No. 22-55336

IN THE 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,

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

On Appeal from the United States District Court
for the Central District of California
No. 2:21-cv-09940-CAS-AFM
The Honorable Christina A. Snyder, Judge

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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INTRODUCTION

In 2018, California voters approved Proposition 12, the Farm Animal Confinement Initiative, with over 60% of voters in favor. Proposition 12 regulates egg and meat products in California, prohibiting the in-state sale of products originating from pigs and other animals confined in inhumane conditions. After the measure's enactment, the National Pork Producers Council challenged it under the dormant Commerce Clause. Last Term, the Supreme Court rejected that challenge decisively. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023). Nearly three years after the measure's enactment, the Iowa Pork Producers Association (IPPA) brought suit on similar grounds. The district court dismissed IPPA's complaint. Consistent with the Supreme Court's recent decision in *National Pork*, this Court should reject IPPA's claims here and affirm the judgment below.

IPPA's principal basis for distinguishing *National Pork* is that the plaintiffs there did not allege that Proposition 12 discriminates against pork producers in other States. But the pork industry plaintiffs there disavowed a discrimination-based claim for a good reason: Proposition 12 is plainly nondiscriminatory. As relevant here, it prohibits the sale within California of whole pork meat from breeding pigs (or their immediate offspring) if the breeding pigs were housed in a manner that denied them at least 24 square feet of usable floorspace or the ability

to stand up or turn around freely. That in-state sales restriction is geographically neutral. It does not distinguish between pork producers based on whether they are in state or out of state.

For that simple reason, most of IPPA's claims fail. Its principal dormant Commerce Clause claim, as well as its Privileges and Immunities Clause and preemption claims, depend on the flawed assertion that Proposition 12 is discriminatory. IPPA's only remaining challenges are that Proposition 12 is invalid on "*Pike* balancing" grounds and that its in-state sales restriction is unconstitutionally vague under the Due Process Clause. Those claims fail as well. The *Pike* claim is materially indistinguishable from the *Pike* challenge rejected by both this Court and the Supreme Court in *National Pork*. And the vagueness claim fails because the measure's bar on "engaging in a sale" within California provides ample notice to regulated parties as to what the statute prohibits.

Ultimately, Proposition 12 is no different from the kinds of everyday restrictions on in-state sales of a wide array of products that states across the country have enacted. The Court should accordingly affirm the final judgment of the district court.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter under 28 U.S.C. § 1331 and 28 U.S.C. § 1441(a). The district court entered final judgment on March 29, 2022

and Plaintiff IPPA filed a timely notice of appeal on March 29, 2022. This Court has jurisdiction to review the district court's judgment under 28 U.S.C. § 1291. IPPA's appeal of the district court's preliminary injunction decision issued on February 28, 2022 merges into its appeal of the final judgment. *E.g.*, *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 730 (9th Cir. 2017).

STATEMENT OF ISSUES

1. Did IPPA state a viable claim that Proposition 12's prohibition on the sale of certain pork products within California, which applies to any business whether based in-state or out-of-state, violates the dormant Commerce Clause?

2. Did IPPA state a viable claim that a statute that prohibits "knowingly engaging in a sale" of specified products "within California" is unconstitutionally vague?

3. Did IPPA state a viable claim that Proposition 12's prohibition on the sale of certain pork products within California by any business whether based in-state or out-of-state, violates the Privileges and Immunities Clause or is preempted by the Packers and Stockyards Act?

4. Did the lower court correctly deny injunctive relief after properly dismissing IPPA's case for failure to state a claim?

STATEMENT REGARDING ADDENDUM

Pursuant to Circuit Rule 28-2.7, pertinent statutes, regulations, and rules are contained in the separate addendum.

STATEMENT OF THE CASE

A. Proposition 12

In 2018, California voters enacted Proposition 12 to "eliminate inhumane and unsafe products . . . from the California marketplace." 4-ER-499. As the ballot materials explained to voters, the measure was "likely [to] result in an increase in prices" for California consumers, because any "increased costs" of producing goods in compliance with Proposition 12 "are likely to be passed through to consumers who purchase the products." 4-ER-498. Nevertheless, over 62 percent of voters approved the measure. 1-ER-5.

Proposition 12 prohibits the in-state sale of certain products derived from animals "confined in a cruel manner." Cal. Health & Safety Code § 25990(b). The measure defines "confining" an animal "in a cruel manner" to include (among other things): 1) "[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" (the "Turnaround Requirement") and 2) confining a breeding pig with less than 24 square feet of useable space (the "Square Footage Requirement"). *Id.* § 25991(e).

Specifically, Proposition 12 provides that "[a] business owner or operator shall not knowingly engage in the sale within the State of California" 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." Cal. Health & Safety Code § 25990(b)(2). It defines a "sale" as "a commercial sale by a business that sells any item covered by this chapter" and "deem[s]" such a sale "to occur at the location where the buyer takes physical possession" of the item. *Id.* § 25991(o).

As to in-state producers, Proposition 12 also prohibits them from confining certain animals, including breeding pigs, in a "cruel manner." Cal. Health & Safety Code § 25990(a). "Confined in a cruel manner" is defined the same way for purposes of both the in-state sales restriction and the restriction on in-state farming practices. *Id.* § 25991(e). Proposition 12 further directs the California Department of Food and Agriculture and the California Department of Public Health to promulgate implementing regulations. *Id.* § 25993(a).

Most of Proposition 12's restrictions took effect between 2018 and 2020. *See* Cal. Health & Safety Code § 25991(e). However, the prohibition on in-state sales of pork products that violated the Square Footage Requirement did not take effect until January 1, 2022. *Id.* Implementation of that prohibition has been further

stayed in part on state-law grounds because of a delay in the State's issuance of implementing regulations; that injunction expires on December 31, 2023, pursuant to a stipulation in *California Hispanic Chambers of Commerce v. Ross*, No. 34-2021-80003765 (Super. Ct. Sacramento Cty.) (June 15, 2023).[1] Under the terms of that stipulation, enforcement of Proposition 12 is enjoined with respect to certain noncompliant pork products that were already in the supply chain as of July 1, 2023. *Id.*

Proposition 12 expanded previous voter-enacted prohibitions on confining animals under cruel and inhumane conditions. In November 2008, California voters enacted Proposition 2, the Prevention of Farm Animal Cruelty Act. Proposition 2 sought to end "the cruel confinement of farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs." Prop. 2, § 2 (2008). It prohibited California farmers from "tether[ing] or confin[ing]" pregnant pigs, calves raised for veal, or egg-laying hens "on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." *Id.* § 3 (former Cal. Health & Safety Code § 25990).

[1] A copy of this stipulation can be found on the California Department of Food and Agriculture's website at https://www.cdfa.ca.gov/AHFSS/AnimalCare/.

Both Proposition 12 and Proposition 2 reflect a larger trend in consumers expressing preferences, including moral and ethical preferences, as to the food they eat. In response to those growing preferences, the industry has generally moved towards offering a greater diversity of products, even in the absence of direct regulation. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 365 (2023). Modern American grocery stores now typically provide a "dizzying array of choice," such as cage-free eggs, free-range chicken, and grass-fed beef. *Id.* Restaurants and retailers have followed suit, such as those that have vowed to eliminate pork that was derived from breeding pigs (or their offspring) housed in "gestation crates"—which are tight metal enclosures in which pigs are unable to turn around—from their supply chain.[2] McDonald's, Kmart, and Safeway, for instance, have made that commitment.[3]

Product differentiation is particularly apparent in the marketplace for pork, where "evolving consumer demand" has led to a range of products "such as crate-free, beta-agonist-free, organic, and antibiotic-free" pork products.[4] Some pork

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[2] Jackson & Marx, *Pork Producers Defend Gestation Crates, but Consumers Demand Change*, Chi. Trib. (Aug. 3, 2016), https://tinyurl.com/bdhr9pkx (last accessed Sept. 3, 2023).

[3] *Id.*

[4] USDA, *Report to Congress: Livestock Mandatory Reporting* 17 (2018), https://tinyurl.com/mv65fu6z (last accessed Sept. 3, 2023).

producers have converted sow breeding facilities to allow for group housing—an alternative system that groups multiple breeding pigs together in one pen, allowing them to move around more freely.[5] Pork produced this way may be marketed as "crate-free" pursuant to USDA regulations, provided that producers segregate crate-free pork from other pork products and trace the crate-free pork through production and distribution to the point of sale.[6] For years, several of the Nation's largest pork producers—including Smithfield, Seaboard, Clemens, and JBS—have segregated their supply chains to produce and market specialty pork products, ensuring that those products are "trac[ed] . . . from the farm to a commercial sale." SER-7.

B. Procedural History

Plaintiff Iowa Pork Producers Association is a trade association representing Iowa pork producers. 4-ER-509. IPPA's members produce whole pork. 4-ER-510. Almost three years after Proposition 12's enactment, IPPA brought suit against Attorney General Rob Bonta, Secretary Karen Ross of the California

[5] *E.g.*, Smithfield Foods, *Smithfield Foods Delivers on Decade-Old Promise to Eliminate Pregnant Sow Stalls in U.S.* (Jan. 23, 2018), https://tinyurl.com/ycy56pwk (last accessed Sept. 3, 2023).

[6] *See* USDA, *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims* 10-11 (2019), https://tinyurl.com/z6tatyns (last accessed Sept. 3, 2023).

Department of Food and Agriculture, and Director Tomás Aragón of the California Department of Public Health (the State Defendants).[7] In the operative complaint, IPPA alleged that Proposition 12 violates the dormant Commerce Clause, is unconstitutionally vague, violates the Privileges and Immunity Clause, and is preempted by federal law. 4-ER-526-539. IPPA sought injunctive relief enjoining Proposition 12's enforcement. 4-ER-541, 4-ER-542. After bringing suit, IPPA filed a motion for a preliminary injunction. 1-ER-3. The State Defendants thereafter moved to dismiss. 1-ER-29. In addition, the district court allowed the Humane Society, a proponent and major supporter of Proposition 12, to intervene as a defendant. 1-ER-11.

The district court granted the motion to dismiss with leave to amend. 1-ER-53. *First*, the district court held that IPPA had failed to state a claim that Proposition 12 was unconstitutionally vague either facially or as applied. The court held that Proposition 12 clearly defined its prohibition on "engaging in a sale" of specified items. 1-ER-37. "Indeed, in the complaint," the court explained, "plaintiff appears to understand the plain meaning of Proposition 12's compliance

[7] IPPA originally brought suit in federal court in Iowa, which was dismissed for lack of personal jurisdiction. *See Iowa Pork Producers Ass'n v. Bonta*, 2021 WL 4465968, at *12 (N.D. Iowa Aug. 23, 2021). IPPA then re-filed suit in California state court, and the State Defendants removed the case to federal court. 1-ER-28

requirements, explaining that it realizes that removing pigs from an enclosure is one means of providing more square footage" 1-ER-37.

Second, the court held that IPPA "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." 1-ER-42. The court thus concluded that "plaintiff cannot state a claim that Proposition 12 treats nonresidents and residents differently," as required to state a Privileges and Immunities Clause claim. 1-ER-42.

Third, the court rejected IPPA's preemption claim. 1-ER-46. IPPA invoked the Packers and Stockyards Act, which seeks to prevent packers from engaging in unfair, discriminatory, deceptive, price control, or monopolistic practices, *Stafford v. Wallace*, 258 U.S. 495, 513 (1922). The district court held 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" not present here. 1-ER-45. This conclusion was buttressed by the fact that "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." 1-ER-45. And, the district court held, "plaintiff has not alleged facts that show that Proposition 12 stands in the way of the execution" of the Packers and Stockyards Act. 1-ER-45.

Fourth, the court held that IPPA had failed to state a dormant Commerce Clause claim. It found that IPPA "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." 1-ER-48. It further rejected IPPA's argument that the statute had a discriminatory purpose or was motivated by economic protectionism. 1-ER-48, 1-ER-49. Finally, the district court held that under this Court's decision in *National Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2022), *aff'd*, 598 U.S. 356 (2023), IPPA had not pleaded sufficient facts that Proposition 12 created a substantial burden on interstate commerce under the dormant Commerce Clause. 1-ER-52.

The district court also denied the motion for a preliminary injunction. 1-ER-27. It held that IPPA had failed to demonstrate a likelihood of success on the two claims it predicated its motion on: its due process and dormant Commerce Clause claims. 1-ER-27. As to the due process claim, the court held (consistent with its ruling on the motion to dismiss) that Proposition 12 "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." 1-ER-13; *see also* 1-ER-15 ("[T]he Turn Around Requirements and Square Footage Requirements are clear, and they apply to sales that are knowingly made within the state of California."). The court's holding on the dormant Commerce

Clause claim also tracked its ruling on the motion to dismiss: 1) Proposition 12 was facially neutral and "makes no distinction whatsoever between in-state and out-of-pork producers," 1-ER-21; 2) Proposition 12 did not have a discriminatory motivation or effect, and IPPA "fail[ed] to provide any authority suggesting that the discriminatory burden of a particular law must be analyzed in connection with previous regulations," 1-ER-21-23; and 3) IPPA raised "no serious argument that Proposition 12 imposes any substantial burden on interstate commerce," 1-ER-26. Because IPPA had failed to demonstrate any serious questions on the merits of the two relevant claims, the court declined to consider the remaining preliminary injunction factors. 1-ER-26.

The district court granted IPPA leave to amend its complaint. 1-ER-53. IPPA did not amend the complaint, however; final judgment was entered and IPPA appealed both the decision to dismiss its complaint and the denial of preliminary injunctive relief. 4-ER-545. After the notice of appeal was filed, the State Defendants moved to stay this appeal pending the Supreme Court's review of this Court's decision in *National Pork*, which also raised a dormant Commerce Clause challenge to Proposition 12. This Court granted the motion and stayed this appeal. The stay was lifted on July 5, 2023, following the Supreme Court's affirmance of the *National Pork* decision, *see* 598 U.S. 356.

STANDARD OF REVIEW

Because the court below dismissed IPPA's claims and denied injunctive relief, this Court's review begins with the district court's order on the motion to dismiss. *American Soc'y of Journalists & Authors v. Bonta*, 15 F.4th 954, 960 (9th Cir. 2021). This Court reviews de novo a district court's grant of a motion to dismiss. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). To survive a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In analyzing whether such a claim is stated, "[a]llegations of material fact" in the complaint "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.), *as amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001). But a court does not accept as true "allegations that are merely conclusory, unwarranted deductions of facts, or unreasonable allegations." *Id.* And a court may similarly disregard "allegations that contradict matters properly subject to judicial notice or by exhibit." *Id.*

If the lower court correctly dismissed IPPA's claims, this Court's review ends. *Am. Soc'y of Journalists*, 15 F.4th at 960. Should this Court, however, reach the preliminary injunction decision, it reviews that denial for abuse of discretion.

Pimentel v. Dreyfus, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam). To do so, it first determines de novo whether the trial court "identified the correct legal rule to apply to the relief requested." *Id*. (citation omitted). It then determines if the "district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in the inferences that may be drawn from the facts in the record." *Id.* (citation omitted). The Court reviews conclusions of law de novo and findings of fact for clear error. *Id.*

SUMMARY OF ARGUMENT

This Court's review should begin—and end—with the lower court's decision on the motion to dismiss. The lower court correctly held that IPPA had failed to state a claim that Proposition 12 should be struck down. Most of IPPA's claims—in particular, its dormant Commerce Clause discrimination claim, Privileges and Immunities Clause claim, and preemption claim—fail because IPPA cannot plausibly allege that Proposition 12's sales prohibition is discriminatory. Both on its face and in practice, Proposition 12 applies to *all* businesses—wherever located or domiciled—that knowingly engage in the sale of prohibited pork products in California. No business may knowingly sell pork products in California that originate from pigs raised in a manner that violates the Turnaround or Square Footage Requirements.

IPPA also fails to allege a viable "*Pike* balancing" challenge or a claim that Proposition 12 is unconstitutionally vague on its face. As to the first, IPPA's *Pike* claim is materially indistinguishable from the claim that this Court and the Supreme Court recently rejected in *National Pork*. And as to IPPA's vagueness challenge, the measure's bar on "engaging in the sale" of certain pork products within California provides ample notice to regulated parties of what conduct is prohibited.

Because the lower court properly dismissed IPPA's claims, this Court need not address the merits of IPPA's preliminary injunction appeal. But if it does, it should also affirm this decision. The lower court properly concluded that IPPA had not shown a likelihood of success on either its dormant Commerce Clause claim or its due process claim. As the Supreme Court recognized in its *National Pork* decision, Proposition 12 is a constitutional exercise of California's police powers to protect public health and oversee the sale of products within its borders.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED IPPA'S CLAIMS ON THE MERITS

A. IPPA has not stated a dormant Commerce Clause claim

1. Dormant Commerce Clause principles following the recent decision in *National Pork*

While the Commerce Clause is a grant of power to Congress to regulate interstate and foreign commerce, it has also "'been recognized as a self-executing

limitation on the power of States to enact laws imposing substantial burdens'" on interstate commerce. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 947 (9th Cir. 2013) (citation omitted). This "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.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (quoting *Dep't of Revenue of Kentucky v. Davis*, 533 U.S. 328, 337-338 (2008)). "[T]he 'very core' of [the Supreme Court's] dormant Commerce Clause jurisprudence" is this "antidiscriminatory principle." *Id*.

Given this focus on prohibiting economic protectionism, the first question in assessing a dormant Commerce Clause challenge is whether a state statute discriminates against out-of-state entities in favor of in-state economic interests. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015). If a statute is discriminatory, then "it is unconstitutional unless it serves a legitimate local purpose, and this purpose could not be served as well by available non-discriminatory means." *Id.* (citation omitted).

If, on the other hand, the statute is not facially discriminatory, a plaintiff may be able to state a claim for a dormant Commerce Clause violation under the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Nat'l Pork*,

598 U.S. at 379-380. The Supreme Court most recently addressed claims brought under the *Pike* framework in the *National Pork* decision. It emphasized that "'no clear line' separates the *Pike* line of cases from [the Supreme Court's] core antidiscrimination precedents." *Id.* at 377. Indeed, "several cases that have purported to apply *Pike*, including *Pike* itself, have turned in whole or in part on the discriminatory character of the challenged state regulations." *Id.* (cleaned up). The *Pike* inquiry, in other words, can serve to illuminate hidden protectionism. *Id.* at 378; *see also id.* at 391 (Sotomayor, J., concurring in part); *id.* at 393 (Barrett, J., concurring in part).

While the five justices in the majority did not agree on a single approach "to [*Pike*] challenges premised on . . . nondiscriminatory burdens," *National Pork*, 598 U.S. at 379 (internal quotation marks omitted), all five agreed that such challenges face a high bar and have rarely, if ever, succeeded, *id.* at 379 & n.2 (internal quotation marks omitted). Four of those five justices—Justices Thomas, Sotomayor, Kagan, and Gorsuch—ultimately applied a standard essentially identical to the standard applied by this Court in its *National Pork* decision. *Id.* at 383-85 (plurality opinion). Under that approach, a plaintiff must demonstrate that the "challenged law imposes 'substantial burdens' on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other." *Id.* at 383 (emphasis in original); *cf. Nat'l Pork*, 6 F.4th at 1032. Three of

those five justices—Justices Thomas, Gorsuch, and Barrett—would have gone even further. They would have barred *Pike* claims altogether when the State's proffered interests in support of the challenged law and the plaintiffs' asserted burdens from compliance are "incommensurable." *National Pork*, 598 U.S. at 382. "In a functioning democracy," those three justices explained, "policy choices" about how to "weigh the relevant 'political and economic' costs and benefits" properly "belong to the people and their elected representatives." *Id.*

The upshot of *National Pork* is that this Court's precedent on the relevant *Pike* analysis remains good law. *See generally Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1073-1074 (9th Cir. 2021).[8] Under that precedent, "laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce." *Nat'l Pork*, 6 F.4th at 1032. "[E]ven a state law that imposes heavy burdens on some out-of-state sellers"—including burdens that cause certain businesses "'to withdraw entirely'" from the enacting State's market—"does not

[8] In Justice Kavanaugh's view, the plurality opinion joined by Justices Gorsuch, Thomas, Sotomayor, and Kagan constitutes the "controlling precedent" of the Court as to *Pike*. *Nat'l Pork*, 598 U.S. at 403 (Kavanaugh, J., concurring in part and dissenting in part); *see generally Marks v. United States*, 430 U.S. 188, 193 (1977). While it is not clear that this Court would agree based on its approach to Supreme Court opinions that do not command a majority, *see United States v. Davis*, 825 F.3d 1014, 1022 (9th Cir. 2016) (en banc), it makes no difference here because this Court's own precedent on the *Pike* analysis is materially indistinguishable from the approach adopted by the plurality opinion.

place an impermissible burden on interstate commerce." *Id.* (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978)).

2. Proposition 12's neutral in-state sales restriction is not discriminatory

Unlike the plaintiffs in *National Pork*, IPPA here first contends that Proposition 12 is discriminatory. But the plaintiffs in *National Pork* "conceded that California's law does not implicate the antidiscrimination principle at the core of this Court's dormant Commerce Clause cases," 598 U.S. at 371, for good reason: Proposition 12 is plainly non-discriminatory. IPPA has not plausibly alleged facts to the contrary.

On its face, Proposition 12 is neutral. Proposition 12 prohibits *any* business owner or operator from selling within California prohibited pork meat from an animal confined in a cruel manner. Cal. Health & Safety Code § 25990(b)(2); *see also id.* § 25991. It draws no distinction between in-state and out-of-state business owners or operators with respect to what pork products may be sold in California. Proposition 12 is thus precisely the sort of statute that this Court has recognized as non-discriminatory. *See, e.g.*, *Int'l Franchise Ass'n*, 803 F.3d at 400 (statute that classified businesses based on model and number of employees, not location, was non-discriminatory); *Ass'n des Eleveurs*, 729 F.3d at 948 (statute that prohibited all entities from selling certain products was non-discriminatory).

Nor can IPPA plausibly allege that Proposition 12 has a discriminatory purpose. The text of the measure clearly lays out its purposes, none of which involve economic protectionism: "The 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 (2018). Or as the proponents for the measure explained to voters, Proposition 12 is designed to "eliminate inhumane and unsafe products from these abused animals from the California marketplace." 4-ER-499. There is nothing in the text of Proposition 12—or anywhere else, for that matter—that suggests that the measure was intended to address anything other than these stated purposes.

IPPA nonetheless argues that Proposition 12 results in "direct discrimination [against] out-of-state producers," OBM 30, because it was enacted after Proposition 2, OBM 29-30. As discussed above, *supra* at 6, Proposition 2 had already barred in-state pork producers from confining their breeding pigs in a certain manners. While IPPA appears to concede that California could have imposed Proposition 12's neutral in-state sales restriction if Proposition 2 had never been enacted, *see* OBM 28-29, it asserts that the same law could not be adopted in a two-step approach—that is, it suggests that after enacting Proposition

2, the State was forever barred from expanding the law because the effect was to provide an economic "benefit" to in-state producers already subject to Proposition 2, OBM 29; *see id.* (arguing that Proposition 12 has a discriminatory effect because "the economic effects of [Proposition 2] were already incorporated into the marketplace").

This argument fails. Under Proposition 12, *all* businesses are prohibited from selling certain pork products within California, whether the pork is produced in California or not. If anything, California's pork producers shoulder a *greater* burden than IPPA's members: in-state producers may be sanctioned for raising pigs in ways that do not comply with Proposition 12's in-state requirements for animal care, *see supra* at 5-6, while out-of-state pork producers remain free to raise their pigs any way they wish. And they may continue to sell their pork to businesses serving over 85% of the American pork market. *See* 4-ER-505 (alleging California is an estimated 13-15% of the pork market). The only relevant consequence of Proposition 12 is that businesses may not sell noncompliant pork in California. The Constitution does not require a state to uniquely discriminate *against* in-state entities by mandating *exemptions* for out-of-state entities from the same neutral rules that apply to in-state sellers. *See, e.g.*, *Ass'n des Eleveurs*, 729 F.3d at 948. IPPA cites no authority to the contrary.

Indeed, IPPA's sweeping assertion would have absurd consequences. It would, in effect, bar a State from imposing a neutral, nondiscriminatory sales ban any time that the State had previously imposed related regulations on an in-state industry. Under IPPA's approach, for example, a State could not bar the in-state sale of any number of harmful products—from asbestos to lead paint—if the State had previously prohibited in-state businesses from manufacturing such products. That would turn our constitutional order on its head. In the absence of a constitutional prohibition or valid federal legislation with preemptive effect, the States have "broad power" to regulate markets and sales within their borders. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531 (1949); *see generally Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (Marshall, C.J.) (describing "immense mass" of valid state legislation, "embrac[ing] everything within the territory of a State, not surrendered to the general government").

IPPA also overstates any "'lead time' discrepancy" in the periods that businesses were given to come into compliance. 1-ER-23. According to IPPA, Proposition 2's prohibition on confining animals in a cruel manner, enacted in 2008, "gave in-state producers *six years* to come into compliance with its turnaround provisions." OBM 30 (emphasis in original). IPPA alleges that Proposition 12, in contrast, "gave out-of-state producers *less than six weeks*" to

comply with its prohibitions on selling pork products that violate the Turnaround Requirement. OBM 30.

IPPA is incorrect. Proposition 12 gave all businesses, no matter where they are located, the same amount of time to come into compliance with the measure's in-state sales restriction. *See* Cal. Health & Safety Code § 25991(o). With respect to pork specifically, Proposition 12 did not require that producers comply with the Square Footage Requirement until 2022, *id.*—over three years after enactment—and because of state-court-ordered delays in enforcement, pork-producing businesses have "now had . . . years"—almost five years as of September 2023—to make any adjustments necessary to produce Proposition 12-compliant pork. 1-ER-23. As discussed above, much of the industry has already taken steps to produce Proposition 12-compliant pork. *Supra* at 7-8; *see also* SER-8-10. IPPA provides no basis for finding a dormant Commerce Clause violation in such circumstances.

Finally, IPPA points to various aspects of the State's implementing regulations, as well as informal guidance documents provided by the California Department of Food and Agriculture to advise businesses on how to produce and sell compliant products, as further evidence of Proposition 12's alleged discriminatory impact. *See, e.g.*, OBM 31-32 & n.5. As IPPA acknowledges, however, "the regulations were enacted" (and the guidance documents were published) "*after* the district court denied IPPA's motion for preliminary

injunction." OBM 31 n.5 (emphasis added). "[T]hus IPPA did not directly challenge them below (since it could not)." *Id.* IPPA provides no basis for this Court to consider these materials. If IPPA had wished to challenge aspects of the regulations, it should have either sought leave to amend its complaint or filed a new lawsuit. It did neither, despite the lower court granting it leave to amend when it dismissed IPPA's claims. *Supra* at 12.

In any event, IPPA's challenge to the regulations and guidance materials is unavailing. Contrary to IPPA's assertions, none of the implementing regulations or guidance documents distinguish between in- and out-of-state businesses. Like Proposition 12 itself, the relevant regulatory materials apply neutrally, regardless of where the business is located or domiciled. *See* OBM 49 (quoting regulations that require both in-state and out-of-state businesses to comply).

Because Proposition 12's in-state sales restriction is plainly nondiscriminatory, the Court should affirm the district court's denial of IPPA's dormant Commerce Clause challenge.

3. IPPA's *Pike* claim is materially indistinguishable from the *Pike* challenge recently rejected in *National Pork*

IPPA further contends that even if Proposition 12 is nondiscriminatory, it still violates the dormant Commerce Clause under the *Pike* balancing test. IPPA's *Pike* claim, however, is materially indistinguishable from the *Pike* claim that this Court and the Supreme Court recently rejected in *National Pork*. Just as in *National*

Pork, the "crux of [IPPA's] allegations" is that "the cost of compliance with Proposition 12 makes pork production more expensive nationwide" and that it would force changes in the structure and methods of the pork production industry. 6 F.4th at 1033; *see, e.g.*, OBM 41-43. And in *National Pork*, the plaintiffs asserted far greater economic burdens, covering the entire U.S. pork market rather than (as here) alleged burdens imposed on pork producers in Iowa alone. *See* 6 F.4th at 1033. This Court nonetheless held in no uncertain terms that such allegations "do not qualify as a substantial burden to interstate commerce for purposes of the dormant Commerce Clause." *Id.* It was clear that "[f]or dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce." *Id.* at 1032. "Nor does a non-discriminatory regulation that 'precludes a preferred, more profitable method of operating in a retail market place a significant burden on interstate commerce.'" *Id.* (citation omitted). "[E]ven a state law that imposes heavy burdens on some out-of-state sellers does not place an impermissible burden on interstate commerce." *Id.* The Supreme Court affirmed that ruling.

In arguing to the contrary, IPPA principally relies on statements made in *National Pork* by the Chief Justice and Justice Kavanaugh in dissent. *See, e.g.*, OBM 40, 41, 43-44. But "dissents, of course, are not precedential." *United States*

v. Ameline, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005) (en banc). Those statements did not garner a majority of votes and have no precedential force here.

IPPA also argues that Proposition 12 has burdensome "extraterritorial effects." OBM 40. But both this Court and the Supreme Court considered virtually identical allegations of harm to out-of-state interests in *National Pork* and held that they did not suffice to state a *Pike* claim. *See, e.g.*, 6 F.4th at 1033. As this Court explained, even if out-of-state producers "will need to adopt a more costly method of production to comply with Proposition 12," and even if consumers across the Nation will face "higher costs," plaintiffs had not alleged a "substantial burden on interstate commerce" for purposes of the *Pike* inquiry. *Id.* Or as Justice Gorsuch explained for four Justices, "the pleadings allow for the … possibility … that California market share previously enjoyed by one group of profit-seeking, out-of-state businesses (farmers who stringently confine pigs and processors who decline to segregate their products) will be replaced by another (those who raise and trace Proposition 12-compliant pork)." *Nat'l Pork*, 598 U.S. at 384-85 (plurality opinion). While some "may question the 'wisdom' of a law that threatens to disrupt the existing practices of some industry participants and may lead to higher consumer prices," "the dormant Commerce Clause does not protect a 'particular structure or method of operation.'" *Id.* at 385 (alteration omitted).

In any event, IPPA seriously—and implausibly—exaggerates the harms to out-of-state businesses. As Justice Gorsuch pointed out in *National Pork*, a number of out-of-state pork producers, both small and large, have already taken steps to comply with Proposition 12. 598 U.S. at 385 (plurality opinion) (pointing to statements from Hormel, Smithfield, and Tyson, among others); *see also* SER-8, SER-9 (listing producers already in compliance or in the process of complying with Proposition 12 with accompanying documentation). Indeed, a number of "smaller out-of-state pork producers have … hail[ed] the 'opportunities' Proposition 12 affords them to compete with vertically integrated firms with 'concentrated market power.'" *Nat'l Pork*, 598 U.S. at 385 & n.3. Basic principles of economics make clear that consumers in other States will *not* pay increased prices. Costs of compliance will instead be borne by California's consumers—the same individuals who voted by an overwhelming margin for Proposition 12. *Id.* at 386 (citing amicus curiae brief from economics scholars "suggesting negligible effect on out-of-state prices for consumers not interested in Proposition 12-compliant pork"). And it is hardly "absurd" to think that producers can "forego the California market." OBM 43. Quite the opposite: it is implausible to think that pork producers cannot run a profitable business selling

pork to businesses serving the approximately 85-plus percent of pork consumers who live in States other than California. *See* 4-ER-505.[9]

In its brief, IPPA instead focuses in large part on what it views as the "marginal or largely illusory" benefits of Proposition 12. OBM 37. But in doing so, IPPA flips the *Pike* inquiry on its head. The threshold question is whether IPPA has alleged that Proposition 12 substantially burdens interstate commerce. It has not. And since IPPA has not alleged a substantial burden, this Court need not consider whether that burden is clearly excessive compared to the putative and actual benefits of the law. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155 (9th Cir. 2012).

Even so, IPPA has not alleged facts establishing that any burden is clearly excessive compared to the local benefits. In determining the local benefits, the Court looks "to the *putative* local benefits." *Nat'l Ass'n of Optomestrists*, 682 F.3d at 1155 (quoting *Pike*, 397 U.S. at 142). Proposition 12's stated purpose is "to prevent animal cruelty by phasing out extreme methods of farm animal

[9] IPPA faults the district court for citing an amicus brief. OBM 59-60. But IPPA points to no authority suggesting it is improper for a court to consider relevant background offered by an amicus at the pleading stage—especially when the amicus discusses incontestable real-world facts or basic principles of economics. *Cf., e.g., Sprewell*, 264 F.3d at 988 (court need not accept "unreasonable allegations" or "unwarranted deductions of fact" on motion to dismiss). As discussed above, Justice Gorsuch's opinion in *National Pork* invoked amicus briefs for such purposes in a case arising at the pleading stage.

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. Regardless of IPPA's conclusory allegations that such benefits may not exist, it does not allege any "reason to doubt that the State believed that the sales ban in California may discourage the consumption" of products that were produced under cruel and inhumane practices "and prevent complicity in a practice that it deemed cruel to animals." *Ass'n de Eleveurs*, 729 F.3d at 952.

And again, the Supreme Court has already rejected this argument. It noted that it is well established that States may "ban the in-state sale of products they deem unethical or immoral without regard to where those products are made (for example, goods manufactured with child labor)." *Nat'l Pork*, 598 U.S. at 381 (plurality opinion).[10] So, too, may States "adopt laws addressing even 'imperfectly understood' health risks associated with goods sold within their borders." *Id.*; *see also Maine v. Taylor*, 477 U.S. 131, 148 (1986) (States have "a legitimate interest in guarding against imperfectly understood . . . risks, despite the possibility that

[10] *See also, e.g.*, *Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 543 (7th Cir. 2019) (upholding ban on in-state sale or transfer of fetal tissue derived from aborted fetuses, even though "much of the tissue" came "from other states"); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 335 (5th Cir. 2007) (upholding ban on in-state sale of horsemeat for human consumption, even if horses were slaughtered out-of-state).

they may ultimately prove to be negligible."). As the California Department of Food and Agriculture explained in its rulemaking, it was not "unreasonable for California's voters to pass the Proposition 12 initiative as a precautionary measure to address any potential threats to the health and safety of California consumers while such health and safety impacts remain a subject scientific of scrutiny."[11]

In any event, the question is whether any burden Proposition 12 imposes on interstate commerce is *clearly excessive* in relation to the putative local benefits. That some producers may face additional costs on their businesses—which can be passed along to California consumers, as California voters understood—is not clearly excessive in relation to the benefits Proposition 12 serves in eliminating voters' complicity in confining animals in ways they consider inhumane and protecting human health in the face of an unsettled risk.

"Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" *Nat'l Pork*, 598 U.S. at 390 (majority opinion) (citations omitted). "'[E]xtreme caution' is warranted before a court deploys this implied authority." *Id.* (citation omitted).

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[11] Cal. Dep't of Food & Agriculture, *Addendum to the Initial Statement of Reasons* 2 (Nov. 30, 2021), https://www.cdfa.ca.gov/ahfss/pdfs/regulations/ACP15dayCommentPeriodDocuments.pdf (last accessed Sept. 3, 2023).

Just as in *National Pork*, IPPA here would have this Court "prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases [it] invoke[s] has never before yielded such a result." *Id.* at 391. And just as in *National Pork*, this Court should "decline . . . [IPPA's] incautious invitation[]." *Id.*

B. IPPA has not stated a due process claim because Proposition 12's in-state sales restriction is not unconstitutionally vague

IPPA also alleges that Proposition 12 is unconstitutionally vague. A statute is impermissibly vague only when it "fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Arce v. Douglas*, 793 F.3d 968, 988 (9th Cir. 2015) (citation omitted). "Due process does not require 'impossible standards of clarity.'" *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 361 (1983)). The statute must simply "give a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1019 (9th Cir. 2013) (citation omitted). Mere ambiguity or "uncertainty at the margins" is not sufficient to render a statute unconstitutionally vague. *Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022). "For facial vagueness challenges," the challenged law "just needs to be clear 'in the vast majority of its intended applications.'" *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 733 (2000)).

Proposition 12 easily meets this minimum standard of clarity. Under Proposition 12, a business owner "shall not knowingly engage in the sale within the State of California of any . . . [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" as defined by Proposition 12. Cal. Health & Safety Code § 25990(b)(2). The scope of conduct that falls within this prohibition is clear. The ordinary meaning of "engaging in" is: to do or take part in.[12] Proposition 12 defines a "sale" as "a commercial sale by a business that sells any item covered by" the statute and clarifies that "a sale shall be deemed to occur at the location where the buyer takes physical possession" of the covered item. *Id.* § 25991(o). And under California law, to "knowingly" do something typically means that the party has "a knowledge that the facts exist which bring the act or omission within" a prohibition's scope. Cal. Penal Code § 7; *see also, e.g.*, *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200, 238 (2022) (company "knowingly and intentionally" exposes consumer to toxic chemicals if it "knows or has reason to know it is exposing" consumer to chemical).

[12] *See, e.g.*, *Engage*, Merriam Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/engage (last accessed Sept. 3, 2023); *Engage*, Collins Dictionary, *available at* https://www.collinsdictionary.com/us/dictionary/english/engage (last accessed Sept. 3, 2023).

Putting all this together, to "knowingly engage in the sale within the State of California of any" prohibited product means to take part in a sale of a prohibited product knowing that physical possession of the item will be taken in California. It is quite clear to the average person what conduct falls within the scope of this statute—for instance, a supermarket in California selling prohibited pork products to its customer, or a pork packing company or distributor selling its products directly to that supermarket in California.

In arguing to the contrary, IPPA raises a litany of hypotheticals, many of which clearly fall outside the plain language of Proposition 12. What about, they ask, "an Iowa pig farmer provid[ing] noncompliant pigs to a processor in Oregon" that "sells to dozens of grocery stores all over the Nation"? OBM 47. Or what about an Iowa farmer who "supplied feed to a neighboring farmer who sold noncompliant pigs, processed within Iowa, and shipped directly to a California consumer"? OBM 47. Or what about producers who "do not have any control over where their pigs—and the pork processed from them—will ultimately end up"? OBM 51.

At the threshold, such hypotheticals are of little weight for IPPA's facial challenge to Proposition 12. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-450 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial

requirements and speculate about 'hypothetical' or 'imaginary' cases."). Nor are these hypotheticals of much relevance to IPPA's as-applied challenge since they do not match the facts it has alleged. In any event, each of these hypotheticals has a clear answer. Proposition 12's plain language prohibits *in-state sales*, not conduct at any point in the pork supply chain. For one thing, the sale must take place in California—not in Oregon, as the sale by the Iowa pig farmer in the first hypothetical would be. (The Oregon processor or distributor of those pigs, however, would be responsible for tracking their own sales to avoid selling non-compliant product into California.) For another, the item that is the subject of the sale must be one that is covered by Proposition 12—which feed (in the second hypothetical) is not. And finally, the business must *know* that the sale will be into California—something that is highly unlikely if the business cannot know or control where a distributor who purchases its product outside of California will eventually send it (as in the third hypothetical). Proposition 12 makes clear that the good subject to the transaction must be covered by Proposition 12, that the sale must be within or into California, and that the business involved in the transaction must know these facts.

IPPA next suggests that it is "impossible to determine whether one *knows* he is engaging in . . . a sale." OBM 51. "[A] pork producer," IPPA claims, is "left to ponder whether it has knowledge about such 'engagement.'" OBM 51. These

arguments strain credulity. The average business person knows when they are participating in or taking part in a "commercial sale," Cal. Health & Safety Code § 25991(o)—including when they are selling goods to another, when they are purchasing goods from another, or when they are brokering such a transaction. And it is commonly understood that a business's involvement in a discrete transaction somewhere in the chain of production does not somehow rope it into involvement in the sale of a final product it is neither selling nor buying.

Indeed, IPPA appears to concede that the statute's definition of "commercial sale" is sufficiently clear to withstand a vagueness challenge. OBM 48. IPPA's claim hinges on its view that "engages in" is vague. *See id.* But legislatures use "engages in" all the time: a Westlaw search reveals hundreds of statutes using the same or similar formulations.[13] IPPA provides no basis for holding that all these commonplace usages are facially vague.

[13] *See, e.g.*, 27 U.S.C. § 203 (unlawful "to *engage in* the business of importing into the United States distilled spirits, wine, or malt beverages" without license); 7 U.S.C. § 2703 (referring to "persons *engaged in* the hatching and/or sale of egg-type baby chicks"); Nev. Rev. Stat. § 640E.360 (unlawful to "*engage in* the practice of dietetics without license); Okla Stat. tit. 19, § 901.30-2.2 (referring to those who "*engage in* any unfair labor practice"); S.D. Codified Laws § 36-2-2 (unlawful to "*engage in* the diagnosis or treatment of any human ill" without license); Wash. Rev. Code § 46.55.020 (unlawful to "*engage in* the activities of a regulated tow truck operator" without proper certification).

IPPA also suggests that the implementing regulations for Proposition 12, in effect, expand the meaning of "engages in" to encompass "production facilities upstream from the end 'sale.'" OBM 49. That is incorrect. Even if the implementing regulations were properly at issue in this appeal—and they are not, *supra* at 23-24—they do not expand the statute's in-state sales restriction to cover activities across "the entire pork supply chain." OBM 48. The implementing regulations are instead designed to create the documentation necessary to allow businesses selling in California to verify that the product that they intend to sell in-state is compliant. *See, e.g.*, 3 Cal. Code Regs. § 1322(b) (discussing "records that are in sufficient detail to document the identification, source, supplier, transfer of ownership, transportation, storage, segregation, handling, packaging, distribution, and sale of whole pork meat").

Ultimately, "while there is little doubt that imagination can conjure up hypothetical cases in which the meaning of [a statute's] terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill*, 530 U.S. at 733 (2000) (cleaned up). All that the Fourteenth Amendment requires is that it be "clear what the [statute] as a whole prohibits." *Id.* (citation omitted). Proposition 12 clearly articulates what it prohibits: selling a covered pork product within or into

California. IPPA therefore has not and cannot allege that the law is unconstitutionally vague.

C. IPPA has not stated a Privileges and Immunity Clause Claim because Proposition 12 does not discriminate against out-of-state interests

IPPA further alleges that Proposition 12 violates the Privileges and Immunities Clause. But it has failed to plausibly allege such a violation. The Privileges and Immunities Clause 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., Article IV, § 2, cl. 1. Courts perform a two-step inquiry when analyzing claims brought under this Clause. *See, e.g.*, *Marilley v. Bonham*, 844 F.3d 841, 846 (9th Cir. 2016) (en banc). First, the plaintiff "must show that the challenged law treats nonresidents differently from residents and impinges upon a 'fundamental' privilege or immunity protected by the Clause." *Id.* If this showing is made, "at step two the burden shifts to the state to show that the challenged law is 'closely related to the advancement of a substantial state interest.'" *Id.* (citation omitted).

As a threshold matter, however, "the Privileges and Immunities Clause has been interpreted not to protect corporations." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460-61 (2019). Rather, "[n]atural persons, and they alone, are entitled to the privileges and immunities" the Clause protects.

Hague v. Comm. for Indus. Org., 307 U.S. 496, 514 (1939). IPPA is not a natural person and it has not alleged that any of its members are either. ER-509, ER-510. It thus cannot state a Privileges and Immunities Clause claim.

Even if IPPA could raise such a claim, it has failed to adequately plead it. As the district court properly held, and as explained above, *see supra* at 19-24, Proposition 12 treats all businesses (including all pork producers) the same. *All* businesses, whether they reside in California or elsewhere, are prohibited from engaging in a sale of prohibited pork products within California. Cal. Health & Safety Code § 25990(b)(2). Citizens of other states are thus on "the same footing" as citizens of California, *McBurney v. Young*, 569 U.S. 221, 226 (2013) (citation omitted). In light of this equal treatment of all pork producers, IPPA cannot plausibly allege a Privileges and Immunities Clause claim.

IPPA argues once again that Proposition 12's purpose is to "take away an economic advantage that out-of-state producers had" and that the law has a discriminatory impact because of Proposition 2 and Proposition 12's different implementation timelines. OBM 63. These arguments are unavailing. As discussed above, *supra* at 19-24, Proposition 12 is facially neutral and has no discriminatory or protectionist effect or purpose. IPPA cites no authority that suggests that a facially neutral sales restriction is discriminatory in effect simply

because in-state residents may be in a better position to produce compliant products due to preexisting in-state manufacturing or production regulations.

At bottom, Proposition 12 "imposes the same . . . requirements on its own citizens as it does on citizens of other states" with respect to whether they can sell certain pork products within California. *Nat'l Ass'n for the Advancement of Multijurisdiction Prac. v. Berch*, 773 F.3d 1037, 1046 (9th Cir. 2014). IPPA thus cannot state a viable claim that such a statute violates the Privileges and Immunities Clause.

D. IPPA has not stated a preemption claim because its preemption theory depends on a flawed assertion that Proposition 12 is discriminatory

Finally, the district court correctly held that IPPA cannot allege a viable preemption claim. Under the Supremacy Clause, federal law may preempt conflicting state laws. *E.g.*, *Bank of Am. v. City & Cty. of San Francisco*, 309 F.3d 551, 557 (9th Cir. 2002). Courts have recognized three types of preemption. "First, Congress may preempt state law by so stating in express terms." *Id.* at 558. "Second, preemption may be inferred when federal regulation in a particular field is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* (citation omitted). "Third, preemption may be implied when state law actually conflicts with federal law." *Id.*

In its opening brief, IPPA argues solely that Proposition 12 is preempted under conflict preemption, the third of these theories. OBM 65. Conflict preemption occurs when either compliance with both state and federal law is impossible or when a state law stands as an obstacle to the accomplishment of the federal law's purposes. *See, e.g.*, *Bank of Am.*, 309 F.3d at 558. IPPA argues that because "Proposition 12 directly requires packers or wholesalers to favor in-state localities and to disadvantage out-of-state localities," it either directly conflicts with or stands as an obstacle to the anti-discrimination provision of the Packers and Stockyards Act, 7 U.S.C. § 192(b). OBM 65. The portion of the Packers and Stockyards Act that IPPA references makes it unlawful for a packer or swine contractor to "give 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). In other words, IPPA repeats the same assertion of discrimination that it advances with respect to its dormant Commerce Clause and Privileges and Immunities Clause claims.

IPPA's argument is refuted by the plain language of Proposition 12. Nowhere does Proposition 12 require packers or wholesalers to favor pork producers because of their *location*. Rather, Proposition 12 simply prohibits packers or wholesalers from selling pork products within California that are not in compliance

with Proposition 12's standards. This may lead packers and wholesalers to prefer to buy from producers who are compliant with those standards, of course. But nowhere does IPPA allege that the *only* producers who are or could be compliant with Proposition 12's standards in raising pigs are located in California; indeed, that is far from the case. *See supra* at 7-8; *see also* SER-8, SER-9. In any event, IPPA's complaint only alleges that a majority of producers do not currently use compliant standards, not that all out-of-state producers do so or that there is something unique about being located outside of California that renders a pork producer unable to comply. *See* 4-ER-518. Proposition 12 thus does not stand as an obstacle to the Packing and Stockyards Act or render it impossible to comply with that Act. IPPA therefore cannot state a valid claim for preemption.

II. THE DISTRICT COURT PROPERLY DENIED INJUNCTIVE RELIEF

Because the lower court properly dismissed this case for failure to state a claim, this Court need not address whether the court also properly denied a motion for a preliminary injunction. After all, it would be "pointless . . . to decide what preliminary relief the [plaintiff] should have obtained on . . . [a] count that has been dismissed for failure to state a claim." *SEC v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982). Should the Court nonetheless reach the merits of this part of the lower court's ruling, it should affirm the denial of injunctive relief.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The party seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Id.* at 20. If a movant fails to establish a likelihood of success, the court generally need not consider the other factors. *Garcia v. Google. Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). IPPA, as the movant here, bears the burden to prove each element. *Winter*, 555 U.S. at 20. Because IPPA has not shown a likelihood of success on the claims underlying its motion—its dormant Commerce Clause and due process claims—or that the other elements for an injunction are met, the lower court did not abuse its discretion in denying injunctive relief.

A. IPPA has not shown a likelihood of success

1. IPPA is not likely to succeed on its dormant Commerce Clause claim

If this Court were to conclude that IPPA had stated a viable dormant Commerce Clause claim, the lower court still properly concluded that IPPA had not demonstrated a likelihood of success on that claim.

First, as discussed in detail above, Proposition 12 is not discriminatory and was not enacted for discriminatory or protectionist reasons. *See supra* at 19-24.

IPPA provided no evidence in its motion for a preliminary injunction that rebuts these facts.

Second, IPPA has not shown a likelihood of success on its dormant Commerce Clause claim under the *Pike* balancing test. The evidence IPPA produced on its motion for a preliminary injunction only further details the expenses that Proposition 12 will impose on Iowa pork producers and the ways that the market might be altered as to firm sizes and production methods. OBM 41. As explained above, "laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce," *Nat'l Pork*, 6 F.4th at 1032, and the dormant Commerce Clause does not protect any "particular structure or methods of operation in a retail market," *Exxon Corp.*, 473 U.S. at 127 (1978). *See supra* at 24.

Moreover, IPPA's contentions regarding the economic costs of compliance and harm to specific producers are undermined by the evidence the State Defendants presented. The State Defendants submitted a declaration from Dr. Annette Jones, the Director of Animal Health and Food Safety Services and State Veterinarian at the California Department of Food and Agriculture. SER-4. Dr. Jones explained that in contrast to IPPA's assertions, pork producers have already "developed traceability systems to improve product flow, limit quality and safety failures, ensure ability to execute a recall for food safety purposes, and for other

specific purposes, such as the USDA Organic certified and antibiotic-free programs." SER-6. For instance, the U.S. Department of Agriculture's Agricultural Marketing Service is one such verification system "already in place to independently verify information about farm animals such as cattle, pigs, sheep, and poultry, and their associated animal products for specific label claims such as animal care standards or non-GMO." SER-7. Industry participants, including large-scale producers such as Tyson and Smithfield, "have USDA verified programs tracing back pork products through the lifetime of the animal. SER-7. Thus, tracking for compliance with Proposition 12 "will simply be an additional code/program added to the list of information to be tracked" in existing systems. SER-7.

Furthermore, Dr. Jones explained that many companies already raised their pigs in compliance with Proposition 12's standards as of January 1, 2022, including producers selling pork products to the European Union (which requires 24.2 square feet for bedding areas), producers certified by Whole Foods' Global Animal Partnership's Animal Welfare Certified and Certified Humane program, and producer Niman Ranch. SER-8. She also included a list of producers that had made public statements that they were already in compliance with Proposition 12 or in the process of obtaining compliance. SER-8, SER-9. And Dr. Jones noted that several grocery stores—including large national chains like Costco, Whole

Foods, and Albertsons—have "confirmed their commitment to only sell Proposition 12 compliant products." SER-9. The existence of prior tracking programs that can be used to trace pork products for Proposition 12 compliance, the numerous companies already in or moving towards compliance, and the numerous grocery stores willing to sell compliant goods undercuts IPPA's contentions about catastrophic costs. Moreover, California voters were aware that companies could, and likely would, pass along any cost of compliance to California consumers in the form of higher prices—thereby minimizing any economic harm on producers. 4-ER-498. All of this underscores that IPPA has not shown Proposition 12 imposes a substantial burden on interstate commerce.

Third, because IPPA has not shown a substantial burden on interstate commerce, this Court need not address whether that burden is clearly excessive compared to the putative benefits of the law. *Nat'l Ass'n of Optometrists*, 682 F.3d at 1155. To the extent it does turn to this final part of the *Pike* balancing test, IPPA has not shown that the burden imposed by Proposition 12 is clearly excessive compared to the benefits of the law. As explained more above, the voters enacted Proposition 12 in part to prevent the sales of a product they deemed morally concerning and to avoid complicity in confining animals in conditions they deemed inhumane. *See supra* at 19-20, 28. None of IPPA's evidence rebuts the benefits that over 60% of California voters found in "ban[ning] the in-state sale of products

they deem unethical or immoral without regard to where those products are made," *Nat'l Pork*, 598 U.S. at 381 (plurality opinion). And it was not "unreasonable for California's voters to pass the Proposition 12 initiative as a precautionary measure to address any potential threats to the health and safety of California consumers while such health and safety impacts remain a subject of scientific scrutiny."[14] *See also supra* at 28-30.

The benefits of Proposition 12 are far from "illusory," OBM 37. And Proposition 12's sales requirement is one that companies have shown themselves capable of and willing to comply with. SER-7-10. Such burden is nowhere near clearly excessive compared to the benefits of Proposition 12. IPPA has thus failed to carry their burden to demonstrate a likelihood of success on their dormant Commerce Clause claim.

2. IPPA is not likely to succeed on its due process claim

Nor has IPPA shown a likelihood of success on its due process claim. Proposition 12 is clear as to what conduct falls within its scope, as explained above. *See supra* at 31-36. None of the hypotheticals and regulations that IPPA points to rebut this. *See supra* at 32-34. IPPA's attempts to create ambiguity are

[14] Cal. Dep't of Food & Agriculture, *Addendum to the Initial Statement of Reasons* 2 (Nov. 30, 2021), https://www.cdfa.ca.gov/ahfss/pdfs/regulations/ACP15dayCommentPeriodDocuments.pdf (last accessed Sept. 3, 2023)

unavailing. So, too, is resorting to arguments about Proposition 12's implementing regulations. The question before the Court is whether IPPA has shown a likelihood of demonstrating that *Proposition 12* is unconstitutionally vague, not whether its *implementing regulations* are vague. IPPA has not made that showing.

B. IPPA does not meet the other factors for injunctive relief

Even if IPPA had shown a likelihood of success, it has not demonstrated that the remaining preliminary injunction factors are met. First, IPPA has not shown an irreparable injury. While the loss of constitutional rights may constitute irreparable harm, *see, e.g.*, *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009), IPPA has not shown that Proposition 12 violates any constitutional provisions. *See supra* at 42-46. Moreover, IPPA's delay in bringing suit undermines its contention that it faces an irreparable injury. "A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief." *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). "By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action." *Id.* (citation omitted); *see also Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."). IPPA waited almost three years after Proposition 12 was enacted to bring

this suit and to seek injunctive relief. Such delay belies any claim of urgent need for injunctive relief.

Second, the balance of equities and public interest do not favor injunctive relief. Where, as here, the government is the opposing party, these last two factors of the preliminary injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). To analyze these factors, the Court "balance[s] the competing claims of injury" and "consider[s] the effect of granting or withholding the requested relief," paying "particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citation omitted). As relevant here, a State "suffers a form of irreparable injury" when it is "enjoined by a court from effectuating statutes enacted by . . . its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2013) (internal quotation marks omitted) (Roberts, CJ., in chambers). The Court should thus refuse to enjoin Proposition 12, a statute that millions of voters supported to rid the State's marketplace of animal products that they reasonably view as inhumane and threatening to public health.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: September 5, 2023

Respectfully submitted,

ROB BONTA
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R. MATTHEW WISE
Supervising Deputy Attorney General

s/ Kristin Liska

KRISTIN A. LISKA
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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases that are currently pending in this Court and are not already consolidated here.

Dated: September 5, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 22-55336

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This brief contains 11,098 **words,** including _____ words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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ADDENDUM

STATUTORY ADDENDUM TO
DEFENDANTS-APPELLEES' ANSWERING BRIEF
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West's Annotated California Codes
Health and Safety Code (Refs & Annos)
Division 20. Miscellaneous Health and Safety Provisions (Refs & Annos)
Chapter 13.8. Farm Animal Cruelty (Refs & Annos)

West's Ann.Cal.Health & Safety Code § 25990

§ 25990. Prohibitions [1]

Effective: December 19, 2018
Currentness

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.

Credits
(Added by Initiative Measure (Prop. 2, § 3, approved Nov. 4, 2008, operative Jan. 1, 2015). Amended by Initiative Measure (Prop. 12, § 3, approved Nov. 6, 2018, eff. Dec. 19, 2018).)

Notes of Decisions (9)

Footnotes

1 Section caption supplied by Prop. 12.

West's Ann. Cal. Health & Safety Code § 25990, CA HLTH & S § 25990
Current with Ch. 1 of 2023-24 1st Ex.Sess, and urgency legislation through Ch. 101 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Health and Safety Code (Refs & Annos)
Division 20. Miscellaneous Health and Safety Provisions (Refs & Annos)
Chapter 13.8. Farm Animal Cruelty (Refs & Annos)

West's Ann.Cal.Health & Safety Code § 25991

§ 25991. Definitions [1]

Effective: December 19, 2018
Currentness

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.

(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.

Credits

(Added by Initiative Measure (Prop. 2, § 3, approved Nov. 4, 2008, operative Jan. 1, 2015). Amended by Initiative Measure (Prop. 12, § 4, approved Nov. 6, 2018, eff. Dec. 19, 2018).)

Footnotes

1 Section caption supplied by Prop. 12.

West's Ann. Cal. Health & Safety Code § 25991, CA HLTH & S § 25991
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CERTIFICATE OF SERVICE

Case Name: ***Iowa Pork Producers v. Rob Bonta, et al.***
Case No.: **22-55336**

I hereby certify that on September 5, 2023, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS-APPELLEES' ANSWERING BRIEF

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished electronically by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on September 5, 2023, at San Francisco, California.

Vanessa Jordan	s/ Vanessa Jordan
Declarant	Signature