available at http://www.supremecourt.gov/DocketPDF/21/21-468/228373/20220617170252460 21-468AgriculturalAndResourceEconomicProfessors.pdf (last visited Sept. 5, 2023).

there have been *no* pork supply shortages or huge price increases attributable to implementation.[18]

B. Proposition 12's putative benefits are substantial as recognized by the Supreme Court.

Under *Pike*, an assumed local interest is valid as long "is not wholly irrational in light of its purposes." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 681 (1981).[19] The interests that California voters sought to advance through Proposition 12—ensuring that the California market is not supporting cruel confinement practices, and protecting the public health—were accepted as valid by the Court and the industry in *Ross*. These are bedrock subjects of state police power authority.

Courts routinely recognize that "prevent[ing] animal cruelty—on its own—is a legitimate exercise of state police powers." *United States v. Stevens*, 559 U.S. 460, 469 (2010); *Eleveurs*, 729 F.3d at 952-53 (law "prevent[ed] complicity in a practice

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[18] Dennis W. Smith, *What I'm Seeing, What I'm Hearing, What I'm Expecting*, National Hog Farmer (Dec. 6, 2021), *at* https://www.nationalhogfarmer.com/market-news/what-im-seeing-what-im-hearing-what-im-expecting ("Prop 12 is not going to present a major disruption to pork distribution and pork pricing.") (last visited Sept. 5, 2023); Bitker, *supra* n. 15; Katharine Gammon, *Why California's 'great bacon crisis' has yet to arrive,* THE GUARDIAN (Jan. 24, 2022), *at* https://www.theguardian.com/environment/2022/jan/23/california-bacon-crisis-animal-welfare-standards (last visited Sept. 5, 2023).

[19] For this reason, IPPA's protestations that the record is devoid of "proof" that the initiative would accomplish its purpose is unwarranted. Op. Br. at 35.

that [California] deemed cruel to animals"). And Proposition 12 ensures California consumers are not unwittingly turned into supporters of practices they find morally reprehensible. *See Cresenzi Bird Importers, Inc. v. New York*, 658 F.Supp. 1441, 1447 (S.D.N.Y. 1987), *aff'd* 831 F.2d 410 (2d Cir. 1987) ("New York has a legitimate interest in regulating its local market conditions which lead, in a short causal chain, to the unjustifiable and senseless suffering and death of thousands of captured wild birds. . . . The State has an interest in cleansing its markets of commerce which the Legislature finds to be unethical."). IPPA may disagree, but it cannot assert Proposition 12 does not meaningfully advance the goal of avoiding complicity in cruelty as Californians see it.

Proposition 12 also effectuates public health objectives. First, it is clear that cruel, intensive confinement is linked to food safety threats, and studies show that providing more room correlates with lower rates of zoonoses among growing pigs.[20]

[20] It is "well-established that close confinement leads to the increased spread of disease between hogs" and that "humans are not far behind." *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 980 (4th Cir. 2020) (Wilkinson, J., concurring). Scientific studies show that offspring of sows subjected to extreme confinement in gestation crates suffer reduced immune resistance—"a weaker immunity barrier"—compared to other piglets. M. Kulok *et al*., *The Effects of Lack of Movement in Sows During Pregnancy Period on Cortisol, Acute Phase Proteins and Lymphocytes Proliferation Level in Piglets in Early Postnatal Period*, 24 Polish J. of Vet. Sci. 85, 90 (2021); *see also* Xin Liu *et al*., *A Comparison of the Behavior, Physiology, and Offspring Resilience of Gestating Sows When Raised in a Group Housing System and Individual Stalls*, 11 Animals 2076, at 5 (2021). That reduced resistance threatens food safety. USDA researchers found that piglets often become colonized

The USDA, too, recognizes that providing "sufficient space and freedom" for farm animals "supports the [animals'] natural behaviors" and thus "may be positively associated with improved health and well-being, may be better for the environment, and may result in *healthier livestock products for human consumption*." USDA, Agric. Mktg. Serv., Proposed Rule to Amend Organic Livestock and Poultry Production Requirements, 87 Fed. Reg. 48,562, -65, -70, -74 (Aug. 5, 2022). (Emphasis added.)

Second, the extreme confinement of farm animals increases the risk of pandemic outbreaks, which can come with a massive price tag for California, both in terms of human and animal life.[21] California is entitled to preemptively address such risks. *See Maine* v. *Taylor*, 477 U.S. 131, 140, 148 (1986) (state need not "sit idly by and wait . . . until the scientific community agrees" about risks "before it acts to avoid such consequences"). In *Maine*, the Court upheld the challenged law despite "imperfectly understood . . . risks" that "may ultimately prove to be negligible." *Id.*

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with *Campylobacter*—"one of the leading causes of human bacterial gastroenteritis"—"within a few hours of birth" and "remain carriers until slaughter." C.R. Young *et al.*, *Enteric Colonisation Following Natural Exposure to* Campylobacter *in Pigs*, 68 Rsch. Vet. Sci. 75, 75-77 (2000). *Campylobacter* "carried in the intestinal tract of animals . . . can thus contaminate foods." *Id.* at 75.

[21] David O. Wiebers & Valery L. Feigin, "What the COVID-19 Crisis Is Telling Humanity," 54 NEUROEPIDEMIOLOGY 283, 284 (2020), https://www.karger.com/Article/FullText/508654 (last visited Sept. 5, 2023).

California can surely enact legislation to address serious human health issues supported by extensive research.[22]

V. PROPOSITION 12 DOES NOT VIOLATE THE PACKERS AND STOCKYARDS ACT

IPPA fundamentally misapprehends the Packers & Stockyards Act, 7 U.S.C. §§ 181-229 ("P&S Act"), which in no way conflicts—irreconcilably or otherwise—with Proposition 12. The P&S Act makes it unlawful "for any packer or swine contractor" to "[m]ake or give any undue or unreasonable preference or advantage to a particular person or locality . . . or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect [.]" 7 U.S.C. § 192(b). The1922 law was intended to "regulate packers by preventing them from forming monopolies that would enable them to unduly and arbitrarily . . . lower prices." *Schumacher v. Cargill Meat Sols. Corp.*, 515 F.3d 867, 871 (8th Cir. 2008) (quotation marks omitted); *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). Thus,

[22] IPPA entirely omits CDFA's characterization of the health and safety impact of Proposition 12. In addition to the statements identified by IPPA, Op. Br. at 35, CDFA believed that voters could reasonably enact Proposition 12 as a "precautionary measure". Cal. Dep't Food & Agric., Final Statement of Reasons (FSOR) 7 (Aug. 30, 2022), *at* https://www.cdfa.ca.gov/AHFSS/pdfs/FSOR_Final_8.30.22.pdf. CDFA elsewhere noted that "benefits accrue to Californians knowing that [farm animals] are raised with a minimum space requirement." Cal. Dep't Food & Agric., Proposed Regulations – Animal Confinement 6 (Nov. 30, 2021), *at* https://www.cdfa.ca.gov/ahfss/pdfs/regulations/ACP15dayCommentPeriodDocuments.pdf.

the P&S Act works to *restrict* certain practices by packers; it does not *insulate* practices by packers from other regulations.

Nevertheless, IPPA claims it is impossible to comply with both the P&S Act and Proposition 12, Op. Br. 64-65, and must prove that it is "[i]mpossible for a private party to comply with both state and federal requirements." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2012). Impossibility "is a demanding defense" requiring "clear evidence" of an "irreconcilable conflict" between federal and state standards. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009); *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 372 (N.D. Cal. 2010). A court's review should be guided by the presumption against preemption, which is especially strong here because the P&S Act regulates food production, an area of traditional state regulation. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963) (California avocado standards stricter than federal requirements upheld as "a subject matter of the kind [the Supreme] Court has traditionally regarded as properly within the scope of state superintendence").[23]

[23] Nothing in the history of the P&S Act or its regulatory implementation indicates that Congress intended to override state law governing transactions involving farm animals. *De Vries v. Sig Ellingson & Co.*, 100 F.Supp. 781, 786 (D. Minn. 1951), *aff'd*, 199 F.2d 677 (8th Cir. 1952) ("[o]bviously Congress had no intention of regulating the entire business of the livestock and meat industry"); *Adams v. Greeson*, 300 F.2d 55, 557-58 (10th Cir. 1962); *see also* USDA, Final Rule, Undue

Even if IPPA has standing to bring this preemption claim,[24] it fails to allege any kind of actual (let alone irreconcilable) conflict between state and federal law. IPPA's argument hinges on the allegation that "[o]ut of state pork producers are unable to come into compliance" with Proposition 12, and that in-state businesses "engaged in the sale of meat" are therefore necessarily required by the state law "to favor in-state producers," in conflict with the P&S Act's prohibition of "undue or unreasonable preference" to any person. ER-536.

IPPA is wrong that in-state producers had more time to come into compliance with any of Proposition 12's sales standards than out-of-state producers. See *supra* at 19-20. Moreover, IPPA's allegations that out-of-state producers are unable to comply with Proposition 12 are belied by its plain text, as well as by IPPA's own allegations. *First*, as discussed *supra* at 19, nothing in the law treats sales from out-of-state producers any different than sales by in-state producers. IPPA itself concedes that the behavioral standards applicable to sales (by both in-state and out-of-state producers) have been in effect since 2018, ER-506, even while bemoaning

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and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 79,779, 79,801 (Dec. 11, 2020) (stating P&S Act "does not preempt state or local laws, regulations, or policies *unless they present an irreconcilable conflict with this rule*").

[24] *See* District Court Dkt. No. 51-1 (Defendants' Motion to Dismiss) at 23, with which Appellee-Intervenors agree in full. Appellees-Intervenors do not concede IPPA has standing relative to this claim, and the District Court noted the standing challenge without deciding the issue. ER-44 n.6.

not having more time to comply with the law. *Id. Second*, as discussed *supra* at 19-20, Proposition 12's alleged "favoritism" toward California producers, which IPPA imagines will necessarily force an irreconcilable conflict with the P&S Act's prohibitions, is illusory, and contradicted by IPPA's own complaint. Because "California cannot feed itself without massive agricultural imports from other states," ER-505-06, even a seller who wanted to favor in-state production over out-of-state production would be unable to do so.

IPPA's speculative allegations that Proposition 12 will force packers and stockyards to take action that will result in a restraint on commerce in violation of 7 U.S.C. § 192(c)-(e) also fails the impossibility analysis. ER-536-37. At the outset, IPPA provides zero factual allegations to support its speculation that unidentified third parties are planning to restrain trade. The argument also hinges on a misunderstanding of what it means to restrain commerce under the P&S Act. The responsible agency, USDA, has explained that "[s]ome preferences or advantages . . . might be considered undue or unreasonable if they are so unfair that they would tend to *restrain trade, creating such excessively favorable conditions for one or more persons that the competitors would have reduced chances of business success*." 85 Fed. Reg. at 79,780 (emphasis added). However, as discussed above, nothing in the language of Proposition 12 prefers any one person or competitor over another. Companies choosing to do business in California may not sell meat from animals

confined contrary to Proposition 12, ER-536-37, but such a decision does not create more favorable conditions for any one producer over another.

The district court was likewise correct in finding that IPPA failed to assert an obstacle preemption argument, because IPPA "has not alleged any facts that show that Proposition 12 stands in the way of the execution of the [P&S Act.]" ER-45-46. Obstacle preemption occurs "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona v. United States*, 567 U.S. 387, 399-400 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). What constitutes an obstacle "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its main purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 373 (2010). This Court has noted that the "Supreme Court has found obstacle preemption in only a small number of cases." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020).

Here, "the primary purpose of the [P&S Act] was 'to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry.'" *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1302 (11th Cir. 2005) (citing H.R. Rep. No. 85-1048 at 1 (1958)). Proposition 12 does not stand as an obstacle to those goals. Because it treats all business owners and operators it covers exactly the same,

it does not and could not interfere with the goals of preventing monopolies and price fixing. *See Eleveurs*, 870 F.3d at 1153 (rejecting obstacle preemption challenge and noting that foie gras law prohibits sale of products of cruelty without interfering with USDA's authority over poultry product inspection). IPPA's complaint failed to sufficiently allege obstacle preemption, and on appeal it repeats the false refrain of discrimination, which it has not shown. Op. Br. at 66.

VI. PROPOSITION 12 IS NOT UNCONSTITUTIONALLY VAGUE

On appeal, IPPA abandons all but one of its vagueness theories. If a law "'implicates no constitutionally protected conduct,' a facial vagueness challenge . . . can succeed only if the law 'is impermissibly vague in all of its applications.'" *Monarch Content Mgmt. LLC v. Arizona Dep't of Gaming*, 971 F.3d 1021, 1030 (9th Cir. 2020) (citation omitted). IPPA cannot show that Proposition 12 is vague in *any* — let alone *all* — applications. Contradicting itself, IPPA asserts that Proposition 12 does not give fair notice of prohibited conduct, while focusing on the details of the law – that it clearly understands – in its other arguments.[25]

As a preliminary matter, IPPA contends that it is "not important" whether it has raised a facial or as-applied challenge. But a litigant must properly plead a claim, and the form of the claim is important in vagueness challenges: "Where a law at

[25] The *Ross* Court's reference to the Due Process Clause in no way suggests the Court saw it as a viable challenge to Proposition 12, as IPPA seems to believe. Op. Br. at 3 (*citing Ross*, 598 U.S. at 374). *See id.* at 380.

issue 'does not implicate First Amendment rights, it may be challenged for vagueness *only as applied*,' unless the enactment is 'impermissibly vague in *all of its applications*.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493-94 (9th Cir. 2010) (emphasis added) (citations omitted). IPPA only points to a *First Amendment* case where "[a]ll concede[d] that the claim [was] properly before [the Court]," *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 331 (2010), but this is not a First Amendment case, in which different vagueness standards apply. IPPA must either plead as-applied vagueness or "vagueness in all of its applications," and Appellees-Intervenors do not concede that an as-applied vagueness challenge is properly before this Court. IPPA has not specifically alleged that *any* of its members are not in compliance or plan not to comply with Proposition 12, nor has it alleged that Proposition 12 has been, or will imminently be, applied directly to IPPA or its members.[26] *See Easyriders Freedom F.I.G.H.T.*, 92 F.3d at 1493. While IPPA need not face prosecution to bring an as-applied challenge, it still must "allege[] an intention to engage in a course of conduct . . . *proscribed by a*

[26] It is not even clear that any of IPPA's members engage in sales in California at all. IPPA alleged only that its "members produce the whole pork that *their processors and packers* sell directly into California." (Emphasis added.) ER-510. Alleged actions of other businesses cannot possibly be enough to determine whether the law is impermissibly vague "in the circumstances of this case" which is "the only question" in an as-applied challenge. *United States v. Kuzma*, 967 F.3d 959, 975 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 939 (2020) (internal citation omitted).

statute," as the very case IPPA cites makes clear. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added). Op. Br. at 60. IPPA has not done so, as the district court correctly recognized. ER-40.

The failure to plead an as-applied challenge also is fatal to IPPA's facial challenge. *Kashem v. Barr*, 941 F.3d 358, 375 (9th Cir. 2019) ("[A]s a general matter, a defendant who cannot sustain an as-applied vagueness challenge to a statute cannot be the one to make a facial vagueness challenge to the statute."). And IPPA does not do that – it advances only an argument that Proposition 12 does not sufficiently define the term "engaged in a sale." Op. Br. at 46-53. However, especially under the "less strict vagueness test," *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494–95 (1982), Proposition 12 is clear that no out-of-state producer would be in violation unless such a person "engage[d] in the sale *within the state* [of California]." Cal. Health & Safety Code § 25990(b) (emphasis added). *See also* § 25991(o) ("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."). Thus, the statute is clear that "engaged in a sale" refers to direct sales of a covered product within California to a buyer who takes physical possession of the product there. For that reason, the district court correctly found that "[b]y the statute's plain terms, a violation of Proposition 12 could only occur if

[one of IPPA's] members were to "engage in the sale within the state [of California]." ER-13 (citing Cal. Health & Safety Code § 25990(b)).

IPPA's other arguments have no merit. First, IPPA incorrectly suggests that Proposition 12 has no limiting principle on *who* cannot be engaged in a prohibited sale. The sales prohibition clearly applies only to "business owner[s] or operator[s]" who "knowingly" "engage in the sale of [non-compliant pork] within the state." Cal. Health & Safety Code § 25990(b)(2). Thus, Proposition 12 could not apply to "anyone up and down the entire pork supply chain." Op. Br. at 47. Clearly, if a person is not an owner or operator, and they are not knowingly selling prohibited products in California, they are not in violation.

To support its theory on unwitting upstream sellers, IPPA offers only a deceptive misquotation of dicta from an unrelated state trial court and irrelevant hypotheticals. IPPA wrongly states that a state court judge found that "engage[d] in a sale" could apply to a producer selling pork products outside of California. Op. Br. at 47-48 n.11, citing *Cal. Hispanic Chambers of Comm. v. Ross*, No. 34-2021-80003765 (Sup. Ct. Cal., County of Sacramento, Nov. 28, 2022) ("*CHCC*").[27] In

[27] The *CHCC* plaintiffs only sought to delay implementation of Proposition 12 until its implementing regulations were finalized. The injunction issued in that case has ended, except as to pork already in the supply chain, which may be sold through December 31, 2023. Joint Stipulation of All Parties Requesting Further Limited Modification of February 2, 2022 Judgment and Writ of Mandate (filed June 16, 2023).

fact, the *CHCC* court clearly indicated that the prohibition on "engag[ing] in sales" only applies to sales within the borders of California. *CHCC*, Dkt. 79-1 at 10, ER-64 (describing the prohibition as "knowingly engaging in *intrastate sales* (emphasis added)). Upstream sales transactions outside of California's borders are not covered. That is clear even from the deceptively truncated quote offered by IPPA.[28] As to the hypotheticals IPPA provides, Op. Br. at 47, they are irrelevant, as none describe a situation where an owner or operator knowingly participates in a prohibited California sale—the only conduct proscribed by Proposition 12.

Though "knowingly" is a common scienter requirement, IPPA nevertheless asserts—for the first time on appeal—that the term is itself vague. Op. Br. at 51. It strains credulity that IPPA's members do not understand what it means to know if they have made a sale of their product in California or not. Moreover, while a scienter requirement may not eliminate vagueness, the very case IPPA cites notes

[28] IPPA claims that the CHCC ruling supports its vagueness argument by selectively quoting portions of a statement in the CHCC ruling in a manner that completely alters what the CHCC court actually said. Op. Br. at 47-48 n.11 (asserting that the state court read the law to apply to any "sales … whether originating within or outside of California"). The dicta selectively carved up by IPPA actually states that the law "prohibits persons in the supply chain from knowingly engaging in intrastate sales of food where such persons know or should have known that the food is derived from a covered animal—whether originating within or outside California—that was confined in a cruel manner." CHCC, Dkt. 79-1 at 10, ER-64. Thus, the CHCC court did not say sales outside California's borders are covered; it said intrastate sales of food from animals raised a certain way—outside (and inside) California—are covered.

that it "may mitigate a law's vagueness, *especially with respect to the adequacy of notice to the complainant that his conduct is proscribed*." *Cal. Teachers Ass'n v. St. Bd. of Edu.*, 263 F.3d 888, 900 (9th Cir. 2001) (emphasis added), *opinion amended and superseded*, 271 F.3d 1141 (9th Cir. 2001) (citing *Vill. of Hoffman Ests.*, 455 U.S. at 499). *See also U.S. v. Shelter*, 665 F.3d 1150, 1164 (9th Cir. 2011) (acknowledging that scienter requirements like "knowingly" can contribute to eliminating the contention of vagueness) (citing *U.S. v. Clavis*, 956 F.2d 1079, 1094 (11th Cir. 1992).[29]

IPPA next suggests that Proposition 12's implementing regulations contemplate enforcement against upstream sellers, making the statute's reach vague.

[29] Moreover, the part of Cal. Teachers Ass'n actually cited by IPPA is the dissent's reference to cases outside this circuit. Op. Br. at 52. Even were this Court to consider this case, it would have no bearing on the vagueness consideration here. While the Seventh Circuit found that scienter cannot eliminate vagueness "if it is satisfied by an 'intent' to do something that is itself ambiguous," Cal Teachers Ass'n, 263 F.3d at 900, citing Nova Records, Inc. v. Sendak, 706 F.2d 782, 789 (7th Cir. 1983), that is not the case with Proposition 12, where the scienter requirement is followed by the unambiguous sales language already described. Indeed, even criminal statutes–subject to a higher vagueness standard—routinely prohibit knowingly engaging in certain conduct without being unconstitutionally vague. See, e.g., 18 U.S.C. § 1957 (prohibits "knowingly engag[ing] or attempt[ing] to engage in" certain "monetary transaction[s]"); 18 U.S.C. § 2421 (prohibits "knowingly transport[ing] any individuals in interstate or foreign commerce . . . with intent that such individual engage in prostitution"); 21 U.S.C. § 960a (providing criminal penalties for "[w]hoever engages in" certain conduct, "knowing or intending to provide . . . anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity").

Op. Br. at 49. This is not true, and as IPPA itself has admitted, California agencies do not have the power to alter the terms of a statute. ER-529. Nevertheless, the regulations, like Proposition 12 itself, cover only sales in which California is the legal situs of the conduct, as the excerpts cited by IPPA, Op. Br. 49-50, demonstrate. Cal. Code Regs. tit. 3, § 1322.2(a), (d), (e) (pork regulations setting forth requirements for sellers of pork into or within California).

In short, Proposition 12 is not unconstitutionally vague because it "defines the conduct it prohibits with sufficient definitiveness." ER-16.

VII. PROPOSITION 12 DOES NOT VIOLATE THE PRIVILEGES & IMMUNITIES CLAUSE

The Privileges & Immunities Clause ("P&I Clause") "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 216 (1984) ("*Camden*"), *quoting Toomer v. Witsell,* 334 U.S. 385, 395 (1948). Here, IPPA just repackages its rejected Commerce Clause claims, asserting mere incidental burden of a law on out-of-state producers constitutes discrimination.

A textbook P&I Clause violation involves laws setting residency requirements that grant opportunities to the regulating state's citizens not also granted to the citizens of other states, because such a law threatens "the vitality of the Nation as a single entity." *Camden*, 465 U.S. at 216-18. The threshold inquiry is whether the law

draws a distinction between citizens of the regulating state and citizens of other states. *Id.* With Proposition 12, there is no such distinction. ER-42-43.

Proposition 12 regulates even-handedly among California citizens and citizens of other states who sell pork products in the state. *McBurney v. Young,* 569 U.S. 221, 226 (2013) (no P&I Clause violation where citizens of other states are on "the same footing"). And IPPA simply repeats its fallacious, rejected arguments that Proposition 12 is discriminatory—which are incorrect for the reasons discussed *supra*. And while in *Ross,* Justice Kavanaugh raised the application of the P&I Clause in "future cases," his opinion was a lone concurrence/dissent, and even he "express[ed] no view on whether such an argument ultimately would prevail." *Ross*, 598 U.S. 356 (Kavanaugh, J., concurring in part and dissenting in part). Controlling Supreme Court precedent is contrary to IPPA's theory. Because Proposition 12 is even-handed with respect to citizens of all states (including California), the district court's dismissal of this cause of action should be affirmed.

VIII. OTHER PRELIMINARY INJUNCTION FACTORS

Because IPPA raised no serious merits question as to the only two of its claims on which it moved for a preliminary injunction (dormant Commerce Clause and Due Process Clause), the district court had no need to analyze the additional preliminary injunction factors, and this Court need not do so either. ER-27; *Global Horizons, Inc. v. U.S. Dep't of Labor*, 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."). However, IPPA also did not demonstrate irreparable harm, or that the alleged harm clearly outweighs the law's legitimate state interests.

A. IPPA Does Not And Cannot Demonstrate Irreparable Harm.

IPPA has not and cannot show that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). First, because IPPA's irreparable harm argument is predicated on imminent enforcement and immediate changes producers allegedly must make to their facilities, Op. Br. 56-57, the presence of a state court order providing that certain noncompliant pork in the stream of commerce may be sold through December 31, 2023 eliminates much of this argument for urgency. *CHCC*, Joint Stipulation of All Parties Requesting Further Limited Modification of February 2, 2022 Judgment and Writ of Mandate (filed June 16, 2023).

Second, even if that state court order has not totally mooted IPPA's theory of immediate harm, it has failed to establish it or its members will suffer any substantial, let alone unrecoverable, harm, that outweighs the significant animal welfare and public health and safety interests that are centrally important to the state of California, the public, and Appellees-Intervenors and their members should a preliminary injunction be granted. IPPA's hyperbolic assertions that its members

will suffer "immediate and extended irreparable economic harm", Op. Br. at 56, even if true, boil down to monetary loss, which does not generally constitute irreparable harm. *Los Angeles Mem. Coliseum Comm. v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("It is well established . . . that . . . monetary injury is not normally considered irreparable.") Even if it did, there is no "Hobson's Choice" here. IPPA says its members must either bear steep compliance costs to sell products in California or kill animals "to make sufficient room for spacing restrictions." Op. Br. at 30. This theory is flawed, as no such choice is required by Proposition 12.

Third, even if converting some production facilities might necessitate certain *short term* costs, these costs would be mitigated. *See* District Court Dkt. No. 66-12, Declaration of Devrim Ikizler ¶¶ 12-28, 40, 59. IPPA's protestations of harm are simply self-serving, rank speculation, and further undercut by its own allegations that consumers will pay more for pork because of Proposition 12. District Court Dkt. No. 15-1 at 32. Even if California consumers are willingly paying more for pork—and industry experts have said non-California consumers will not pay more[30]—it stands to reason that IPPA's members will make more from those California sales,

[30] Smith, *supra* n. 18 (noting that the market indicates that Proposition 12 "is not going to present a major disruption to pork distribution and pork pricing").

which will go toward recouping any Proposition 12-related costs.[31] Even IPPA acknowledges that "it may be true in the long run" that its members may be able to "pass costs on to consumers" which "may alleviate some financial stress." Op. Br. 55, *citing Ross*, 598 U.S. at 384-85. IPPA points to nothing in its complaint or preliminary injunction motion to support its assertion that members "will be unable to keep any profitable margin," Op. Br. 55, despite the fact that it bears the burden to persuade this Court "*by a clear showing*" that the ability to charge all pork consumers more somehow contributes to its members' irreparable harm. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original); *Walsh v. Ahern Rentals, Inc.*, No. 21-16124, 2022 WL 118636, at *2 (9th Cir. Jan. 12, 2022), *citing Winter*, 555 U.S. at 22 ("The irreparable-harm analysis focuses on the moving party, not the nonmoving party or some third party.").

Fourth, IPPA's focus on immediate compliance costs proves the lie in its claim of irreparable harm. If such routine compliance expenses were sufficient to constitute "irreparable harm" this test would virtually always be met. *See Chinatown Neighborhood Ass'n v. Brown*, 2013 WL 60919, at *7 (N.D. Cal. Jan. 2, 2013) (finding no irreparable harm where "Plaintiffs have cited no other type of economic

[31] As with the compliance costs IPPA focuses on, it baldly alleged only short-term price increases for consumers. ER-207 at ¶ 24 (predicting certain price increases for 2022 and 2023).

harm, apart from unsupported claims by two declarants that if the Shark Fin Law is not overturned, they will 'lose [their] livelihood entirely'"), *aff'd* 539 F. App'x 761, 762 (9th Cir. 2013).

Business harms typically rise to the level of "irreparable harm only where the loss threatens the very existence of the movant's business," *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985), or where the economic harm is "so severe as to cause extreme hardship to the business." *Sandoz, Inc. v. Food and Drug Admin.*, 439 F.Supp.2d 26, 32 (D.D.C. 2006) (irreparable harm requires a threat to "the company's very existence"). Here, IPPA has not alleged any particular percentage of its members' businesses will be lost due to the cost of complying with Proposition 12 and it does not allege that loss of the California market would "threaten the . . . very existence" of its members' businesses. *Id.* at 32. In fact, while it alleges that "[f]oregoing the California market is not a realistic option," District Court Dkt. No. 15-1 at 32, its so-called "Hobson's Choice" does not even contemplate exiting the California market—but that is a realistic choice *some producers have already made*. *See supra* n.15.

Fifth, as discussed above, the harms IPPA alleges are speculative at best, and speculative injury does not constitute irreparable harm sufficient to warrant granting

a preliminary injunction.[32] "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Am. Passage Media Corp. v. Cass Commc'ns.*, 750 F.2d 1470, 1473 (9th Cir.1985) (noting that statements that are "conclusory and without sufficient support in facts" are an insufficient basis for finding irreparable harm). Further indication of the speculative nature of IPPA's claims of harm is the fact that since Proposition 12 went into full effect, pork products are still on the shelves in California and many producers have chosen to continue to sell into California. District Court Dkt. No. 15-1 at 30.

B. IPPA's Alleged Harm Does Not Clearly Outweigh the Law's Legitimate State Benefits.

Since injunctive relief is sought against the public servants charged with enforcing Proposition 12 for the benefit of the public, the balance of harms and disservice to the public interest may be considered together. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). California has already made its own policy determination that the compelling animal protection and public health and safety reasons to prohibit the cruel confinement of farm animals, and the sale within the state of products resulting from such cruel confinement, easily outweigh any

[32] *See also* of Agricultural and Resource Economics Professors and Amicus Curiae, *supra* n.17, undermining the same types of arguments made by IPPA here.

economic or other interests in having that conduct continue. California has already made a specific policy judgment about where the public interest lies, and there is no need or justification for the Court to second-guess that judgment. *See Pac. Nw. Venison Producers*, 20 F.3d at 1017 ("[C]ourts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation.") (quotation omitted). Many other states have passed legislation addressing humane treatment of farm animals and sale of farm animal products, and many agricultural producers throughout the country– unlike IPPA's members here – have actively embraced providing more humane treatment and continued sales into California. Their interests would be harmed by an injunction in this case.

IPPA's argument that the State Appellees will suffer no harm if Proposition 12 is put on hold by an injunction in this case wrongly presumes that Californians have no interest in strong enforcement of the laws enacted on their behalf. Proposition 12 was enacted to further the public interest in animal welfare and citizen health and safety, and the continued sale in California of products deemed unacceptably cruel, unsafe, and unhealthy by Californians threatens the public, Appellees-Intervenors and their members, and cruelly-confined animals with far greater, and more clearly irreparable, harm than the hypothetical private loss of profit. *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) ("[W]hen

a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.").

CONCLUSION

For the foregoing reasons, Appellees-Intervenors respectfully request that the district court's order granting the motions to dismiss and denying the motion for a preliminary injunction be affirmed.

Dated: September 5, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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