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

Case No. 2:21-cv-09940-CAS-AFM
The Honorable Christina A. Snyder

APPELLANT'S REPLY BRIEF

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INTRODUCTION

California wants to tell Midwestern states, and Midwestern pig farmers, how they must raise their pigs. Worse yet, they want to do so to the direct economic benefit of the few in-state California pig farms. For many reasons, the Constitution forbids this. California appears to abandon many of its purported justifications for this effort, such as *no longer* claiming Proposition 12 prevents a threat to the health and safety to California consumers or foodborne illness, despite misleading voters with these concepts originally, and is now solely claiming it can do this to impose its opinion for farm housing. This is true, despite the fact Proposition 12 does not regulate *any* product itself actually sold in its state from breeding pigs. The record—and ***certainly*** IPPA's complaint—establishes Proposition 12 is far worse for the health and welfare of the pigs that California claims it is helping, and increases risk for disease, injury and death of breeding pigs. Not to mention the cascading consequences for the nation's pork supply chain.

The district court should have preliminarily enjoined California's unconstitutional effort. And, in any event, there is no way IPPA's extensive allegations fail to state a claim. This Court should correct

course. The consequences of failing to do so are immense. This type of out-of-state discriminatory "regulation," especially when purportedly based on a single state's sense of "morality," invites trade wars amongst the states, and more states seeking to impose their policy preferences nationwide. If California is allowed to proceed now, other states can take similar actions against California in the future, regulating commerce dominated by California and the West coast. This Court should reverse and enjoin enforcement of Proposition 12 to follow U.S. Supreme Court precedent and long-standing constitutional jurisprudence.

ARGUMENT

The district court erred in concluding that IPPA failed to show a likelihood of success on the merits. However, even worse, the district court *extended* that erroneous legal analysis in dismissing IPPA's entire case, blending two different standards of review. This resulted in an improperly dismissal of IPPA's claims tied to a likelihood-of-success-on the-merits standard, as opposed to a standard simply asking whether IPPA sufficiently plead its claims. Similarly, California and Intervenors fail to address a central premise of IPPA's argument: the district court ignored a wealth of facts *plead* by IPPA, which, had they been accepted

as true, would have at least resulted in a denial of the motion to dismiss. So while the district court should have enjoined enforcement of Proposition 12 altogether, it *egregiously* erred in denying the motion to dismiss. IPPA urges this Court to do what the district court failed to do and review such facts *de novo* in a light most favorable to IPPA.

I. Dormant Commerce Clause—Discrimination

Both California Intervenors (collectively, "Defendants") emphasize that the petitioner in *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2019), *aff'd,* 6 F.4th 1021 (9th Cir. 2021), and *aff'd*, 598 U.S. 356 (2023)(hereinafter "*NPPC*"), did not include a claim that Proposition 12 was discriminatory, and claim that this somehow weakens IPPA's argument. But that concession by NPPC has zero preclusive effect on IPPA's ability to pursue a discrimination challenge, as the Supreme Court made it expressly clear that it simply was not part of the Court's analysis. *See NPPC*, 598 U.S. at 370 ("[P]etitioners disavow any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones.").

IPPA could not disagree more with this concession.[1] Defendants' response that Proposition 12 draws no textual distinction based on geography (and thus is not discriminatory) misstates the "antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence." *Id.* at 377. It matters not that Proposition 12's text does not expressly differentiate between in-state or out-of-state producers, for a state law need not "be drafted explicitly along state lines in order to demonstrate its discriminatory design." *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of Treasury*, 490 U.S. 66, 76 (1989). Nor does it matter that Proposition 12's legislative purposes do not expressly admit it discriminates against out-of-state producers. Instead, the goal "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994). And

[1] IPPA takes exception to Intervenors' argument that because other parties in other cases failed to raise or outright conceded an argument, the argument is "outlandish" or "frivolous." Intervenor Ans. Br. 16. This is not a *legal* argument, as "a decision by a party"—let alone an *entirely different party*—"not to raise an argument in one case does not preclude it from raising that argument in an entirely separate case." *Pizzino v. NCL (Bahamas) Ltd.*, 709 F. App'x 563, 567 (11th Cir. 2017).

to smoke out such discriminatory laws, it is "the practical effect of a challenged statute [that] is the critical inquiry," *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001)(quotation omitted), and this Court is not "bound by the stated purpose when determining the practical effect of a law." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1098 (9th Cir. 2013); *see also Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)("when considering the purpose of a challenged statute, th[e] Court is not bound by the name, description or characterization given by the legislature or courts of the State, but will determine for itself the practical impact of the law.")(quotations omitted).[2]

[2] For similar reasons, this Court should reject Intervenors' contention that the "extraterritoriality lens [was] foreclosed by the Supreme Court" as it implies that extraterritoriality impacts have no import in a dormant Commerce Clause analysis. Int. Br. 14 & n.14. All the Supreme Court held—as IPPA recognized in its opening brief, Op. Br. 39–40—was that the *per se* articulation of the extraterritoriality doctrine was inappropriate. *NPPC*, 598 U.S. at 375 ("In rejecting petitioners' 'almost per se' theory we do not mean to trivialize the role territory and sovereign boundaries play in our federal system."); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). IPPA has not revived the *per se* application of an extraterritoriality doctrine rule here, but instead asks this Court to examine the extraterritorial effects of Proposition 12 in determining whether Proposition 12 is discriminatory in purpose or effect. And to the extent this Court's opinion in *NPPC*, 6 F.4th 1021 (9th Cir. 2021) states otherwise, a three-judge panel may overrule a prior panel's decision if

Practically speaking, Proposition 12 has a disparate impact on out-of-state producers (even independent from consideration of Proposition 2). California has as few as 8,000 breeding pigs in-state, and pork production in California makes up less than 1% of total U.S. pork production. 4-ER-505–506. Compare those numbers to Iowa, with 960,000 breeding pigs and over 22 million hogs and pigs total on Iowa farms. 4-ER-518; *see also* 2-ER-108. On this basis alone, Proposition 12 violates a core principle of the dormant Commerce Clause.

But of course, that isn't the only practical effect of Proposition 12; it also uniquely applied to out-of-state producers. Defendants' argument that Proposition 12 provided the same amount of time for all producers to comply with its provisions is false and also takes an overly myopic view of the reality on the ground when Proposition 12 was enacted.[3]

"the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)(en banc). As explained in IPPA's opening brief, a six-Justice majority "affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." *NPPC*, 598 U.S. at 403 (Kavanaugh, J., concurring in part and dissenting in part). Any Ninth Circuit holding that conflicts with that reasoning is irreconcilable.

[3] Further, Intervenors appear to concede the "possibility that California producers may have fewer costs associated with complying with

Proposition 12 imposed turnaround requirements for out-of-state producers at a time that Proposition 2 had *already* implemented turnaround requirements for in-state producers.[4] Thus the turnaround requirements of Proposition 12 were redundant to in-state producers, leaving out-of-state producers to immediately have to cease sales or sell non-compliant product risking criminal and civil enforcement.[5] Given the

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Proposition 12's sales standards than out-of-state producers because they were already in compliance with the behavioral confinement standards" while simultaneously contending there is nothing indicating any disparate cost between in-state and out-of-state producers. Intervenor Ans. Br. 20. If by "unremarkable," Intervenors mean "obvious," IPPA agrees: a longer time to bring oneself in compliance is naturally more business friendly. And IPPA very clearly plead and submitted evidence for the proposition that California producers had many additional years to bring themselves into compliance, allowing them to spread out compliance costs over a longer period of time than what was afforded to out-of-state producers. 4-ER-511, 4-ER-532–34, 4-ER-536, 4-ER-541; *see also* 3-ER-201–205.

[4] Understanding the timeline is important to understanding how Proposition 12 discriminates against out-of-state producers. For in-state producers, Proposition 2 was approved on November 4, 2008, and the turnaround provisions did not become operative until January 1, 2015, offering California producers over 6 years to comply. 2008 Cal. Legis. Serv. Prop. 2. For out-of-state producers, Proposition 12 was approved on November 6, 2018, but the turnaround provisions (by operation of the sales ban) became effective immediately just weeks later on December 19, 2018. 2018 Cal. Legis. Serv. Prop. 12.

[5] Intervenors' attempt to parse out Proposition 2 from Proposition 12 seems to imply that they can be considered independent from each other for purposes of the discrimination claim. Intervenor Ans. Br. 16; 18

sum of these practical effects, IPPA has established a likelihood of success on the merits, and at the very least, plead a violation of a core principle of the dormant Commerce Clause.

Nor was the impact limited to the turnaround requirements. While Proposition 12 was the first time that square footage requirements were implemented, an obvious correlation exists between the turnaround requirements and square footage requirements for barn conversions. In-state producers already compliant with the turnaround requirements would have found it substantially easier—and less costly—to comply with the square footage requirements than out-of-state producers, who had never been subjected to Proposition 2. California producers made mere *adjustments* to facilities already compliant with the turn around requirements, whereas out-of-state producers had to invest in *emergency overhaul* of their facilities at premium costs. Thus, the real compliance cost was the initial shift to comply with the turnaround requirements,

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(calling Proposition 2 an "earlier law"). But Proposition 12 *added to and amended* Proposition 2. Thus, to talk about Proposition 2 is to only talk about the legislative history of Proposition 12. And the reality is that Proposition 12 effectively applied to out-of-state producers for the turnaround requirements, and effectively gave the in-state producers a substantial head start for compliance with the square footage requirements as described herein.

and Proposition 12 simply did not provide out-of-state producers the same benefit it did for California's in-state producers when it gave them a substantial head start for compliance. These facts dispel any notion that in-state and out-of-state producers were treated equally.[6]

In this respect, a few points from Intervenors' opposition are worth addressing. Intervenors contest the dormant Commerce Clause challenge by citing—at great length—an unpublished opinion issued by this Court in *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020)(hereinafter "*NAMI*"). But under Ninth Circuit Rule 36-3, "[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Defendants do not argue that these exceptions apply here, and thus this case is not

[6] Defendants both concede there was a significant difference in lead in times, but California argues that the burden was lessened as result of several court-ordered stays of Proposition 12. The fact California chose *not* to enforce Proposition 12 until after *NPPC* and the fact that no private parties sued, or the fact a state court judge ordered a stay of enforcement due to the significant risk that the law would be deemed unconstitutional (which California initially opposed), does nothing to absolve the unconstitutional economic protectionism that exists.

binding. Nor does it carry any persuasive value otherwise; the underlying district court opinion actually opined that the difference in lead-in times could *support* a discrimination claim (but ultimately held "the argument [wa]s premature prior to the release of the relevant implementing regulations[.]" *NAMI*, 420 F. Supp. 3d at 1024 n.7. Thus, this Court never had an opportunity to consider the argument, which is now squarely before it.[7]

Defendants' arguments that Proposition 12 is somehow constitutionally adequate because it allegedly hurts in-state producers more by also banning the actual raising of pigs in-state do not carry any merit. One raises pigs to sell pork; by banning the engagement in the sale of non-compliant pork in California, California has forced IPPA's members to *raise* pigs commensurate with California's standards on a nationwide basis *because they cannot simply opt out of selling in*

[7] Intervenors are also placing far too much weight on *NAMI*'s voluntarily dismissal of this "lead time" argument only after the *NPPC* decision issued. Apart from the district court's reasoning that the argument could *weigh in favor of* IPPA's position, the case was *jointly* dismissed after the *mandate from the Ninth Circuit appeal was issued*, which again, never considered the lead time argument.

California. 4-ER-520 ("it would be impossible for certain producers to forego the California market because packing facilities cannot track which hogs came from producers complying with Proposition 12"); *see also* 4-ER-522 ("it is impossible to segregate which portions of meat will be sold into the California market alone."); *see also* 2-ER-109 ("IPPA members have no voice on where their meat is ultimately sold to because of the nature of pork processing.").

Nor do IPPA's arguments preclude a state from passing a neutral, nondiscriminatory sales ban any time it had previously regulated an in-state industry. California can enact sales bans; but it may not enact *discriminatory* sales bans. And here, due to the fact that the primary impact of Proposition 12 is felt solely outside of the state, and the suspect relationship between Proposition 2 and Proposition 12 that directly correlates to out-of-state producers being *targeted* through Proposition 12, IPPA has established a likelihood of success on the merits, and has at least plead an articulable violation of the dormant Commerce Clause.

Finally, California challenges IPPA's citations to the regulations, both as a matter of substance and procedure because the regulations were not finalized when the district court issued its decisions. IPPA is

not challenging the regulations themselves. Indeed, IPPA could not challenge the regulations, because California failed to promulgate the *mandated* regulations before Proposition 12 going into full effect and the state saying it was enforceable. Thus, IPPA had to file suit without the benefit of being able to challenge the final regulations, as they did not exist.

Regardless, IPPA only cites to those regulations as further support of its legal argument that Proposition 12 is discriminatory. And it is proper for the Court to consider this argument for two reasons. First, unless California is willing to dispute the regulations fall outside the scope of Proposition 12 (in which case they would be automatically invalid, *RLC Indus. Co. v. C.I.R.*, 58 F.3d 413, 417 (9th Cir. 1995)) they fall within the intended scope and reach of Proposition 12, and thus evidence its discriminatory impact.[8] Second, IPPA cited to all of Proposition 12's proposed and draft regulations as they then existed it its complaint. 4-ER-506–07, 4-ER-514–17, 4-ER-527–33. IPPA should not be

[8] Furthermore, the regulations are relevant to be considered to the extent that California argues they have somehow remedied IPPA's due process vagueness concerns with respect to Proposition 12. *See infra*, Part III.

faulted for now citing the *final* versions, especially when it would have had California timely issued them.

In sum, Defendants have failed to meaningfully respond to IPPA's central argument. State laws that discriminate in practical effect by regulating out-of-state commerce and protecting in-state commerce are invalid. Thus, the Court should enjoin enforcement of Proposition 12 as IPPA showed a likelihood of success on the merits of its claim; and at the very least, this Court should reverse the district court's dismissal of IPPA's dormant Commerce Clause claim.

II. Dormant Commerce Clause—*Pike* Test

Even if this Court finds that Proposition 12 does not discriminate, "a majority of the Court agree[d in *NPPC* that] *Pike* extends beyond laws either concerning discrimination or governing interstate transportation." 598 U.S. at 396 (Roberts, C.J. concurring in part and dissenting in part).

Defendants argue that the claims in *NPPC* are the same type presented here and should similarly be rejected. But IPPA cannot emphasize enough that this case presents an additional host of substantial burdens never considered and that carry monumental importance for the constitutional structure of the United States. IPPA

has alleged seismic impact to the interstate market for pork,[9] and that California is seeking to impose sweeping changes on how every state raises pork, and perhaps most significantly, that Proposition 12 will negatively impact the national *supply* of pork. 4-ER-523 ("[M]any producers will need to limit their supply so that their pigs will have more space, as many do not have the option to buy more real estate. This means that the national pork supply will drop . . . . The implementation and enforcement of Proposition 12 would result in . . . less pork being available for purchase."); *see also* 4-ER-539 ("If Proposition 12 goes into effect, it will have an impact on the national market of pork production, including: decreasing supply, forcing small pork producers out of the market, [and] consolidating pork production into large producers[.]"). Nowhere in *NPPC* were such allegations addressed or analyzed, *see*

[9] California contends that IPPA unduly focuses on the impact on Iowa pork producers instead of the nation at large. But to talk about the hog market in Iowa is to talk about the Nation's hog market, as Iowa is the "largest pork producing state in the nation." 2-ER-108. Indeed, "[n]early one-third of the nation's hogs are raised in Iowa—more than twice the amount of its runner up state[.]" 4-ER-517; *see also* 2-ER-107–108. ("As of December 2019, hog inventory numbers reached a new record high of 24.8 million hogs on Iowa farms representing 32% of the U.S. hog inventory . . . In 2019, Iowa harvested an estimated 39.117 million hogs, which represented approximately 30% of the hogs harvested in the United States that year.").

Compl., *NPPC*, 456 F. Supp. 3d 1201 (S.D. Cal. 2019), and thus such claims were never analyzed or foreclosed by the *NPPC* line of cases.[10]

Defendants' both argue that IPPA has overstated the effects of Proposition 12.[11] But in attacking these allegations within IPPA's

[10] Any contention that IPPA provided no evidence in its motion for preliminary injunction that supports the discrimination allegations of Proposition 12 is false. IPPA submitted declarations from industry and academic experts that explicitly discuss the effect that Proposition 12 will have on the national market for pork, the manner in which pork processors raise pigs, the negative impact and harm to the breeding pigs themselves, and the negative impact on the national supply of pork. 3-ER-203 ("most operations outside of California would currently have about 14-16 square feet of floor space–hence the move to 24 square feet represents a more substantial adjustment."); 4-ER-477 ("Currently, most breeding pigs within the industry are confined in 14-16 square feet individualized gestation pens."); *see also* 3-ER-201–205 ("production restrictions involving the California pork market have clear, direct economic implications for both producers and consumers in other U.S. markets outside of California" and concluding there is a disparate increase in capital costs between in-state and out-of-state producers as a result of Proposition 12 as the extra space required by Proposition 12 that "will make construction of new infrastructure unfeasible for many Iowa producers" and that "many Iowa producers will choose to exit the market all together due to a lack of profit or potential losses faced year over year."); *see also* 4-ER-480–87 (discussing significant negative impacts on sow welfare).

[11] California also cites to its own expert's declaration submitted in support of its opposition to IPPA's motion for preliminary injunction for evidence that indicates the existence of prior tracking programs as well as the fact that some grocery stores and select producers have stated they would comply with Proposition 12. But the fact that a small volume of

complaint and its evidence supporting its preliminary injunction motion, they rely on portions of the *NPPC* opinion analyzing evidence submitted by *different* parties. It is black-letter law that such documents cannot be accepted for the truth of the matters asserted therein. *Kristiansen v. Russell*, No. 3:21-CV-00546-IM, 2022 WL 1910138, at *3 (D. Or. June 2, 2022)("[I]t is inappropriate to notice for their truth facts contained in declarations submitted as part of separate litigation. . . . This Court does not, and cannot, notice the facts contained in the declarations for their truth or consider them as conclusively established when resolving these motions to dismiss."); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1410 n.2 (9th Cir. 1990)(declining to take judicial notice of another action that was "not relevant to this case"); *see also Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) ("We cannot agree. 'A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'"). More important, it defies the applicable standard, which required the district court—and

producers have converted to comply with Proposition 12 is immaterial to whether it inflicts irreparable harm on *IPPA's members*.

the Court here on *de novo* review—to "accept all factual allegations as true and view them in the light most favorable to Plaintiffs." *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 763 (9th Cir. 2023).

Intervenors relatedly argue that "Proposition 12 has been in effect for years, largely in effect for years without the apocalyptic doom predicted by the pork industry, [and thus] IPPA's claims of irreparable harm are undeniably untrue." Int. Br. 13. This sounds like a summary judgment argument; regardless, of course the full extent of the irreparable harm hasn't materialized yet. Due to the extension of the sell through period in California, so long as pigs were at an FSIS facility or end user retailer as of July 1, 2023, even non-compliant pork from those pigs can continue to be sold in California until December 31, 2023. *See Ct. Order, Cal. Hisp. Chambers of Com. v. Ross*, No. 34-2021-80003765 (Super. Ct. Sacramento County, Cal. June 15, 2023). Until that supply runs out, it is disingenuous to argue Proposition 12 has had no impact.

Furthermore, Defendants present conflicting interpretations of why Proposition 12 was even enacted, and it is telling that not even Defendants can agree on whether Proposition 12 provides articulable health benefits for purposes of *Pike* balancing. California now seems to

concede that there is no health benefit to Proposition 12, and instead argues the local benefits are tied to Proposition 12's status as an animal welfare law—which, as described above, only regulates animals *outside* California's borders. Cal. Ans. Br. 28–31. But in contrast, Intervenors bear down on the argument that Proposition 12 is a health food safety law. Intervenor Ans. Br. 32–34.

Yet, the most telling fact to demonstrate that Proposition 12's conflicting purposes for the law are false, is that Proposition 12 on its face and in implementation *does not regulate a single piece of pork from a single pig entering* California. It only regulates breeding pigs, which remain out-of-state or, if sold in California, are excluded under the definition of whole pork meat. Cal. Health & Safety Code § 25991(u). This alone demonstrates the stated purposes are incomparable to the unconstitutional regulation of out-of-state activity.

For one, the argument that Proposition 12 provides *any* health and safety benefits directly conflicts with the allegations in the complaint and the evidence IPPA submitted as part of the preliminary injunction motion, and thus the issue was inappropriate to resolve at the motion to dismiss stage. 4-ER-508–09. But even the argument that Proposition 12

provides benefits to animals is itself contradicted by the evidence and allegations submitted by IPPA. 4-ER-518–19; 4-ER-474–503. In reality, there is *no scientific evidence* it advances any welfare benefit. Indeed, IPPA submitted evidence that the sow housing requirements are actually *harming* the breeding sows the law purportedly protected. 4-ER-474–503. This raises the question of what real benefit does Proposition 12 advance. This Court should be concerned of the actual harm Proposition 12 will inflict on animals outside of California's borders (with no corresponding food safety benefit). To be clear, if California wants to impute its *moral preferences* on California farmers, that can be done without violating the Constitution. But extending moral preferences beyond California's borders to primarily regulate animals outside of California, under the guise of "only regulating sales in California," violates the foundational principles of the dormant Commerce Clause and imposes a substantial burden on interstate commerce.

In sum, the district court erred in summarily relying on the 9th Circuit *NPPC* opinion without even considering the additional facts that IPPA had alleged, including that Proposition 12 requires a complete national re-write of the pork industry supply chain, with a material

negative impact on national interstate commerce and the national food supply. This case is about more than a simple "preferred, more profitable method of operating in a retail market" space. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154 (9th Cir. 2012). This case is about a "California knows best" nationwide policymaking when such an impact will hardly be felt on its own pork producers. While Proposition 12 does not expressly require all fifty states to comply in black-and-white language, IPPA has alleged that is effectively what California has done. *See* 4-ER-508 (alleging that California "has attempted to create a national regulation on breeding pig housing through the passage of Proposition 12.") "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows." *Cummings v. Missouri*, 71 U.S. 277, 325 (1866). And what California cannot do is pass a nationwide standard of how to raise pigs, especially when California has only 1% of the Nation's pork producers. Consequently, IPPA requests that this Court enjoin Proposition 12, or at the very least, hold that IPPA had adequately plead a violation of the dormant Commerce Clause.

III. Due Process

Defendants' briefs fail to address the crux of the due process problem: in light of the reality that pork passing through a national supply chain is imported into California daily, "knowingly engage in a sale" could mean anyone up and down the supply chain who participate at any level in the supply chain. California defines "engaging in" as "to do or take part in," and "knowingly"[12] as "typically mean[ing] that the party has a knowledge that the facts exist which bring out the act or omission within a prohibition's scope." Cal. Ans. Br. 32. Piecing these together, California presents the following description of the sales prohibition: "to take part in a sale of a prohibited product knowing that physical possession of the item will be taken in California." Cal. Ans. Br. 33.[13]

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[12] IPPA did not waive any argument as to the "knowingly" element as Intervenors assert. The fact that "knowingly" may apply to anyone within the supply chain was a central part of IPPA's argument. *See* FER-26 ("Many producers know their pork is going to processors and packers who will sell it to California. Thus, the Attorney General's Office, but also any district attorney, may criminally indict anyone "engaged in the sale," which can apply to Plaintiff.")

[13] The pieced-together explanation of "engaging in the sale" by California differs from Intervenors' interpretation, which refers to "direct sales of a covered product within California to a buyer who takes physical possession of the product there." Intervenor Ans. Br. 41. These differing

This definition leaves California in the same place it started. Without IPPA members raising pigs out of state, sale of their pork would not occur within California, and thus California state prosecutors—and private parties—can claim that IPPA members have *engaged in* or "taken part in" the sale of the prohibited product within California. Furthermore, they can claim they have done so knowingly, because IPPA's members know that California is the largest buyer of pork in the country, and that the product from their animals is sold in California. 4-ER-508; 2-ER-109.

Defendants argue that because the sale must occur *within* California, this provides clarity as to the scope of Proposition 12. For one, the limiting phrase—"within California"—applies to the "sales" only, not the "engagement" in the sale.[14] Regardless, if that is what Proposition 12

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interpretations raise the question of how the pork industry participants are to interpret the phrase.

[14] Intervenors colorfully argue that in citing the CHCC order, IPPA "selectively carved up" a "deceptive misquotation of dicta from an unrelated state trial court[.]" Intervenor Ans. Br. 42–43 n.28. IPPA will let the order speak for itself, and Defendants have not provided any explanation for the ambiguity therein as detailed in its opening brief. Op. Br. 47 n.11.

meant, California would have chosen to simply prohibit the *sale* of whole pork meat within California. There would be less of a due process problem if the prohibition used a phrase such as "shall not knowingly *sell*" the prohibited products—but this is not what it says. Instead, it has banned the "engagement" in the sale, which is purposefully *broader* than merely *selling* the product[15]; arguments to the contrary would have the court ignore "engage" out of the statute.

While California cites to several unrelated statutes that contain the phrase "engage in," they cite no opination where a court actually *analyzed* the meaning of the phrase. Cal. Ans. Br. 35 n.13. But some courts have specifically held that the phrase *is* vague in violation of due process principles. *See e.g., Bodfish v. State,* No. A-10070, 2009 WL 3233716, at *5 (Alaska Ct. App. Oct. 7, 2009)("the meaning of the phrase 'engage in an intimate relationship' is unclear . . . . [I]t does not adequately inform . . . what conduct is prohibited."); *Pfizer Inc. v. Ajix, Inc.*, No. 3-03-cv-754 (JCH), 2005 U.S. Dist. LEXIS 15984, *12 (D. Conn.

[15] Additionally, California wholly fails to address Proposition 12's due process infirmities as it relates to aiding and abetting or conspiracy charges. *See* Cal. Penal Code Ann. §§ 27(a)(1), 182, & 184; *see also* Op. Br. 49 n.13, 51 n.14.

July 29, 2005)("The word 'engage' has many meanings."); *Sola Commc'ns, Inc. v. Bailey*, 861 So. 2d 822, 829 (La. Ct. App. 2003)(Ezell, J., concurring)("the word 'engage' has many definitions."). Especially given the interconnectedness of the pork market, "engaged in" is too vague to withstand due process scrutiny.

Last, and with no cited authority, California asserts that 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." Cal. Ans. Br. 35. California fails to explain how this is a commonly understood concept; worse, the assertion is simply erroneous. California's own laws impose civil liability on those in the chain of distribution of a defective product. *See e.g., O'Neil v. Crane Co.*, 266 P.3d 987, 995 (Cal. 2012)("Regardless of a defendant's position in the chain of distribution, the basis for his liability remains")(quotations omitted). It also openly conflicts with Proposition 12's own regulations, which state that "any out-of-state person engaged in a commercial sale *into or* within the state as a pork distributor, shall hold a valid registration." Cal. Code Regs. tit. 3, § 1322.2 (emphasis added). If California did not intend to

capture the entire pork supply chain in its "engaged in" language, then why require certifications and an audit trail of compliance tracing all the way back to the producer who ultimately supplied the pigs imported into California? *See* Cal. Code Regs. tit. 3, § 1322.8 ("any written certification from a supplier to a buyer engaged in commercial sales of whole pork meat that was not derived from a breeding pig, or offspring of a breeding pig, confined in a cruel manner . . . *shall be traceable to pork producers compliant with all requirements of section 1322.1 of this Article*." (emphasis added)). California's phrasing, by describing the sales prohibition as an "in-state sales restriction," would have this Court rewrite the plain text of Proposition 12. This Court should enjoin Proposition 12; or at the very least, reverse the district court's dismissal of its Due Process challenge.[16]

[16] Intervenors also fault IPPA for arguing it is of little import whether the due process challenge is styled as a facial or as-applied challenge, apparently arguing that IPPA is somehow trying to circumvent the requisite pleading standard for a due process claim. Intervenor Ans. Br. 39–40. It is unclear what Intervenors hope to accomplish with this argument, given that IPPA's complaint alleges its due process claim alleges both "facial and as applied" challenges. 4-ER-526–30. Intervenors' argument is also legally incorrect, as "classifying a lawsuit as facial or as-applied . . . does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019); *see also Mi Familia Vota v. Hobbs*, 608 F.

IV. Privileges and Immunities Clause

IPPA is not a corporation and has specifically alleged since the beginning of this lawsuit that it has brought all claims in a "representative capacity" on behalf of its members, who consist of "overwhelmingly individual producers." 4-ER-505, 509–10; *see also* 2-ER-107. This is sufficient to give it standing. *See Util. Contractors Ass'n of New England, Inc. v. City of Worcester*, 236 F. Supp. 2d 113, 117 n.1 (D. Mass. 2002); *NAMI*, 420 F. Supp. 3d at 1022 ("The Court finds that the allegations in [the] complaint satisfy the test for representational standing" as it "alleges that its members 'own and raise hogs and veal calves in various states across the country'").[17]

And regarding the discrimination element, IPPA adequately plead that Proposition 12 carries discriminatory impact as stated above. And

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Supp. 3d 827, 839 (D. Ariz. 2022)("The State is not entitled to dismissal based on its arguments related to facial versus as-applied challenges."). And it is frankly incorrect that IPPA has not alleged its members' difficulties in facing compliance with Proposition 12. *See, e.g.*, 4-ER-507–509; 2-ER-106–110; *see also* 2-ER-109 ("The vast majority of IPPA's members are currently not in compliance with either the Turn Around Requirements or the Square Footage Requirements of Proposition 12.").

[17] Below, IPPA contends the district court did not premise its orders on the lack of standing, as it reasoned that IPPA "may have associational standing" and instead dismissed the claim on the merits. 1-ER-42.

this applies for IPPA's Privileges and Immunities Clause claim, as it directly affects the ability of IPPA's members to pursue their livelihood as pork producers. 4-ER-509 ("Proposition 12 will unconstitutionally and irreparably risk and injure [their] livelihoods, liberty and their property."); *see also* 2-ER-110 ("Many of IPPA's individual producer members face imminent harm in being forced out of the marketplace if they can neither afford the cost to retrofit or build new confinement facilities nor maintain any level of profit by virtue of being forced to substantially decrease their breeding sow herd size."); *see also* 2-ER-110 (stating that as a result of Proposition 12, its members would an impossible choice by the end of 2021 to cull breeding pigs early to ensure that the immediate offspring that already exists in 2021 can be sold into California). Due to this impact on IPPA's members as a direct result of out-of-state legislation, it has adequately stated a Privileges and Immunities Clause claim.

V. Preemption under the Packers and Stockyards Act

California argues in response to IPPA's Packers and Stockyards Act ("PSA") preemption argument that IPPA failed to allege there is "something unique about being located outside of California that renders

a pork producer unable to comply" with Proposition 12. Cal. Ans. Br. 41. Response Br. 41. Somehow, California has misunderstood the practical effect of Proposition 2, which subjected in-state producers to the turnaround requirements well before Proposition 12 subjected out-of-state producers to the same. As a result, the reality is that producers who are already halfway compliant with Proposition 12 are *uniquely* in-state producers by operation of Proposition 2. And California says the quiet part out loud: this will necessarily "lead packers and wholesalers to prefer to buy from producers who are compliant with" Proposition 12. Cal. Ans. Br. 41.

And just because some out-of-state producers have found it possible to comply with Proposition 12 on a truncated timeline (relative to in-state producers) does not mean that Proposition 12 still does not pose an *obstacle* to the PSA's requirements of uniform treatment among producers. Relatedly, California argues that IPPA does not specifically allege that the only producers who are or could be compliant are located in California. But IPPA has alleged precisely that: Proposition 12 afforded California producers more time to comply with the space requirements, while out-of-state producers have received far less time.

This has afforded California producers—and only California producers—sufficient time to implement Proposition 12's requirements to their business practices, and the extra time has made such practices more economically feasible. 4-ER-535–36. At least until full compliance is met with Proposition 12, IPPA has plausibly alleged that packers and wholesalers must necessarily favor in-state producers to comply with the PSA.

VI. Other Injunctive Factors

As for the other injunctive factors, Defendants' arguments fare no better. Defendants assert IPPA should be denied a preliminary injunction due to its delay in filing this litigation, but part of the alleged "delay" resulted from California abject failure to timely enact regulations for Proposition 12. *See, e.g.*, FER-46 at ¶ 9 ("The timing of the filing of this lawsuit—initially in California state court—was not due to the lack of diligence by IPPA or due to any other purpose for delay. Rather, it was necessary following the inability to conclude a reasonable stipulation with California after weeks of attempting to reach an agreement that would bridge the gap between California's vague law and its tardy regulations[.]"). And this delay was not insignificant. Regulations for

Proposition 12 were to be enacted by September 1, 2019; by the time this litigation was filed on November 9, 2021, California had still not enacted final regulations for Proposition 12. Cal. Health & Safety Code § 25993; *see also* FER-5. IPPA should not be faulted for waiting to see Proposition 12's implementing regulations to help clarify its reach and scope of before going to the trouble and expense of challenging it.

California admits that loss of constitutional rights constitutes irreparable harm, Cal. Ans. Br. 47, and IPPA's members stand to suffer irreparable harm due to the inability to capture monetary damages from government officials, an argument that Defendants have not materially responded to. *See* Op. Br. 55 (citing cases holding that irreparable harm may be shown when lost revenue is unrecoverable due to sovereign immunity). Nor have they materially responded to IPPA's argument that its members face stiff civil and criminal penalties. In addition to these factors, IPPA has also set forth above how Proposition 12 will hurt the national supply of pork in addition to the impact it will have on the economics of the interstate supply chain.

In sum, ordering a preliminary injunction will only maintain the status quo and ensure free flow of pork into California and across the

United States. While California may pass duly voted-for legislation to regulate the animals raised within California, it does not have the right to do is reach outside their borders to regulate other states and their raising practices. Consequently, this Court should preliminarily enjoin enforcement of Proposition 12 during the pendency of this lawsuit.

CONCLUSION

For the reasons stated in IPPA's opening brief, and above in reply, this Court should (1) reverse the district court's denial of IPPA's motion for preliminary injunction, (2) and at the very least, reverse the district court's dismissal of IPPA's case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Cir. R. 32-1 because this brief contains 6,830 words.

2. This brief complies with the typeface and type style requirements of FED. R. APP. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Century Schoolbook font.

/s/Michael T. Raupp

CERTIFICATE OF SERVICE

I certify that on September 12, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael T. Raupp