

No. 22-55336

IN THE
United States Court of Appeals for the Ninth Circuit

IOWA PORK PRODUCERS ASSOCIATION,

Plaintiff-Appellant-Petitioner,

v.

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

Defendant-Appellee-Respondent.

**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**

**PETITION FOR PANEL REHEARING
AND REHEARING *EN BANC***

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INTRODUCTION AND RULE 35 STATEMENT

The panel decision here collides with this Court’s own precedent—and the precedent of many federal circuits—about how to interpret fractured Supreme Court decisions. Even setting that conflict aside, the writing is on the wall: a majority of Justices believe the panel’s reasoning on the merits of this case cannot stand, as Judge Callahan’s concurrence recognizes. Irrespective of the panel’s incorrect view that it was bound by a prior Ninth Circuit panel decision, the en banc Court most assuredly is not. For several reasons, this Court should grant panel rehearing or rehearing en banc.

BACKGROUND

1. In November 2008, California passed Proposition 2, a ballot initiative prohibiting California farmers from tethering or confining pregnant pigs in a manner preventing them from “[l]ying down, standing up, and fully extending [their] limbs,” or from “[t]urning around freely.” See Cal. Health & Safety Code §§ 25990, 25991(b). After allowing California farms ten years of lead time, California then passed Proposition 12. Cal. Health & Safety Code §§ 25990-25993.1 (“Proposition 12”). Remarkably, Proposition 12 immediately reached beyond the borders of California, banning a seller from “knowingly engag[ing] in the

sale within the state” of pork meat that the seller “knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal that was confined in a cruel manner.” Cal. Health & Safety Code § 25990(b)(2).

On December 16, 2021, IPPA filed its first amended complaint and a motion for preliminary injunction, seeking to enjoin Proposition 12 as unconstitutional and unlawful because it (1) violated IPPA’s members’ rights under the Due Process Clause; (2) violated the Privileges and Immunities Clause; (3) was preempted by Packers and Stockyards Act; and (4) violated the dormant Commerce Clause. 1-ER-3; 4-ER-504–544. On January 3, 2022, California filed a motion to dismiss. 1-ER-28. After hearing, the district court denied IPPA’s motion for preliminary injunction and granted California’s motion to dismiss. *See* 1-ER-2–53.

IPPA appealed both rulings. On April 29, 2022, California moved to stay the appeal pending the Supreme Court’s review of *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021) (“*NPPC I*”). That case involved a different dormant Commerce Clause challenge to Proposition 12 (and no other claims), but was up on appeal to the Supreme Court. ECF No. 8. IPPA opposed the stay, in part because the

case raised different dormant Commerce Clause theories, entirely separate claims, and arose from a different procedural posture. Nevertheless, this Court granted the stay. ECF No. 11.

2. On May 11, 2023, the Supreme Court decided *Nat'l Pork Producers Council v. Ross*. 598 U.S. 356 (2023) (“*NPPC II*”). The Court affirmed *NPPC I*, holding that the plaintiffs (the National Pork Producers Council, or “NPPC”) failed to state a claim that Proposition 12 violated the dormant Commerce Clause under the limited legal theories NPPC decided to advance. *Id.* at 390-91. Notably, the Court specifically recognized that for purposes of the dormant Commerce Clause claim, NPPC had “disavow[ed] any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones.” *Id.* at 370.

Given there was no discrimination claim to consider, the Supreme Court turned to NPPC’s other two theories for why Proposition 12 violated the dormant Commerce Clause. As for the first, the Court rejected NPPC’s suggested per se application of the “extraterritoriality doctrine,” finding that such an application—at least on a per se basis—extended the dormant Commerce Clause too far. *Id.* at 371-76, 390-91.

As for the second, NPPC raised a claim under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), alleging that the benefits Proposition 12 secures for Californians did not outweigh the costs it imposed on out-of-state economic interests. On this issue, the Court splintered. *Id.* A majority of five Justices determined that NPPC overstated the extent to which *Pike* “depart[ed]” from the antidiscrimination principles at the heart of the dormant Commerce Clause, and since NPPC had disavowed any claim that Proposition 12 discriminated on its face or that its “practical effects in operation would disclose purposeful discrimination against out-of-state businesses,” NPPC’s claim—as pled—“f[ell] well outside *Pike*’s heartland.” *NPPC I*, 598 U.S. at 376-80 (Part IV-A).

The Court then moved to the question of what to do with *Pike* in that specific case. Three Justices concluded that *Pike* should be dead letter, asserting it inappropriately asked judges to engage in a balancing act that no court could perform. *Id.* at 380-83 (Part IV-B). Four Justices determined that even if the Court were to apply the *Pike* test as NPPC articulated it, NPPC’s specific allegations failed to adequately allege a necessary prerequisite—a sufficient burden on interstate commerce. *Id.* at 383-87 (Part IV-C).

Four Justices dissented. While they agreed the “per se” rule against state laws with extraterritorial effects was inappropriate, they explained that *Pike* was still good law to ensure that there be “free private trade in the national marketplace[.]” *Id.* at 394-95 (Roberts, C.J., concurring in part and dissenting in part) (quotation omitted). Applying *Pike*, the dissent concluded that because NPPC “identif[ied] broader, market-wide consequences of compliance” with Proposition 12, NPPC had stated “economic harms that our precedents have recognized can amount to a burden on interstate commerce.” *Id.* at 397.

There were several concurring opinions. Relevant here, Justice Barrett agreed that judges are ill-suited to engage in the analysis required by *Pike*, but believed the complaint *did* adequately allege that Proposition 12 stated a substantive burden on interstate commerce. *Id.* at 393-94. Justices Sotomayor and Kagan agreed with the dissenters that a judge could engage in the analysis *Pike* required, but found the specific complaint did not allege a substantial burden. *Id.* at 391-93.

In sum, the Court’s application was deeply fractured. That said, a six-Justice majority “affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to

state economic regulations.” *Id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part). Further, one concurring Justice and four dissenting Justices (for a five-Justice majority) determined that NPPC had “identif[ied] broader, market-wide consequences of compliance” with Proposition 12, and thus had stated “economic harms that our precedents have recognized can amount to a burden on interstate commerce.” *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part).

3. After the Supreme Court’s decision in *NPPC II*, this Court affirmed dismissal of IPPA’s complaint. *IPPA v. Bonta*, No. 22-55336, 2024 WL 3158532 (9th Cir. June 25, 2024), ECF No. 61-1. The panel concluded that a “majority of the Justices in *NPPC II* did not agree upon a ‘single rationale’ and there is no opinion in that case that ‘can reasonably be described as a logical subset of the other.’” *Id.* at *2 (quotation omitted). Thus, “[b]ecause the Court did not agree upon a single rationale for affirming, and neither of the two rationales is a logical subset of the other, only the specific result [in *NPPC II*] is binding on lower federal courts” and thus determined that “we remain bound by our decision in *NPPC I*.” *Id.* at *3 (quotations omitted). The panel then applied *NPPC I*’s holding to affirm the dismissal of IPPA’s *Pike* claim. *Id.*

However, in a concurrence, Judge Callahan opined that under *NPPC II*, a majority of the Supreme Court would have determined that IPPA had plausibly alleged a substantial burden on interstate commerce, and thus if the panel had not been bound by *NPPC I*, she would have remanded for the district court to decide IPPA’s *Pike* claim. *Id.* at *5 (Callahan, J. concurring). The panel majority did not agree, instead assuming that such a holding would disregard the so-called “settled rule that dissents may not be considered when interpreting the holding of a splintered Supreme Court decision.” *Id.* at *3, n.5.

Due to the exacerbated conflicts created by the panel opinion, the en banc Court should review it.

REASONS FOR GRANTING THE PETITION

I. The panel decision exacerbates a conflict within the Ninth Circuit about the use of dissenting opinions within splintered Supreme Court opinions.

The panel’s opinion evidences a long-running discord within this Circuit about whether the Court may consider dissenting voices in a splintered Supreme Court opinion. En banc consideration will ensure uniformity on how this Court interprets Supreme Court decisions in the future, which is of utmost importance due to the increasing number of

splintered Supreme Court decisions in the last twenty years. *See, e.g.*, Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 *Stan. L. Rev.* 795, 799 (2017) (“Although Supreme Court plurality decisions were historically rare, they have grown more frequent since the mid-twentieth century and are now a familiar feature of the Court’s decisionmaking.”); *see also* Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 *Duke J. Cont. L. & Pub. Pol’y* 285, 291 (2019) (“Between 1955 and 2006 the Court issued 213 pluralities, and between the 2007 and 2016 terms, it issued forty-one.”) (footnotes omitted).

This is not the first time this Court has been asked to resolve this issue. Indeed, this question came to head in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc). But even then, this Court could not come to a consensus, and instead “assume[d] but d[id] not decide that dissenting opinions may be considered in a *Marks*^[1] analysis.” *Id.* at 1025 & n.12. Judges from both camps wrote a dueling concurrence and dissent on that precise issue. *Id.* at 1031 (Bea, J., dissenting) (opining that *Marks* permits counting votes, including from dissenting Justices); *id.* at 1028

¹ *Marks v. United States*, 430 U.S. 188 (1977).

(Christen, J. concurring) (opining that dissenting opinions should not be considered). It's time to settle the issue.

And this case presents a particularly good vehicle by which the Court, sitting en banc, can resolve it. The *NPPC II* decision is as fractured as they come. All nine Justices participated in the case, and split irrespective of traditional ideological lines. Justice Gorsuch and Justice Thomas, joined by Justice Sotomayor and Justice Kagan, held that the complaint did not adequately allege a substantial burden within the meaning of a *Pike* claim. On the other hand, a five-Justice dissenting “majority”—Chief Justice Roberts, Justice Alito, Justice Kavanaugh, Justice Jackson, and Justice Barrett—concluded the opposite: the complaint *did* adequately allege a substantial burden for purposes of pleading a *Pike* claim. However, Justice Barrett joined Justice Gorsuch and Justice Thomas in holding that judges could not engage in the *Pike* analysis in the first place; but it was on this point that Justice Sotomayor and Justice Kagan differed from Justice Gorsuch’s opinion, holding instead (alongside the Chief Justice and the three other Justices who joined him) that judges *could* engage in such an analysis. In light of these overlapping opinions, the Ninth Circuit can decide what the rule is with

respect to dissenting opinions and their impact on the holding of a splintered Supreme Court decision.

In *Davis*, the concurrence wisely foresaw that “[l]eaving this work unfinished will surely result in continued uneven application of *Marks* within our circuit.” *Id.* at 1028 (Christen, J. concurring). The chickens have come home to roost, and the Court should address now what it left unanswered in *Davis* so that lawyers, parties, and interested stakeholders in the Nation’s largest Circuit are not left in the dark as to what is binding Supreme Court precedent and what is not.² For this reason alone, the Court should rehear this case en banc.

² True, one post-*Davis* opinion summarily said “[d]issenting opinions cannot be considered when determining the holding of a fractured Supreme Court decision—only the opinions of those who concurred in the judgments can be considered.” *Ballinger v. City of Oakland*, 24 F.4th 1287, 1295 (9th Cir.), *cert. denied sub nom., Ballinger v. City of Oakland, California*, 142 S. Ct. 2777 (2022). But *Ballinger*’s statement most assuredly cannot be considered the authoritative statement of what was left unanswered in *Davis*; as Judge Callahan points out, *Ballinger*’s statement was not germane to the case’s resolution, and thus is not binding. *IPPA*, 2024 WL 3158532, at *5 n.1 (citing *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) & *United States v. Orozco-Orozco*, 94 F.4th 1118, 1128 (9th Cir. 2024) (explaining that statements regarding “non-litigated issues” cannot be “precedential holdings binding future decisions”). Further still, as Judge Callahan also rightly notes, *Davis* itself “looked at the votes of all Supreme Court justices from a fractured decision.” *Id.*

II. The panel’s blind application of *Davis* conflicts with how other circuits analyze cases, like *NPPC II*, where there are “dual majorities.”

As set forth above, the panel applied the “reasoning-based” or “common-denominator-of-the-reasoning rule” (accepted by the en banc court in *Davis*) in holding that *NPPC I* was still binding on the Ninth Circuit since *NPPC II* did not agree upon a single rationale for affirming, and neither of the two rationales was a logical subset of the other. But applying this rule to Supreme Court cases where there is a “dual majority” (i.e., where there are in effect two majorities: the plurality and concurrence agreeing on the result, and the concurrence and dissent agreeing on the fundamental legal principles involved) is nonsensical, and conflicts with the manner in which other circuits approach the analysis.

To understand this, it helps to illustrate why that “rule” worked in *Davis* but doesn’t work in cases like this one. In *Davis*, the Ninth Circuit was attempting to interpret the plurality opinions in *Freeman v. United States*, 564 U.S. 522 (2011). In *Freeman*, there was a four-Justice majority, a four-Justice dissent, and a single Justice concurrence. In defining the binding impact of *Freeman*, the Ninth Circuit overruled its

own prior precedent that would have required it to apply the concurring opinion as the precedential opinion; it found instead that, under *Marks*, when there is no common rationale as to the majority of the Justices, the Court is bound only by the result. *Davis*, 825 F.3d at 1016.

This makes complete sense as to why the “common-denominator-of-the-reasoning rule” applied: in *Freeman*, there was **no** overlap between the concurrence, and **either** the dissent or the majority. See *Freeman*, 564 U.S. at 539 (Sotomayor, J., concurring) (stating that she “agree[d] with the plurality . . . but I differ as to the reason why” and that she “necessarily reject[ed] the [argument] . . . endorsed by the dissent.”). In other words, there was no single viewpoint that garnered a majority of votes, and there was no binding viewpoint.

But in *NPPC II*, the complete *opposite* is true. The two concurrences from Justice Barrett and Justice Sotomayor **expressly agreed** with several propositions of law set forth within the dissent which thus garnered at least five votes, the most important of which (for purposes of this case) is that NPPC’s complaint **did** allege a substantial burden for purposes of a *Pike* claim, and that judges could engage in *Pike* balancing. *NPPC II*, 598 U.S. at 394 (Barrett, J., concurring in part) (approving of

the dissent's conclusion that "[t]he complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California."); *see also id.* at 392-93 (Sotomayor, J., concurring in part) ("Yet, I agree with [the dissent] that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency"). In such situations, it is entirely appropriate under *Marks* to analyze the principles of law that have garnered at least five votes. *Marks*' central rule is that "[w]hen a fragmented Court decides a case ***and no single rationale explaining the result enjoys the assent of five Justices***, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]" *Marks*, 430 U.S. at 193 (emphasis added). In a "dual majority" case, there are rationales that enjoy the "assent of five Justices."³ And to the extent *Davis* dictates otherwise, the Court should clarify as much.

³ Which is particularly the case with *NPPC II*, where the dissent was not only a partial dissent, but a partial concurrence as well.

Indeed, other circuits have done just this. In cases with dual majorities, other circuits apply an “issue-by-issue” approach, whereby the court parses each of the various opinions in the plurality case—including the plurality opinion, concurrences, and dissents—to determine each proposition where five or more Justices agree. *See, e.g., United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (“[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue.”); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) (concluding that lower courts are “bound to follow the five-four vote against the takings claim in [a case]” where four of those five votes were provided by the dissenters); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (counting votes from the dissent to determine which of the concurring opinions should control under *Marks*); *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) (“[W]e do not share the reservations of the D.C. Circuit about combining a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices.”).

Persuasive policy reasons amplify this result. For one, not affording precedential weight to a viewpoint that has a five-Justice majority conflicts with the bedrock of the Nation’s legal system that the “majority rules.” *See, e.g., Davis*, 825 F.3d at 1036 (Bea, J., dissenting). As applicable here, **four** Justices in *NPPC II* held that the complaint didn’t allege a *Pike* claim; **five** held it did.⁴ It is absurd not to afford precedential weight to majority opinions, even if some of those votes are derived from a “partial” dissent and concurrence. Second, such an inflexible application of *Marks/Davis* likely means there will hardly ever be majority holdings from plurality opinions, “thus threaten[ing] to leave lower courts without meaningful precedential guidance with respect to many—perhaps most—plurality decisions.” Williams, *supra*, at 813. And third, it helps explain why the Supreme Court itself has considered previous dissenting opinions to determine its prior majority holding. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 17 (1983) (“On remand, the Court of Appeals correctly recognized that the

⁴ The only reason it was not binding was because Justice Barrett uniquely reasoned that although the complaint did allege a burden, a judge cannot engage in the requisite *Pike* balancing test. But on that point, there was a **six**-Justice majority permitting that balancing.

four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test.”); *see also United States v. Jacobsen*, 466 U.S. 109, 111 (1984) (determining that the rule of law established by its prior decision in *Walter v. United States*, 447 U.S. 649 (1980), could be divined by combining the opinion of the *Walter* Court (which garnered only two votes) with the opinion of four dissenting Justices); *see also Nat’l Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (indicating that lower courts are bound by holdings that garner the support of a “majority” of the nine Justices on the entire Court, even if that agreement derives in part from votes from the dissent).

In sum, the en banc Court should clarify or amend *Davis* such that the “common-denominator-of-the-reasoning rule” may be applied correctly to dual majority cases consistent with other circuits.

III. To the extent the panel appropriately applied *Davis*, and that there is no binding holding from the dissenting opinions in *NPPC II*, the en banc court should overrule *NPPC I*.

Assuming the panel correctly determined it was bound by *NPPC I* notwithstanding the majority holdings of *NPPC II*, this Court, en banc, most assuredly is not. And the Supreme Court has already told this en

banc Court what result it should reach—the Complaint states a claim under the dormant Commerce Clause.

When the Nation was formed, the need to prevent interstate discrimination was a “central concern of the Framers [and] was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461 (2019) (quotation omitted). As a result, the Nation was born from the proposition that “every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export[s], and no foreign state will by customs duties or regulations exclude them.” *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

Accordingly, *Pike* provides that nondiscriminatory state regulations are valid under the Commerce Clause “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the

putative local benefits.” 397 U.S. at 142. Thus, the Supreme Court has allowed claims under *Pike* as “even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008); see also *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (plurality opinion) (*Pike* applies to “a nondiscriminatory statute like this one”).

Contrary to this authority, *NPPC I* determined that “[f]or dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce.” 6 F.4th at 1032. But the complaint alleged more than simply an increase in “compliance costs,” as five Justices of the Supreme Court held. And even then, IPPA’s complaint here alleged ***even more*** discriminatory misalignment than NPPC’s complaint. What’s more, the panel opinion includes only a cursory analysis of IPPA’s other claims (Due Process, Privileges and Immunities, and preemption) despite explicit reference in *NPPC II* to their possible viability. *Compare IPPA*, 2024 WL 3158532, at *4-5, *with NPPC II*, 598 U.S. at 403-04 (Kavanaugh, J., concurring in

part and dissenting in part) (opining that Prop 12 “may raise questions [under] the Privileges and Immunities Clause). This Court, en banc, should follow the majority of Justices in confirming that IPPA states a claim.

IV. The panel erred by overlooking a material point of fact or law.

The panel also erred in at least one material respect it can correct on its own. Both the majority and concurrence state that IPPA conceded that the panel was bound by *NPPC I. IPPA*, 2024 WL 3158532, at *2 n.4; 2024 WL 3158532, at *5 (Callahan, J., concurring). Nothing could be further from the truth. To the contrary, counsel for IPPA’s position was that *NPPC I* was **not** controlling “to the extent that there was something [within *NPPC I*] that could be read to be inconsistent with any of the holdings in [*NPPC II*].” See Oral Argument at 7:54-9:00, 19:28-38, *IPPA v. Bonta*, 2024 WL 3158532 (9th Cir. June 25, 2024) (No. 22-55336) (“I do think the Court has to take into consideration what the Supreme Court said [in *NPPC II*].”).

IPPA’s position has always been that *NPPC I* is not binding here, because it raised **different** legal theories and was in a **different** procedural postures. Of course, if the panel disagreed with those

arguments, it would be left with the decision in *NPPC I* to interpret. But in no way did IPPA concede that *NPPC I* binds the panel. And that misapprehension by the panel is significant, because a panel of this Court “may overrule prior circuit authority without taking the case en banc when an ‘intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.’” *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002) (quoting *United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985)).

Simply put, IPPA contended throughout the argument that the panel should have relied upon the collective view of the majority of Justices in *NPPC II* and ruled that IPPA stated a claim, *especially* because the plaintiff there raised legal theories *distinct* from those of IPPA. *See, e.g.*, Oral Argument at 7:54-9:00, *IPPA v. Bonta*, 2024 WL 3158532 (9th Cir. June 25, 2024) (No. 22-55336). And even then—even if the panel disagreed—IPPA *also* explained when even *NPPC I* itself did not doom IPPA’s complaint, because the opinion in *NPPC I* expressly left room for allegations like those asserted by IPPA (another point left

unaddressed by the panel majority's opinion here). *See, e.g., id.* at 18:35-19:37; 21:25-22:16; 23:52-24:20.

CONCLUSION

This Court should grant panel rehearing or rehearing en banc.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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/s/ MICHAEL T. RAUPP

MICHAEL T. RAUPP

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FILED

UNITED STATES COURT OF APPEALS

JUN 25 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

IOWA PORK PRODUCERS
ASSOCIATION,

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

and

HUMANE SOCIETY OF THE UNITED
STATES; et al.,

Intervenor-Defendants-
Appellees.

No. 22-55336

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

MEMORANDUM*

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

Argued and Submitted January 9, 2024
Pasadena, California

Before: CALLAHAN, CHRISTEN, and BENNETT, Circuit Judges.
Concurrence by Judge CALLAHAN.

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

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

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

On its face, Proposition 12 does not discriminate against out-of-state pork

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

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

Nor has IPPA adequately alleged that Proposition 12 has a discriminatory purpose. IPPA asserts that California enacted Proposition 12 to “avoid negative fiscal impacts to the State of California.” But Proposition 12’s stated purpose “is to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and *associated* negative fiscal impacts on the State of California.” Prop. 12, § 2 (2018) (emphasis added). This statement reflects a concern about fiscal impacts associated with foodborne illness, and

cannot support an inference that California sought to discriminate against out-of-state producers by enacting Proposition 12.²

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

Contrary to IPPA’s characterization, Proposition 12 did not extend the provisions of Proposition 2 to out-of-state producers. Proposition 2 imposed

² IPPA also alleges the California Department of Food and Agriculture (“CDFA”) “explicitly noted that, unless out-of-state farmers are required to comply with the confinement requirements as well, ‘[i]n-state farms will find it more costly to compete with farms outside of the state when selling . . . whole pork meat to an out of state buyer compared to farms located in states that do not have the same animal confinement standards as described in the Act.’” But rather than revealing protectionist intent, this statement suggests that Proposition 12 may place in-state farms at a competitive disadvantage with respect to sales to out-of-state buyers.

turnaround provisions on all breeding pigs located in California, regardless of where pork derived from those pigs might ultimately be sold. Prop. 2, § 3 (2008). Proposition 12, by contrast, requires all pork producers who *sell* pork meat in California to comply with certain confinement standards, including turnaround provisions and square footage requirements. *See* Cal. Health & Safety Code § 25991(e). Although in-state producers may have felt less impact from Proposition 12 because they were already subject to the turnaround provisions of Proposition 2, that does not demonstrate that Proposition 12 discriminates against out-of-state producers. *See Eleveurs*, 729 F.3d at 948 (noting that a statute is not discriminatory “even when only out-of-state businesses are burdened because there are no comparable in-state businesses” (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119-20, 125 (1978))). The district court properly concluded that IPPA did not adequately allege discrimination under the dormant Commerce Clause.³

2. We next address IPPA’s claim that Proposition 12 is unconstitutional

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

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

We previously considered and rejected such a challenge to Proposition 12 in *National Pork Producers Council v. Ross (NPPC I)*, 6 F.4th 1021 (9th Cir. 2021). The Supreme Court later affirmed in a fractured decision. *See Nat’l Pork Producers Council v. Ross (NPPC II)*, 598 U.S. 356 (2023). We conclude that *NPPC I* remains controlling in this circuit because a majority of the Justices in *NPPC II* did not agree upon a “single rationale” and there is no opinion in that case that “can reasonably be described as a logical subset of the other.” *United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (en banc); *see also Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).⁴

In *NPPC II*, a majority of the Court held that the plaintiff’s challenge to Proposition 12 fell “well outside *Pike*’s heartland,” but did not agree on the underlying reasoning. 598 U.S. at 380; *id.* at 377-89. A four-justice plurality concluded that the plaintiff had not met its initial burden of showing the

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

“challenged law imposes ‘substantial burdens’ on interstate commerce.” *Id.* at 383, 386-87 (plurality opinion). Three justices separately reasoned that the case demanded a comparison of “incommensurable” goods, which is “a task no court is equipped to undertake.” *Id.* at 382 (three-justice opinion).

Because the Court did not agree upon a single rationale for affirming, and neither of the two rationales is a “logical subset” of the other, “only the specific result [in *NPPC II*] is binding on lower federal courts.” *Davis*, 825 F.3d at 1022; *see also Ballinger v. City of Oakland*, 24 F.4th 1287, 1295 (9th Cir. 2022) (recognizing that, “when determining the holding of a fractured Supreme Court decision[,] only the opinions of those who concurred in the judgment[] can be considered”).⁵ Because only the result in *NPPC II* is binding, and there is no controlling reasoning, we remain bound by our decision in *NPPC I*.

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

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

Here, as in *NPPC I*, IPPA argues that complying with Proposition 12 will require costly alterations to its infrastructure and substantial new training and labor.⁶ *See id.* at 1033 (noting that the “crux” of the plaintiffs’ allegations was that “the cost of compliance with Proposition 12 makes pork production more expensive nationwide”). But “[t]he mere fact that a firm engaged in interstate commerce will face increased costs as a result of complying with state regulations does not, on its own, suffice to establish a substantial burden on interstate commerce.” *Id.* at 1032 (citation omitted). Moreover, “a non-discriminatory regulation that ‘precludes a preferred, more profitable method of operating in a retail market’” does not “place a significant burden on interstate commerce,” even

⁶ To the extent IPPA argues that Proposition 12 has an “impermissible extraterritorial effect,” the *NPPC I* court already concluded that “state laws that regulate only conduct in the state, including the sale of products in the state, do not have impermissible extraterritorial effects.” 6 F.4th at 1029.

if it inflicts “heavy burdens on some out-of-state sellers.” *Id.* (citation omitted).

We conclude the district court properly dismissed IPPA’s *Pike* claim.

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

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

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

The term “engage in” is widely used and readily understood. Generally, to “engage in” an activity means to “take part in” that activity. *See, e.g., Engage*, Black’s Law Dictionary (11th ed. 2019) (“To employ or involve oneself; to take

part in; to embark on”). IPPA insists that entities upstream of a sale in California might be deemed to have “engaged in” that California sale. Upstream entities, by virtue of being upstream, are not engaging in the ultimate sale in California; rather, they are engaging in earlier, separate sales.⁷

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

4. IPPA also raises a facial vagueness challenge. Where a challenged

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

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

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

omitted).

6. IPPA contends that Proposition 12 is impliedly preempted by the Packers and Stockyards Act based on principles of conflict preemption. A federal statute preempts state law where “a party’s compliance with both federal and state requirements is impossible,” or where “state law poses an obstacle to the accomplishment of Congress’s objectives.” *Whistler Invs., Inc. v. Depository Tr. & Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008).

The Packers and Stockyards Act makes it unlawful “for any packer or swine contractor” to “[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.” 7 U.S.C. § 192(b). IPPA argues that Proposition 12 requires packers and wholesalers to favor in-state pork producers, who have had more time to comply with the requirements of Proposition 12. But Proposition 12 does not require packers or wholesalers to favor or disfavor any pork producers based on their location. It instead prohibits packers and wholesalers from selling non-compliant pork meat in California, regardless of where such meat originates. *See* Cal. Health & Safety Code § 25990. IPPA does not allege that out-of-state producers are unable to comply with California’s requirements, such that Proposition 12 requires packers and wholesalers to prefer in-state producers. Thus, Proposition 12 does

not render it impossible to comply with the Packers and Stockyards Act, nor serve as an obstacle to its purposes and objectives.

AFFIRMED.

JUN 25 2024

CALLAHAN, Circuit Judge, concurring in the judgment:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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

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

¹ The majority says my analysis “disregards” a rule that courts cannot consider dissents when interpreting fractured Supreme Court decisions. Mem. Disp. n.5. The opposite is true. The last time this court sat en banc to interpret *Marks* it looked at the votes of *all* Supreme Court justices from a fractured decision. See *Davis*, 825 F.3d at 1025 (considering Chief Justice Roberts’s dissent in *Freeman v.*

Proposition 12 Is Compatible with *Pike* Balancing

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

Six Justices disagree. Chief Justice Roberts—joined by Justices Alito, Kavanaugh, and Jackson—explained that when it comes to Proposition 12, “a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*.” *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part.). Justices Sotomayor—joined by Justice Kagan—similarly found Proposition 12 capable of judicial balancing. *Id.* at 392–93 (Sotomayor, J., concurring in part) (“Justice Gorsuch, for a plurality, concludes that petitioners’ *Pike* claim fails because courts are incapable of balancing economic burdens against noneconomic benefits. I do not join that portion of Justice Gorsuch’s

United States, 564 U.S. 522 (2011) to explain why “the plurality and dissent do not share common reasoning whereby one analysis is a logical subset of the other.”) (internal quotations omitted). The statement in *Ballinger* about *Marks*, which was not “germane to the eventual resolution of [*Ballinger*],” does not change this. See *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019); see also *United States v. Orozco-Orozco*, 94 F.4th 1118, 1128 (9th Cir. 2024) (explaining that statements regarding “non-litigated issues” cannot be “precedential holdings binding future decisions”).

opinion. . . . I agree with the Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency.”). *See also id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part) (“In today’s fractured decision, six Justices of this Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations.”).

Proposition 12 Imposes a Substantial Burden on Interstate Commerce

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

According to Chief Justice Roberts and the three other Justices who joined him, petitioners in *NPPC II* plausibly alleged that Proposition 12 imposes “a

substantial burden against interstate commerce” and that “*Pike* found both compliance costs and consequential market harms cognizable in determining whether the law at issue impermissibly burdened interstate commerce.” *Id.* at 398 (Roberts, C.J., concurring in part and dissenting in part). The four Justices further noted that, in addition to alleging compliance costs, petitioners asserted harms “to the interstate market itself.” *Id.* at 399–400 (“[D]ue to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California.”). Accordingly, they would have held that “[t]he Ninth Circuit misapplied our existing *Pike* jurisprudence” and that remand was required for the court below to decide petitioners’ *Pike* claim. *Id.* at 395.

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

Putting this all together, I read *NPPC II* as supporting the following conclusions: (i) that Proposition 12 is compatible with *Pike* balancing, and (ii) that IPPA plausibly alleged Proposition 12 imposes a substantial burden on interstate

commerce. However, these conclusions do not derive from opinions that are a “logical subset of the other.” *Davis*, 825 F.3d at 1025 (“[T]he plurality and dissent do not share common reasoning whereby one analysis is a logical subset of the other.” (internal quotations and citations omitted)). If they did, I would remand for the district court to decide IPPA’s *Pike* claim.