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 Health

12 IN THE UNITED STATES DISTRICT COURT  
 13 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 14  
 15  
 16

17 **IOWA PORK PRODUCERS**  
**ASSOCIATION,**

18 Plaintiff,

19 v.

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

25 Defendants.  
 26  
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 28

2:21-cv-09940-CAS-AFM

**MEMORANDUM OF POINTS**  
**AND AUTHORITIES IN SUPPORT**  
**OF DEFENDANTS' MOTION TO**  
**DISMISS FIRST AMENDED**  
**COMPLAINT**

[Fed. R. Civ. P. 12(b)(6)]

Date: February 7, 2022  
 Time: 10:00 a.m.  
 Courtroom: 8D  
 Judge: Hon. Christina A. Snyder  
 Trial Date: None  
 Action Filed: November 9, 2021

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CDFa May 28, 2021 Notice of Proposed Action,  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

1  
2  
3 In November 2018, California voters approved Proposition 12 “to prevent  
4 animal cruelty by phasing out extreme methods of farm animal confinement, which  
5 also threaten the health and safety of California consumers, and increase the risk of  
6 foodborne illness and associated negative fiscal impacts on the State of California.”  
7 Prop. 12, § 2, as approved by voters, Gen. Elec. (Nov. 6, 2018). This initiative  
8 statute requires California farmers to house veal calves, breeding pigs, and egg-  
9 laying hens in confinement systems that comply with specific standards for  
10 freedom of movement, enclosure design, and minimum floorspace. It also prohibits  
11 the sale in California of meat from an animal that is not housed in compliance with  
12 these standards.

13 Plaintiff Iowa Pork Producers Association, a trade association, challenges the  
14 constitutionality of Proposition 12 on five separate grounds, seeks declaratory  
15 relief, and further seeks to enjoin Defendants<sup>1</sup> from enforcing the measure. As  
16 outlined below, each claim suffers from numerous defects that require dismissal of  
17 the First Amended Complaint (FAC).

18 First, Plaintiff cannot establish that Proposition 12 violates due process. The  
19 challenged law clearly defines what conduct is prohibited, and Plaintiff cannot  
20 plausibly state a claim that the law is unconstitutionally vague, on its face or as  
21 applied. Additionally, because the initiative’s text is clear, the lack of final  
22 implementing regulations addressing administrative details does not invalidate the  
23 measure on due process grounds.

24 Second, Plaintiff’s Privileges and Immunities Clause claim fails because the  
25 clause applies only to natural persons, not legal entities such as Plaintiff.

26  
27 <sup>1</sup> Defendants are California Attorney General Rob Bonta, Department of  
28 Food and Agriculture Secretary Karen Ross, and Department of Public Health  
Director Dr. Tomás J. Aragón, sued in their official capacities.

1 Moreover, Plaintiff cannot plausibly allege that Proposition 12 treats nonresidents  
2 differently from residents. To the contrary, the measure’s standards for animal  
3 confinement apply equally to all whole pork meat sold within California, whether  
4 produced within or outside of the State.

5 Third, Plaintiff’s preemption claim fails. The federal Packers and Stockyards  
6 Act upon which Plaintiff relies is concerned with unfair, discriminatory, or  
7 deceptive practices. Plaintiff misapprehends the Act’s purpose and scope, and does  
8 not plausibly allege that it is impossible to comply with both Proposition 12 and the  
9 Act, or that Proposition 12 stands as an obstacle to the accomplishment and  
10 execution of the Act’s purposes and objectives.

11 Fourth, Plaintiff’s dormant Commerce Clause claim fails because Plaintiff does  
12 not and cannot plausibly allege that Proposition 12 is discriminatory, that it  
13 regulates extraterritorially, or that it substantially burdens interstate commerce.  
14 Indeed, the Ninth Circuit recently rejected a similar challenge brought by Plaintiff’s  
15 umbrella organization. *See Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021  
16 (9th Cir. 2021), *petition for cert. filed*, Case No. 21-468 (U.S. Sept. 27, 2021).

17 Finally, because Plaintiff has failed to plead any viable underlying claim, its  
18 claim for declaratory relief necessarily fails. Thus, Plaintiff’s amended complaint  
19 should be dismissed, without leave to amend.

## 20 BACKGROUND

### 21 I. RELEVANT CALIFORNIA LEGISLATION PRECEDING PROPOSITION 12

#### 22 A. Proposition 2

23 In the November 2008 election, California voters enacted Proposition 2, the  
24 Prevention of Farm Animal Cruelty Act, “to prohibit the cruel confinement of farm  
25 animals in a manner that does not allow them to turn around freely, lie down, stand  
26 up, and fully extend their limbs.” Prop. 2, § 2, as approved by voters, Gen. Elec.

27  
28

1 (Nov. 4, 2008) (adding Cal. Health and Safety Code §§ 25990-25994, effective Jan.  
 2 1, 2015).<sup>2</sup> Proposition 2 prohibits California farmers from “tether[ing] or  
 3 confin[ing]” pregnant pigs, calves raised for veal, or egg-laying hens “on a farm,  
 4 for all or the majority of any day, in a manner that prevents such animal from: (a)  
 5 Lying down, standing up, and fully extending his or her limbs; and (b) Turning  
 6 around freely.” §§ 25990, 25991(b).

7 **B. Assembly Bill 1437**

8 In 2010, the California Legislature enacted Assembly Bill No. 1437 (AB  
 9 1437), adding sections 25995 through 25997.1. Cal. Stats. 2010, c. 51, § 1.  
 10 Beginning on January 1, 2015, AB 1437 prohibited the sale in California of eggs  
 11 produced by egg-laying hens that were not confined in compliance with Proposition  
 12 2’s animal care standards. § 25996. Among the findings cited in support of this  
 13 law is a Pew Commission on Industrial Farm Production report concluding that  
 14 “food animals that are treated well and provided with at least minimum  
 15 accommodation of their natural behaviors and physical needs are healthier and safer  
 16 for human consumption.” § 25995(a). A challenge to AB 1437 brought by six  
 17 states under the dormant Commerce Clause was dismissed for lack of standing.  
 18 *Missouri ex. rel. Koster v. Harris*, 847 F.3d 646, 650 (9th Cir. 2017). A larger  
 19 group of states unsuccessfully sought to initiate an original jurisdiction action  
 20 against California in the Supreme Court. *Missouri v. California*, 2019 WL 113057,  
 21 139 S. Ct. 859, 859 (2019) (mem.).

22 **II. PROPOSITION 12**

23 In the November 2018 election, California voters enacted Proposition 12.  
 24 Prop. 12, as approved by voters, Gen. Elec. (Nov. 6, 2018) (amending §§ 25990-  
 25 25993 and adding § 25993.1). Proposition 12 prohibits “[a] farm owner or operator  
 26 within the state” from confining any calf raised for veal, breeding pig, or egg-laying

27 \_\_\_\_\_  
 28 <sup>2</sup> All statutory references are to the California Health and Safety Code, unless otherwise noted.

1 hen who is kept on a farm in a “cruel manner”—specifically, as relevant here,  
2 (1) confining covered animals “in a manner that prevents the animal from lying  
3 down, standing up, fully extending the animal’s limbs, or turning around freely”  
4 (Turn Around Requirements) and (2) after December 31, 2021, confining a  
5 breeding pig with less than 24 square feet of usable floorspace (Square Footage  
6 Requirements). §§ 25990(a); 25991(e)(1), (e)(3).<sup>3</sup> Proposition 12 also prohibits the  
7 sale in California of “[w]hole pork meat that the business owner or operator knows  
8 or should know is the meat of a covered animal who was confined in a cruel  
9 manner, or is the meat of immediate offspring of a covered animal who was  
10 confined in a cruel manner.” § 25990(b)(2).<sup>4</sup> Violators are subject to both criminal  
11 and civil penalties. § 25993(b).<sup>5</sup>

12 Proposition 12 provided that the California Department of Food and  
13 Agriculture (CDFA) and the California Department of Public Health (CDPH)  
14 should jointly promulgate rules and regulations for its implementation by  
15 September 1, 2019. § 25993. Regulations have been proposed and opened to  
16 public comment but have not yet been finalized.

---

20 <sup>3</sup> Section 25992 includes exceptions to these confinement requirements for  
21 medical research, veterinary care, transportation, exhibitions, slaughter, periods  
22 before a breeding pig is expected to give birth or when a breeding pig is nursing,  
and temporary periods for animal husbandry.

23 <sup>4</sup> Proposition 12 similarly prohibits the sale in California of whole veal meat,  
24 shell eggs, or liquid eggs that the business owner or operator knows or should know  
is the meat of (or product of, in the case of eggs) a covered animal that was  
confined in a cruel manner. § 25990(b)(1), (b)(3), (b)(4).

25 <sup>5</sup> Proposition 12 proscribes the “knowing[] engage[ment] in the sale within  
26 [California]” of whole pork meat from a breeding pig that has been confined in a  
27 cruel manner, or that is the immediate offspring of a breeding pig that has been so  
28 confined. § 25990(b)(2). That is the only prohibition that can form the basis for  
criminal liability for a pork producer. *See* § 25993. Violation is a misdemeanor.  
§ 25993(b).

1 **III. OTHER LAWSUITS CHALLENGING THE CONSTITUTIONALITY OF**  
2 **PROPOSITION 12**

3 Industry groups have challenged Proposition 12 on constitutional grounds in  
4 two additional lawsuits. In October 2019, the North American Meat Institute  
5 (NAMI), representing meat packers and processors who raise hogs and veal calves  
6 in states across the country, and who sell their pork and veal in California, filed suit  
7 in this Court challenging Proposition 12. Compl., *N. Am. Meat Inst. v. Becerra*,  
8 Case No. 2:19-cv-08569 (C.D. Cal. Oct. 4, 2019), ECF No. 1. NAMI alleged that  
9 Proposition 12 violates the dormant Commerce Clause by discriminating against its  
10 members who produce pork and veal outside of California, impermissibly  
11 regulating its members' business activities beyond California's borders, and  
12 substantially and unlawfully burdening its members' ability to engage in interstate  
13 commerce. *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1020 (C.D. Cal.  
14 2019). This Court denied plaintiff's motion for preliminary injunction, *see id.* at  
15 1035, and the Ninth Circuit affirmed. *See N. Am. Meat Inst. v. Becerra*, 825 F.  
16 App'x 518 (9th Cir. 2020), *cert. denied sub nom. N. Am. Meat Inst. v. Bonta*, 141 S.  
17 Ct. 2854 (2021). The court granted in part and denied in part the defendants'  
18 motion to dismiss, and that case is still pending. *N. Am. Meat Inst. v. Becerra*, Case  
19 No. 2:19-cv-08569, 2020 WL 919153, at \*1 (C.D. Cal. Feb. 24, 2020).

20 In December 2019, the American Farm Bureau Federation and the National  
21 Pork Producers Council, of which Plaintiff is a constituent entity, brought suit in  
22 the Southern District of California challenging Proposition 12. Compl., *Nat'l Pork*  
23 *Producers Council v. Ross*, Case No. 3:19-cv-02324 (S.D. Cal. Dec. 5, 2019), ECF  
24 No. 1. Plaintiffs in that case similarly alleged that Proposition 12 violates the  
25 Commerce Clause of the U.S. Constitution because it reaches extraterritorially and  
26 imposes substantial burdens on interstate commerce, and they sought an injunction  
27 against the enforcement of Proposition 12's requirements concerning pork. *See*  
28 *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1204 (S.D. Cal.

1 2020). The Southern District granted defendants’ motion to dismiss, and the Ninth  
2 Circuit again affirmed. *Id.* at 1210, *aff’d*, 6 F.4th 1021 (9th Cir. 2021). Those  
3 plaintiffs filed a petition for writ of certiorari in the U.S. Supreme Court, which is  
4 currently pending. *Nat’l Pork Producers Council v. Ross*, Case No. 21-468 (Sept.  
5 29, 2021).

#### 6 **IV. PLAINTIFF’S PREVIOUS LAWSUIT AND THE INSTANT ACTION**

7 In May 2021, Plaintiff filed suit in Iowa state court, raising the same claims it  
8 raises in this action and seeking to enjoin enforcement of Proposition 12. *Iowa*  
9 *Pork Producers Ass’n, et al. v. Bonta*, Case No. 3:21-cv-3018 (N.D. Iowa), ECF  
10 No. 1-4. Defendants removed the action to the Northern District of Iowa, the  
11 district within which the state court action was filed. *Id.*, ECF No. 1. In August,  
12 the district court dismissed the action for lack of personal jurisdiction. *Iowa Pork*  
13 *Producers Ass’n v. Bonta*, Case No. 3:21-cv-3018, 2021 WL 4465968, at \*13 (N.D.  
14 Iowa Aug. 23, 2021). Over ten weeks later, on November 9, Plaintiff filed this case  
15 in Fresno County Superior Court. ECF No. 1. As in Iowa, Plaintiff raised only  
16 federal claims. Defendants again promptly removed the case. On December 16,  
17 Plaintiff filed a First Amended Complaint. ECF No. 23. On December 27, the case  
18 was transferred from the Eastern District to this Court, at Plaintiff’s request. ECF  
19 No. 28.

#### 20 **LEGAL STANDARD**

21 A motion to dismiss may be brought to challenge the sufficiency of the  
22 allegations in the complaint. Fed. R. Civ. P. 12(b)(6). The complaint must allege  
23 facts establishing “a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*  
24 *Twombly*, 550 U.S. 544, 570 (2007). The court must accept the factual allegations  
25 as true, and construe them in the light most favorable to the plaintiff. *Corrie v.*  
26 *Caterpillar*, 503 F.3d 974, 977 (9th Cir. 2007). The court is not, however, required  
27 to assume the truth of legal conclusions merely because they are cast in the form of  
28 factual allegations (*Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009)),

1 “allegations that contradict matters properly subject to judicial notice or by  
2 exhibit[,]” or allegations that are “merely conclusory, unwarranted deductions of  
3 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049,  
4 1055 (9th Cir. 2008). Leave to amend need not be granted if “it is clear that the  
5 complaint could not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon*  
6 *Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

## 7 ARGUMENT

### 8 I. PLAINTIFF CANNOT STATE A VIABLE DUE PROCESS CLAUSE CLAIM

9 Plaintiff asserts two due process challenges to Proposition 12. In its first  
10 claim, Plaintiff alleges that Proposition 12 is unconstitutionally vague both on its  
11 face and “as applied to Plaintiff’s members’ specific conduct in pig production.”  
12 FAC ¶¶ 127, 128. In its second claim, Plaintiff contends that the delay in  
13 promulgation of implementing regulations constitutes a Due Process violation.  
14 ¶¶ 156–167. Neither states a claim upon which relief may be granted.

#### 15 A. Plaintiff’s Unconstitutional Vagueness Allegations Fail Because 16 the Statute Is Clear and Specific

17 Plaintiff’s first cause of action asserts that Proposition 12 is unconstitutionally  
18 vague within the meaning of the Due Process Clause of the Fourteenth Amendment  
19 because it “does not define the conduct it prohibits with sufficient definiteness[,]”  
20 does not establish minimum guidelines to govern law enforcement[,]” and “fails to  
21 define the material words and terminology in the statute so that Plaintiff’s members  
22 and the pork industry can comply with the legal requirements and not inadvertently  
23 violate the law.” FAC ¶¶ 129, 130. Despite such broad assertions, Plaintiff never  
24 explains how or under what circumstances the statute is vague. Its constitutional  
25 claim—whether facial or “as applied”—therefore fails.

26 To satisfy due process, a penal statute must define the criminal offense to (1)  
27 “provide a person of ordinary intelligence fair notice of what is prohibited” and (2)  
28 not be “so standardless that it authorizes or encourages seriously discriminatory

1 enforcement.” *United States v. Williams*, 553 U.S. 295, 304 (2008). In the context  
2 of a facial challenge on constitutional vagueness grounds, a plaintiff confronts a  
3 “heavy burden” in asserting its claim. *Nat’l Endowment for the Arts v. Finley*, 524  
4 U.S. 569, 580 (1998) (“[f]acial invalidation ‘is, manifestly, strong medicine’ that  
5 ‘has been employed by the Court sparingly and only as a last resort’”) (internal  
6 citations omitted).

7 Plaintiff does not meet its heavy burden.

### 8 **1. The Facial Challenge Fails**

9 Plaintiff’s facial vagueness challenge fails because Proposition 12, by its own  
10 plain text, gives fair notice of what is required and, as such, its standards do not  
11 permit enforcement officials to discriminate. Plaintiff’s four threadbare allegations  
12 of vagueness are addressed below:

13 *First*, Plaintiff asserts that section 25990(b) is unconstitutionally vague  
14 because it “does not define what it means for an individual to be ‘engaged in’ a sale  
15 within the State of California” and out-of-state producers therefore could be subject  
16 to prosecution. FAC ¶ 47.

17 Plaintiff’s concern is misplaced because the statute makes clear, in at least two  
18 ways, that a Plaintiff’s members selling in Iowa are not in danger of prosecution for  
19 “engag[ing] in” a sale. First, by the statute’s plain terms, a violation could only  
20 occur if a member were to “engage in the sale within the state [of California].”  
21 § 25990(b). Second, the statute clarifies, “For purposes of this section, a sale shall  
22 be deemed to occur at the location where the buyer takes physical possession of an  
23 item covered by Section 25990.” § 25991(o). There is nothing ambiguous about  
24 any of this: An out-of-state producer is subject to Proposition 12 only if it sells to a  
25 buyer who takes physical possession of a covered item in California. Accordingly,  
26 there is no threat to Plaintiff’s members of criminal enforcement of the statute  
27  
28

1 under any likely scenario, and the term “engaging in the sale in the state” is not  
2 vague.<sup>6</sup>

3 *Second*, Plaintiff contends that “Proposition 12 does not define what it means  
4 for facilities to comply with one or either of the two [animal confinement]  
5 requirements.” FAC ¶ 47. Plaintiff alleges that it is unclear whether its “members’  
6 specific conduct in pig production” and its “members[’] specific actions” render  
7 them subject to prosecution, but gives no indication of their specific conduct or how  
8 the statute is unclear, other than to incorrectly allege that the statute “fails to define  
9 the material words.” FAC ¶ 130.

10 Contrary to Plaintiff’s allegations, the terms of the animal confinement  
11 requirements are clearly defined. Regarding the prohibition on “confining a  
12 covered animal in a manner that prevents the animal from lying down, standing up,  
13 fully extending the animal’s limbs, or turning around freely” (§ 25991(e)(1))—the  
14 statute provides:

- 15 • “Fully extending the animal’s limbs” means “fully extending all limbs  
16 without touching the side of an enclosure, or another animal” (§ 25991(k))  
17 where “enclosure” means “a structure used to confine a covered animal or  
18 animals” (§ 25991(h)); and
- 19 • “Turning around freely” means “turning in a complete circle without any  
20 impediment, including a tether, and without touching the side of an  
21 enclosure or another animal.” § 25991(q).

---

22  
23 <sup>6</sup> Plaintiff further contends that, by selling its product in Iowa to a processor  
24 or packer, *see* FAC ¶¶ 27, 110, who then resells it in California, a member could be  
25 liable for aiding, abetting, or conspiring to violate section 25990(b). FAC ¶¶ 16,  
26 44. This fear is not reason to invalidate a statute on a Due Process facial challenge.  
27 Moreover, it is unfounded. Under California law, a person may be liable for aiding  
28 and abetting only if they “have advised and encouraged” the commission of a  
criminal offense. Cal. Penal Code, § 31. If Plaintiff’s members have no such  
criminal intent and provide no certification of compliance with Proposition 12, they  
face no liability.

1           Regarding the prohibition on “confining a breeding pig with less than 24  
2 square feet of usable floorspace per pig” (§ 25991(e)(3))—the statute provides:

- 3           • “Usable floorspace” means “the total square footage of floorspace provided  
4 to each covered animal, as calculated by dividing the total square footage  
5 of floorspace provided to the animals in an enclosure by the number of  
6 animals in that enclosure” (§ 25991(s)).

7           Plaintiff does not explain how these straightforward and well-defined  
8 standards—which go so far as to provide how to calculate square footage of  
9 floorspace—are unclear to the ordinary person. *Cf. United States v. Osinger*, 753  
10 F.3d 939 (9th Cir. 2014) (holding, where First Amendment implicated, “harass”  
11 and “substantial emotional distress” in stalking not unconstitutionally vague  
12 because they were “not esoteric or complicated terms devoid of common  
13 understanding”).<sup>7</sup> In fact, the FAC itself sets forth an accurate “interpretation” of  
14 the Square Footage Requirement (FAC ¶ 86)—which, due to the simplicity of the  
15 statutory term, is merely a restatement of the statute—and does not offer any  
16 competing “interpretation.” Indeed, Plaintiff appears to realize that removing pigs  
17 from an enclosure is one means of providing more square footage—which is simple  
18 mathematics—and it appears Plaintiff’s members may opt to do just that to  
19 continue serving customers who sell into the California market. FAC ¶¶ 93, 121  
20 (noting possibility of reducing the number of pigs in stalls); ¶ 99 (noting need to  
21 transition stalls from 16 square feet to 24 square feet per pig). Thus, Plaintiff’s  
22 argument is directly contradicted by its own allegations and is insufficient to state a  
23 claim.

24           *Third*, Plaintiff contends that “Proposition 12 does not clearly define whether  
25 the requirements apply to the life of the breeding pig or whether moving a breeding

26           <sup>7</sup> And to the extent the statute regulates commercial conduct only, “it is  
27 reviewed under a less stringent standard of specificity” than, for example, criminal  
28 laws or restrictions on speech. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 906  
(9th Cir. 2019).

1 pig to a new compliant facility will suffice for the production of compliant whole  
2 pork for sale into California.” FAC ¶ 48. Again, the statute is clear.

3 Proposition 12 clearly states that “the meat of a covered animal<sup>8</sup>...or...the  
4 meat of immediate offspring of a covered animal who was confined in a cruel  
5 manner” cannot be compliant. § 25990(b) (emphasis and footnote added). The text  
6 specifically refers to “immediate offspring,” making it clear that the confinement  
7 standard relates to a particular gestation, not the entire life of the breeding  
8 pig. Thus, “moving a breeding pig to a new compliant facility will suffice for the  
9 production of compliant whole pork for sale into California.” FAC ¶ 48. But the  
10 Court need not resolve any ambiguity on that score here. Many, if not most,  
11 statutes have some degree of ambiguity at the margins. *See Vill. of Hoffman*  
12 *Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 n. 21 (1982). That is  
13 not enough to give rise to void-for-vagueness concerns—and certainly not enough  
14 to justify facial invalidation. This argument thus also fails.

15 *Fourth*, Plaintiff contends that “Proposition 12 does not define what qualifies  
16 as specific violation of the Act,” asserting that “it remains vague as to whether a  
17 single violation is based on each sale, each pound or piece of meat, or each  
18 breeding pig.” FAC ¶ 49. But under the clear terms of the statute, a violation is  
19 based on each “sale”: “A business owner or operator shall not knowingly engage in  
20 the sale within the state....” § 25990(b). The statute contains no language  
21 indicating that a single sale can yield multiple violations based on the amount sold,  
22 nor does Plaintiff point to any. Here again, Proposition 12 plain language provides  
23 fair notice of the required behavior.

24 For the same reasons, the statute is also not so “standardless” as to encourage  
25 discriminatory enforcement. Nevertheless, Plaintiff contends that “Proposition 12

26 <sup>8</sup> “Covered animal” means “any...breeding pig...who is kept on a farm.”  
27 § 25991(f). “Breeding pig” means “any female pig of the porcine species kept for  
28 the purpose of commercial breeding who is six months or older or pregnant.”  
§ 25991(a).

1 allows for arbitrary, inconsistent, and discriminatory enforcement by Defendants,  
2 by other parties, and law enforcement authorities who are left to determine who and  
3 [sic] when they can prosecute the Act.” FAC ¶ 150. But even when there are  
4 actual ambiguities in a law—and here there are none—hypothetical and conjectural  
5 concerns are insufficient to support a pre-enforcement vagueness challenge. *See*  
6 *Vill. of Hoffman Estates*, 455 U.S. at 503, n. 21 (stating, in First Amendment  
7 context, theoretical possibility of enforcement “of no due process significance  
8 unless the possibility ripens into a prosecution”) (citation omitted). Plaintiff’s  
9 hypothetical fear that a district attorney will prosecute actions under Proposition 12  
10 in a discriminatory manner in Iowa is insufficient to state a claim.

11 Even if Plaintiff’s allegations of vagueness were specific and accurate,  
12 Plaintiff has not plausibly alleged that its members face any realistic danger of  
13 enforcement, militating against resort to the “strong medicine” of facial  
14 invalidation. In short, Plaintiff does not meet its heavy burden to allege facial  
15 vagueness.

## 16 2. The “As Applied” Challenge Fails

17 Plaintiff’s “as applied” challenge fails because there is no allegation the law  
18 has been applied to its members. Although Plaintiff alleges that the “vast majority”  
19 of its members are not in compliance with the statute (FAC ¶ 119), it provides no  
20 details of any particular member’s noncompliance, referencing only their “specific  
21 conduct in pig production.” FAC ¶ 128. This generalized allegation is insufficient  
22 to support an as-applied challenge. Plaintiff notes elsewhere that many of its  
23 members’ enclosures provide only 16 square feet per breeding pig rather than 24—  
24 but this does not raise any vagueness concerns. And because no pork producer is a  
25 party, there is no single particular application of the law for the Court’s  
26 consideration. Accordingly, the “as applied” challenge, like the facial challenge,  
27 should be dismissed.  
28

1           **B. The Lack of Regulations Does Not Render the Challenged**  
2           **Statutes Unconstitutional**

3           Plaintiff alleges that CDFA and CDPH’s failure to promulgate final  
4 regulations by the statutory deadline constitutes a violation of the Due Process  
5 Clause. FAC ¶¶ 156-167. Plaintiff is mistaken. Rather, as illustrated in *Robles v.*  
6 *Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), where a statute is sufficiently  
7 clear, a lack of implementing regulations does not invalidate the statute on due  
8 process grounds.

9           In *Robles*, the U.S. Department of Justice (DOJ) had issued an Advance  
10 Notice of Proposed Rulemaking to “explor[e] what regulatory guidance [DOJ] can  
11 propose to make clear to entities covered by the ADA (Americans with Disabilities  
12 Act) their obligations to make their Web sites accessible.” *Id.* at 903. Domino’s  
13 argued that applying the ADA to its website and mobile app violated its due process  
14 rights because the DOJ had not yet issued any regulations. *Id.* at 903, 907.

15           The Ninth Circuit held that the lack of regulations did not eliminate Domino’s  
16 statutory duty. *Robles*, 913 F.3d at 908. “[T]he Constitution only requires that  
17 Domino’s receive fair notice of its legal duties, not a blueprint for compliance with  
18 its statutory obligations.” *Id.* at 908. “Moreover, the possibility that an agency  
19 might issue technical standards in the future does not create a due process  
20 problem.” *Id.* at 909, citing *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d  
21 440, 445 (9th Cir. 1994). California law similarly recognizes that a statute  
22 prohibiting specified conduct is enforceable even where it directs state agencies to  
23 adopt regulations. *See, e.g., Fisher v. State Personnel Bd.*, 25 Cal. App. 5th 1  
24 (2018).

25           So too here. While Proposition 12 requires CDFA and CDPH to adopt  
26 regulations to implement it (§ 25993(a)), its substantive requirements are plain from  
27 the statute’s text and its enforcement provisions are self-executing. Proposition 12  
28 provides fair notice of what Plaintiff’s members must do to comply with the statute

1 and creates enforceable standards irrespective of the regulations being developed.  
2 While CDFA and CDPH are developing regulations to implement Proposition 12,  
3 such as certification and registration procedures that will help to streamline and  
4 validate compliance, implementation of these programs does not alter the Square  
5 Footage requirements. The statute’s enforcement provisions, which are described  
6 in section 25993(b), provide alleged violators with formal court trials that clearly  
7 comport with due process. The delay in promulgating administrative regulations  
8 thus does not amount to a due process violation.

9 **II. PLAINTIFF CANNOT STATE A VIABLE PRIVILEGES AND IMMUNITIES**  
10 **CLAUSE CLAIM**

11 Plaintiff next alleges that Proposition 12 violates the Privileges and  
12 Immunities Clause because: (1) Californians had more time to come into  
13 compliance with the Turn Around Requirements and thus the law “serves as a  
14 proxy for differential treatment and discriminates in practical effect against out-of-  
15 state producers” (FAC ¶¶ 180, 181); and (2) the law has a “facially discriminatory  
16 purpose in avoiding ‘negative fiscal impacts’ to the State of California” and “was  
17 designed to take away an economic advantage that out-of-state pork producers  
18 had[.]” *Id.* ¶¶ 182, 183. Plaintiff fails to state a viable cause of action.

19 The Privileges and Immunities Clause provides that “[t]he Citizens of each  
20 State shall be entitled to all Privileges and Immunities of Citizens in the several  
21 States.” U.S. Const. art. IV, § 2, cl. 1. The Clause applies to natural persons only,  
22 and not legal entities. *W. Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907) (“a  
23 corporation cannot be deemed a citizen within the meaning of the clause of the  
24 Constitution of the United States which protects the privileges and immunities of  
25 citizens of the United States against being abridged or impaired by the law of a  
26 state”); *see also, e.g., Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1059  
27 n. 7 (9th Cir. 1987) (“corporations are not ‘citizens’ for purposes of [the privileges  
28 and immunities] clause”) (citing *Hemphill v. Orloff*, 277 U.S. 537, 548–50 (1928));

1 *Spencer v. Lunada Bay Boys*, 806 F. App'x 564, 567 (9th Cir. 2020). Plaintiff is  
2 not a natural person and it has not alleged that any of its members are natural  
3 persons. Plaintiff therefore lacks standing to raise a claim under the Privileges and  
4 Immunities Clause.

5 But the claim would fail in any event. “The purpose of the Privilege and  
6 Immunities Clause is to prevent a state from discriminating against citizens of other  
7 states in favor of its own.” *Nat’l Ass’n for the Advancement of Multijurisdiction*  
8 *Prac. v. Berch (Berch)*, 773 F.3d 1037, 1046 (9th Cir. 2014). Yet, on its face, and  
9 in practical effect, everyone is treated the same under Proposition 12. Its standards  
10 for freedom of movement, enclosure design, and minimum floorspace for breeding  
11 pigs apply equally to all meat sold within California, whether produced within or  
12 outside of the State. § 25990(b). So, citizens of other states are on “the same  
13 footing” as citizens of California. *See McBurney v. Young*, 569 U.S. 221, 226  
14 (2013); *Berch*, 773 F.3d at 1046 (finding no violation of the Privileges and  
15 Immunities Clause where same bar admission requirements imposed on both in-  
16 state and out-of-state citizens).

17 Moreover, both in-state and out-of-state pork producers have been on notice of  
18 the proposition’s requirements for exactly the same amount of time, since the  
19 measure passed in November 2018. At this point, Plaintiff’s members have had  
20 over three years to come into compliance with Proposition 12. If Plaintiff’s  
21 members wish to continue selling pork in California, they need only follow the  
22 same rules as in-state pork producers. Thus, Plaintiff’s Privileges and Immunities  
23 Clause claim fails.

### 24 **III. PLAINTIFF CANNOT STATE A VIABLE PREEMPTION CLAIM**

25 Plaintiff next claims that Proposition 12 conflicts with the federal Packers and  
26 Stockyards Act, 7 U.S.C. §§ 181-229, and is therefore preempted under the  
27 Supremacy Clause, U.S. Const. art. VI, cl. 2. FAC ¶¶ 187–202. Specifically,  
28 Plaintiff cites 7 U.S.C. § 192(b), which, as explained by Plaintiff, “prohibits any

1 wholesaler of meat from providing any preference to a particular locality and from  
2 subjecting any particular locality to a ‘disadvantage’ in the sale of meat.” FAC  
3 ¶ 196.<sup>9</sup> Plaintiff alleges that Proposition 12 “requires wholesalers to favor in-state  
4 pork producers and to disadvantage out-of-state pork producers who have not had  
5 as much time to come into compliance with the Turn Around Requirements and  
6 now, the Square Footage Requirements.” FAC ¶ 197. This claim also fails, for  
7 several reasons.

8 First, as an initial matter, Plaintiffs’ preemption claim rests on the assertion  
9 that “it is impossible for a wholesaler to comply with both Proposition 12 and the  
10 Packers and Stockyards Act.” FAC ¶ 198. But neither Plaintiff nor its members  
11 are wholesalers. FAC ¶ 27 (“Plaintiff’s members produce the pork that their  
12 processors and packers sell directly into California.”). And Plaintiff does not allege  
13 that it is impossible for any of its members to comply with both Proposition 12 and  
14 the Packers and Stockyards Act. Plaintiff thus lacks standing to challenge  
15 Proposition 12 under the Supremacy Clause. *See, e.g., Bayaa v. United Airlines,*  
16 *Inc.*, 249 F. Supp. 2d 1198, 1204 (C.D. Cal. 2002) (“[B]ecause Plaintiff [] has failed  
17 to establish standing of its members ‘in their own right,’ [Plaintiff] cannot claim  
18 representational standing.”).

19 Second, on the merits too, Plaintiff cannot state a viable cause of action.  
20 “Conflict preemption arises when [1] compliance with both federal and state  
21 regulations is a physical impossibility, or [2] when state law stands as an obstacle to  
22 the accomplishment and execution of the full purposes and objectives of Congress.”  
23

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24 <sup>9</sup> That section of the Act reads: “It shall be unlawful for any packer or swine  
25 contractor with respect to livestock, meats, meat food products, or livestock  
26 products in unmanufactured form, or for any live poultry dealer with respect to live  
27 poultry, to: . . . (b) Make or give any undue or unreasonable preference or  
28 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).

1 *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (citing  
2 *Hillsborough Cty., Fla. v. Automated Med. Lab 'ys, Inc.*, 471 U.S. 707, 713) (1985)  
3 (internal quotation marks omitted). Plaintiff alleges both (1) that “it is impossible  
4 for a wholesaler to comply with both Proposition 12 and the Packers and  
5 Stockyards Act” because Proposition 12 “requires wholesalers to favor in-state pork  
6 producers” (FAC ¶¶ 197–198), and (2) that “Proposition 12 creates hurdles to  
7 comply with the Packers and Stockyards Act” because “[b]y refusing to sell meat  
8 from animals that were not confined in accordance with Proposition 12, wholesalers  
9 will be engaged in conduct that restrains trade based on the impacts on interstate  
10 commerce in the pork industry.” FAC ¶¶ 199–201.

11 Plaintiff’s first allegation that wholesalers are “required” to favor in-state pork  
12 producers over out-of-state pork producers is belied by the plain text of the law.  
13 Proposition 12 and its standards for freedom of movement, enclosure design, and  
14 minimum floorspace for breeding pigs apply equally to all meat sold within  
15 California, whether produced within or outside of the State. § 25990(b).  
16 Moreover, as outlined above, both in-state and out-of-state pork producers have had  
17 the same amount of time to comply with the measure. § 25991(e)(3). Even if  
18 Proposition 12 did force wholesalers to give a preference or advantage to in-state  
19 pork producers—which it does not—such preference would not be “undue or  
20 unreasonable,” as it would be borne out of compliance with a state law. *See* 7  
21 U.S.C. § 192(b).

22 Nor does Proposition 12 “stand[] as an obstacle to the accomplishment and  
23 execution of the full purposes and objectives” of the Act, *McClellan*, 776 F.3d at  
24 1039, as Plaintiff’s second allegation suggests. “The Packers and Stockyards  
25 Act . . . forbids [packers] to engage in unfair, discriminatory, or deceptive practices  
26 in such commerce, or to subject any person to unreasonable prejudice therein, or to  
27 do any of a number of acts to control prices or establish a monopoly in the  
28 business.” *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). Compliance with

1 Proposition 12 does not conflict with the Packers and Stockyards Act’s targeting of  
2 packers’ unfair and deceptive practices, dooming Plaintiff’s preemption claim.

3 Moreover, when evaluating whether federal law has preempted a state law, a  
4 court must “(1) look to the purpose of Congress as the ultimate touchstone, while  
5 also (2) starting with the assumption that the historic police powers of the States  
6 were not to be superseded unless that was the clear and manifest purpose of  
7 Congress.” *McClellan*, 776 F.3d at 1039 (citing *Wyeth v. Levine*, 555 U.S. 555, 565  
8 (2009)) (internal quotations omitted).

9 Here, that assumption is expressly buttressed by Congress’s statement that the  
10 Act does not “preclude a State from enforcing State law or regulations with respect  
11 to any packer not subject to this chapter or section 204 of this title.” 7 U.S.C.  
12 § 228c. Congress intended to preempt only state laws imposing requirements on  
13 the “bonding of packers or prompt payment.” *Id.*; see also *De Vries v. Sig*  
14 *Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (“Obviously Congress had  
15 no intention of regulating the entire business of the livestock and meat industry.”),  
16 *aff’d*, 199 F.2d 677 (8th Cir. 1952). And the presumption against preemption  
17 applies here, because animal welfare and the health and safety of citizens have long  
18 been recognized as part of the historic police power of the States. See *Ass’n des*  
19 *Éleveurs de Canards et d’Oies du Québec v. Becerra (Éleveurs II)*, 870 F.3d 1140,  
20 1146 (9th Cir. 2017). For this additional reason, Plaintiff’s preemption claim fails.

21 **IV. PLAINTIFF CANNOT STATE A VIABLE DORMANT COMMERCE CLAUSE**  
22 **CLAIM**

23 Plaintiff argues that Proposition 12 violates the Commerce Clause because:  
24 (1) it is discriminatory—facially, in purpose, and in practical effect; (2) it  
25 unlawfully regulates extraterritorial conduct; and (3) the burdens the law imposes  
26 on interstate commerce outweigh any local benefits. FAC ¶¶ 205–219. None of  
27 these arguments supports a cognizable dormant Commerce Clause claim.  
28

1 “There are two primary principles that mark the boundaries of a State’s  
2 authority to regulate interstate commerce. . . . First, state regulations may not  
3 discriminate against interstate commerce; and second, States may not impose undue  
4 burdens on interstate commerce.” *Nat’l Pork Producers Council v. Ross*, 6 F.4th at  
5 1026 (citing *South Dakota v. Wayfair, Inc.*, \_\_ U.S. \_\_, 138 S. Ct. 2080, 2090  
6 (2018)) (internal quotations and citations omitted). “State laws that regulate even-  
7 handedly to effectuate a legitimate local public interest will be upheld unless the  
8 burden imposed on such commerce is clearly excessive in relation to the putative  
9 local benefits[.]” *Id.* (citing *Wayfair*, 138 S. Ct. at 2091) (internal quotations  
10 omitted). In addition, “a state law may violate the dormant Commerce Clause when  
11 it has extraterritorial effects.” *Id.* (citing *Wayfair*, 138 S. Ct. at 2091). As the Ninth  
12 Circuit recently held, Proposition 12 does not violate dormant Commerce Clause  
13 principles in any of these ways. *Nat’l Pork Producers Council*, 6 F.4th at 1026–32;  
14 *N. Am. Meat Inst.*, 825 F. App’x at 519–20.

15 **A. Proposition 12 Does Not Discriminate Against Interstate**  
16 **Commerce**

17 Plaintiff asserts that Proposition 12 is discriminatory on its face and in its  
18 purpose and effect. FAC ¶¶ 205–213. “[T]he dormant Commerce Clause is driven  
19 by concern about economic protectionism—that is, regulatory measures designed to  
20 benefit in-state economic interests by burdening out-of-state competitors.” *Rocky*  
21 *Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (internal  
22 quotations and citation omitted). “For dormant Commerce Clause purposes,  
23 economic protectionism, or discrimination, simply means differential treatment of  
24 in-state and out-of-state economic interests that benefits the former and burdens the  
25 latter.” *Id.* (citing *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*,  
26 511 U.S. 93, 99 (1994)) (internal quotations omitted). “If a statute discriminates  
27 against out-of-state entities on its face, in its purpose, or in its practical effect, it is  
28 unconstitutional unless it serves a legitimate local purpose, and this purpose could

1 not be served as well by available nondiscriminatory means.” *Id.* at 1087–88  
2 (internal quotations and citation omitted).

3 Here, Plaintiff does not—and cannot—plausibly allege that Proposition 12 is  
4 discriminatory in any respect. On its face, Proposition 12 is neutral. The  
5 prohibition on the sale of whole pork meat from an animal confined in a cruel  
6 manner applies to any “business owner or operator” selling “within the state.”  
7 § 25990; *see also* § 25991. The law makes no distinction between in-state and out-  
8 of-state business owners or operators. “[A] statute that ‘treat[s] all private  
9 companies exactly the same’ does not discriminate against interstate commerce.”  
10 *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris (Eleveurs I)*, 729  
11 F.3d 937, 948 (9th Cir. 2013) (citing *United Haulers Ass’n, Inc. v. Oneida-*  
12 *Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007)); *see also N. Am.*  
13 *Meat Inst.*, 825 F. App’x at 519.

14 As for discriminatory purpose, Plaintiff inaccurately alleges that Proposition  
15 12 has “one singular stated purpose . . . to ‘avoid negative fiscal impacts to the State  
16 of California[.]’ FAC ¶ 211. In fact, the text of the measure actually states: “The  
17 purpose of this act is to prevent animal cruelty by phasing out extreme methods of  
18 farm animal confinement, which also threaten the health and safety of California  
19 consumers, and increase the risk of foodborne illness and associated negative fiscal  
20 impacts on the State of California.” Prop. 12, § 2, as approved by voters, Gen.  
21 Elec. (Nov. 6, 2018). There is nothing in the text of Proposition 12—or anywhere  
22 else, for that matter—that suggests that the measure was intended to address  
23 anything other than these stated purposes. *Id.*

24 Plaintiff next cites to language contained in a Notice of Proposed Action  
25 issued by CDFA in connection with its rulemaking that, under the heading  
26 “Determination of Anticipated Business Impact,” notes that “[i]n-state farms will  
27 find it more costly to compete with farms outside of the State when selling shell  
28 eggs, liquid eggs, whole veal meat, and whole pork meat to an out-of-state buyer

1 compared to farms located in states that do not have the same animal confinement  
2 standards as described in the Act.” FAC ¶ 210.<sup>10</sup> But this observation that, as a  
3 result of Proposition 12, California farmers will find it more costly to compete with  
4 out-of-state farms that are *not* subject to confinement standards when selling to *an*  
5 *out-of-state* buyer, does not evidence any discriminatory intent or purport to explain  
6 Proposition 12’s purpose.

7 Finally, Plaintiff does not plausibly allege that Proposition 12 has a  
8 discriminatory effect. Plaintiff alleges that Proposition 12 discriminates against  
9 out-of-state producers “in [p]ractical [e]ffect” because in-state pork producers had  
10 more time to come into compliance with the Turn Around Requirements—which  
11 they have been required to implement since 2015—than out-of-state producers.  
12 FAC ¶¶ 207–208. As Plaintiff essentially concedes, Proposition 12 merely applies  
13 the same standards to all product sales in California, regardless of where the pork  
14 was produced—nothing more. The Constitution does not require a state to give  
15 preferential treatment to out-of-state entities that choose to sell their products within  
16 that state, or to exempt those entities from the same neutral rules that apply to in-  
17 state sellers. Plaintiff has therefore failed to allege that Proposition 12  
18 discriminates against out-of-state entities.

19 **B. Proposition 12 Does Not Regulate Extraterritorially**

20 Plaintiff also alleges that Proposition 12 unlawfully regulates “extraterritorial  
21 conduct wholly outside of California by placing onerous certification, registration,  
22 and recordkeeping requirements on out-of-state producers” and by “requir[ing] out-  
23 of-state producers to open up their farms” for purposes of these certifications. FAC  
24 ¶¶ 214–215. That contention, however, is foreclosed by circuit precedent. As the  
25 Ninth Circuit recently held in connection with a challenge to this very statute,  
26

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27 <sup>10</sup> See also CDFA May 28, 2021 Notice of Proposed Action,  
28 [https://www.cdffa.ca.gov/ahfss/pdfs/regulations/AnimalConfinement1stNoticePropReg\\_05252021.pdf](https://www.cdffa.ca.gov/ahfss/pdfs/regulations/AnimalConfinement1stNoticePropReg_05252021.pdf) at 10 (last visited Dec. 29, 2021).

1 “[u]nder our precedent, state laws that regulate only conduct in the state, including  
2 the sale of products in the state, do not have impermissible extraterritorial effects.”  
3 *Nat’l Pork Producers Council*, 6 F.4th at 1029. “A state law may require out-of-  
4 state producers to meet burdensome requirements in order to sell their products in  
5 the state without violating the dormant Commerce Clause.” *Id.* (citing *Rocky*  
6 *Mountain Farmers Union v. Corey*, 913 F.3d 940, 952 (9th Cir. 2019) and *Eleveurs*  
7 *I*, 729 F.3d at 942). As to certification, registration, and recordkeeping  
8 requirements referenced by the complaint, those are requirements contained in  
9 *proposed* regulations. Because they are not yet final, no constitutional challenge to  
10 them is currently ripe. But even if a challenge were ripe, those requirements would  
11 not “violat[e] the dormant Commerce Clause.” *Nat’l Pork Producers Council*, 6  
12 F.4th at 1030 (recognizing that, under established dormant Commerce Clause  
13 precedent, “appropriate certificates may be exacted from out-of-state producers for  
14 in-state health and safety purposes”) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S.  
15 511, 524 (1935)). Thus, Proposition 12 does not unlawfully regulate  
16 extraterritorially.

17 **C. Proposition 12 Does Not Substantially Burden Interstate**  
18 **Commerce**

19 Finally, Plaintiff alleges that the burdens imposed on interstate commerce by  
20 Proposition 12 outweigh any local benefits. FAC ¶¶ 214–219. Specifically,  
21 Plaintiff alleges that Proposition 12 will have various effects on the pork industry,  
22 including “decreasing supply, forcing small pork producers out of the market,  
23 consolidating pork production into large producers, altering sales in all remaining  
24 states to conform to Proposition 12 confinement standards, altering packers’  
25 practices to conform to Proposition 12 confinement standards, and ultimately  
26 resulting in nationwide increases in the costs of pork meat that will be passed along  
27 to consumers nationwide.” *Id.* at ¶ 217.  
28

1 This claim, too, is foreclosed by Ninth Circuit precedent. “For dormant  
2 Commerce Clause purposes, laws that increase compliance costs, without more, do  
3 not constitute a significant burden on interstate commerce.” *Nat’l Pork Producers*  
4 *Council*, 6 F.4th at 1032. “Nor does a non-discriminatory regulation that precludes  
5 a preferred, more profitable method of operating in a retail market place a  
6 significant burden on interstate commerce.” *Id.* (citing *Nat’l Ass’n of Optometrists*  
7 *& Opticians v. Harris*, 682 F.3d 1144, 1154–55 (9th Cir. 2012), internal quotations  
8 omitted). “[E]ven a state law that imposes heavy burdens on some out-of-state  
9 sellers does not place an impermissible burden on interstate commerce.” *Id.*  
10 Moreover, higher costs to consumers do not qualify as a substantial burden on  
11 interstate commerce. *Id.* at 1033.<sup>11</sup>

12 Under Ninth Circuit precedent, “unless a state law facially discriminates  
13 against out-of-state activities, directly regulates transactions that are conducted  
14 entirely out of state, substantially impedes the flow of interstate commerce, or  
15 interferes with a national regime, a plaintiff’s complaint is unlikely to survive a  
16 motion to dismiss.” *Nat’l Pork Producers Council*, 6 F.4th at 1033. Because  
17 Proposition 12 does none of these things, Plaintiff’s Commerce Clause claim fails.

#### 18 **V. PLAINTIFF’S CLAIM FOR DECLARATORY RELIEF NECESSARILY FAILS**

19 Finally, Plaintiff’s sixth cause of action seeking declaratory relief necessarily  
20 fails because Plaintiff has failed to plead any viable underlying claim. *Davis v.*

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21  
22 <sup>11</sup> Because the complaint fails to plausibly allege that Proposition 12  
23 imposes a substantial burden on interstate commerce, this Court need not address  
24 the benefits of the challenged law. *Nat’l Pork Producers Council*, 6 F.4th at 1033  
25 (citing *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019)). In  
26 any case, Proposition 12’s stated purpose is “to prevent animal cruelty by phasing  
27 out extreme methods of farm animal confinement, which also threaten the health  
28 and safety of California consumers, and increase the risk of foodborne illness and  
associated negative fiscal impacts on the State of California.” Prop. 12, § 2, as  
approved by voters, Gen. Elec. (Nov. 6, 2018). And “[t]he Supreme Court has  
frequently admonished that courts should not second-guess the empirical judgments  
of lawmakers concerning the utility of legislation.” *Eleveurs I*, 729 F.3d at 953  
(internal quotations and citation omitted).

1 *Zimmerman*, Case No. 17-cv-01230-BAS-NLS, 2018 WL 1806101, at \*6 (S.D. Cal.  
2 Apr. 17, 2018) (listing cases).

3 **CONCLUSION**

4 Based on the foregoing, Plaintiff’s amended complaint should be dismissed in  
5 its entirety without leave to amend.

6  
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Respectfully submitted,

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