No. 24-728

IN THE

Supreme Court of the United States

IOWA PORK PRODUCERS ASSOCIATION,

Petitioner,

V.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RYANN A. GLENN
HUSCH BLACKWELL LLP
13330 California Street
Suite 200
Omaha, NE 68154

ELDON MCAFEE
BRICK GENTRY P.C.
6701 Westown Parkway
Suite 100
West Des Moines, IA 50266

MICHAEL T. RAUPP
Counsel of Record
CYNTHIA L. CORDES
HUSCH BLACKWELL LLP
4801 Main Street,
Suite 1000
Kansas City, MO 64112
(816) 983-8000
michael.raupp@
huschblackwell.com

Counsel for Petitioner

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INTRODUCTION

Respondents' contention is remarkable: States are free to enact laws discriminating against out-of-state citizens in favor of their own, so long as they can litigate the issue long enough that they can claim the discrimination has subsided. Of course, that's not the law.

Respondents don't wish to talk much about that errant legal proposition, instead making efforts trying to *prove* that Proposition 12 didn't discriminate. But they forget the procedural posture. The district court dismissed this case on the pleadings *alone*. Thus, the only question is whether Petitioner pleaded direct-discrimination, and there is no doubt it did. Petitioner welcomes the opportunity to debate the discriminatory impact of Proposition 12, and that's exactly what should happen on remand.

Petitioner's request of this Court is modest but critically important: confirm what the Court unanimously ruled in *Nat'l Pork Producers Council v. Ross* ("*NPPC II*"), 598 U.S. 356 (2023)—that when a plaintiff alleges discrimination by a state against out-of-state citizens, it states a claim under the dormant Commerce Clause. Not to mention, of course, that Petitioner also stated a preemption claim, as well as claims under the Due Process and Privileges and Immunities Clauses, all of which were prematurely dismissed.

Given this Court's unanimous description in *NPPC II* of discrimination sitting at the heart of dormant Commerce Clause jurisprudence, the Ninth Circuit shouldn't have dismissed a case presenting precisely those theories. This Court should grant the petition to eradicate this confusion.

I. Petitioner's Direct Discrimination Claim—Which The *NPPC II* Plaintiffs Failed To Include—Compels A Grant Of This Petition To Effectuate The Majority Rulings From *NPPC II*.

Respondents' myopic articulation of the scope of this case illustrates precisely why certiorari is proper. Respondents claim that because *NPPC II* involved a challenge to the same law, the outcome here is preordained and the Court shouldn't look twice. But they ignore that the plaintiffs in the two cases aren't raising the same claims. "[B]asic to our adversary system[,]" the "principle of party presentation" ensures that judges and courts decide *only* the claims and arguments presented to them. *Wood v. Milyard*, 566 U.S. 463, 472 (2012). So although *NPPC II* happened to involve the same *statute*, it didn't involve the same claims; in fact, the plaintiffs there *expressly disclaimed* a discrimination claim, the principal claim Petitioner advances here. *See NPPC II*, 598 U.S. at 370. And it's also undisputed that *NPPC II* didn't involve a preemption claim, nor claims under the Privileges and Immunities and Due Process Clauses. *See* § V, *infra*.

Again, the result of *NPPC II* was *only* a rejection of the "'almost *per se*' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State,' even when those laws do not purposely discriminate against out-of-state economic interests." *NPPC II*, 598 U.S. at 371. In contrast, the argument here is that the statutory lead-in time disparity provided in-state farmers with a significant, and discriminatory, head start. And that harm doesn't go away because everyone *may* find themselves on a level playing field at some point in the

future—the discriminatory time differentials changed the whole marketplace in ways that persist. Take the upshot of the oppositions' point: somehow, there is a time-horizon to constitutional harm, and once active litigation takes a sufficiently long enough time, discrimination caused by a protectionist head-start eventually becomes a nonissue. This cannot be.[1]

None of the caselaw cited by respondents states the contrary. For example, in *Exxon Corp. v. Governor of Maryland*, the Court evaluated a Maryland statute providing that a producer or refiner of petroleum products (1) could not operate any retail service station within the state and (2) must extend all "voluntary allowances" uniformly to all service stations to which the producers supply. 437 U.S. 117, 119-20 (1978). But that's wholly distinguishable from the situation here. First, in *Exxon*, *all* gasoline sold in Maryland came from out-of-state refineries; it was therefore ***impossible*** for the Maryland law to discriminate against interstate commerce because no in-state producers existed to be benefitted by the law. *Id.* at 121-22. That's not the case here, where it is that local market that directly benefits from the lead-in

[1] Relatedly, Respondents claim that Petitioner delayed in challenging Proposition 12. Nothing could be further from the truth. Part of the alleged "delay" resulted from California's failure to timely enact regulations for Proposition 12. *See, e.g.*, Jensen Decl., at 4, *Iowa Pork Producers Ass'n v. Rob Bonta*, No. 2:21-CV-09940 (C.D. Cal., Dec. 30, 2021) (ECF No. 43-2). And this delay was not insignificant. Regulations for Proposition 12 were to be enacted by September 1, 2019; by the time this litigation was filed on November 9, 2021, California had *still* not enacted final regulations for Proposition 12. Cal. Health & Safety Code § 25993 (West 2018). Petitioner should not be faulted for waiting to review Proposition 12's implementing regulations to help clarify its reach and scope, especially in light of its due process challenge.

time of the Act. Second, the *Exxon* Court reasoned that the Maryland law did not discriminate against interstate commerce because it: created no barrier against interstate independent dealers; did not prohibit the flow of interstate goods; did not place added costs upon the challengers; and did not distinguish between in-state and out-of-state companies in the retail market. *Id.* at 117-18. But here, as discussed below, those are precisely the types of barriers and discrimination that do exist because of the Act.[2]

Perhaps more remarkably, respondents claim any actual harm inflicted by Proposition 12's discriminatory nature has been *imagined* by Petitioner; or at least, the harm alleged is not sufficient for a dormant Commerce Clause claim as a *factual* matter. But that's a matter for summary judgment and trial, not on the pleadings. Indeed, the opposition's attempts to litigate the merits of the case is a taciturn admission that this case warrants litigating the veracity of Proposition 12's impact on the *entire* pork industry, not a handful of companies referenced by the Respondents.

Respondents' obfuscation of the procedural posture also manifests itself in the inclusion of untested, unadmitted, and unconsidered evidence about the

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[2] Respondents also make note that this Court denied certiorari in another case involving a challenge to Proposition 12. *See N. Am. Meat Inst. v. Becerra,* 825 Fed. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021). For one, any direct discrimination case presented there was de minimis in comparison to the case presented here; further, that case did not include all of the additional claims at issue here, either. Additionally, that petition arose from the denial of a preliminary injunction motion only—*not* on a motion to dismiss. Finally, that case was also ultimately voluntarily dismissed, without any final ruling on the merits.

supposed impact Proposition 12 has had on the pork industry. That is something not even the district court would consider when reviewing a motion to dismiss.[3] If anything, the opposition has squarely demonstrated why this case should be remanded: so that a trial court may consider the precise evidence of Proposition 12's impact. The Court should reject Respondents' arguments otherwise, as they simply reflect an attempt to reframe the issues as factual in nature, when the dispute is purely legal at this juncture. To the extent there is any dispute as to why this case is different from *NPPC II*, the opposition has shown this Court why it would benefit from a full set of merits-based briefing on that issue. The lead-in time vastly benefited in-state farmers at the expense of out-of-state farmers, allowing them to capture market share in one of the largest markets of America, and at a financial windfall, to the detriment of out-of-state

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[3] To be clear, even if the Court were to consider such "evidence" at this stage, this Court should not be lulled into thinking that a discriminatory impact does not still remain. In fact, "U.S. pork producers have just suffered the worst 18 months of financial losses in history and many farm families are contemplating whether they can pass along their farm to the next generation." Todd Neeley, *Senators Introduce Bill to Stop Prop 12*, Western Livestock Journal (Apr. 11, 2025), https://www.wlj.net/senators-introduce-bill-to-stop-prop-12/. Further, now given the license to discriminate, California has mandated farms be certified for compliance. *See* Cal. Code Regs. tit. 3, § 1326.5. CDFA offers auditing services to obtain the mandated certification for California farmers, while forcing out-of-state farmers to retain and pay private certifiers. Notably, CDFA only offers the audit and certification services to in-state farmers and CDFA is the only approved governmental entity who is allowed to provide certification services. *See CDFA Animal Care Program Certifying Agents,* https://www.cdfa.ca.gov/AHFSS/AnimalCare/AccreditedCertifyingAgents.html (last visited Apr. 25, 2025).

farmers where the market is largely concentrated.

In this same vein, however, Respondents posit that this isn't a cert-worthy case because it is unclear what type of relief could be afforded to remedy the constitutional harm posed by the disparate lead-in time. Arguing that it is unclear what relief Petitioner is seeking is disingenuous: striking Proposition 12 as unconstitutional is the simplest way to remedy constitutional harm. But regardless, this argument is simply a different iteration of the unacceptable legal argument already analyzed above, namely, that if the parties simply litigate the case long enough, there is eventually no harm to litigate about. But nothing could be further from the truth, as the difference in lead time is illustrative of the entire Act being a discriminatory attempt to win over more market share for in-state farmers. That is the harm that needs to be remedied, and this is simply a fact-specific type of harm for the district court to determine.

In sum, Respondents neglect the fact that the complaint adequately alleged Proposition 12 discriminates against out-of-state farmers and *NPPC II* did not. And it is no answer at all to say that the benefit of time through litigation has remedied the unconstitutional lead-in time granted to in-state farmers. An unconstitutional law remains unconstitutional. Proposition 12 burdens out-of-state farmers to the direct benefit of in-state farms. This falls squarely within the dormant Commerce Clause's "core" antidiscrimination principles. *NPPC II*, 598 U.S. at 377.

II. If *Pike* Means Anything, It Applies In This Case.

Respondents also attack the precise meaning of *NPPC II*'s fractured opinions, primarily Justice

Barrett's. Specifically, the opposition homes in on the portion of her concurrence stating that it is not possible for a judge to compare Proposition 12's in-state moral and health benefits against interstate financial costs.

For one, to Justice Barrett's point, it was not necessary for a litigant to balance these interests merely to state a *Pike* claim. She wrote that "[n]one of our *Pike* precedents require us to attempt such a feat." *NPPC II*, 598 U.S. at 394 (Barrett, J., concurring in part). But second, the opposition overlooks the last sentence of her concurrence: she specifically ruled that "[i]f the burdens and benefits were capable of judicial balancing, I would permit petitioners to proceed with their *Pike* claim." *Id.* And it was on that first point—i.e., that a judge *could* engage in such a test—that 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). It is the latter part of Justice Barrett's opinion that matters here, giving a fifth vote that the complaint in *NPPC II* stated a *Pike* claim.

Additionally, the opposition's argument would categorically reject the holding of those six Justices that retained the *Pike* balancing test. Even if there is no *majority* holding, and the Court is to "follow the result," the Court must also "follow the reasoning or standards set forth in the opinion constituting the 'narrowest grounds' of the Justices in the majority." *Ramos v. Louisiana*, 590 U.S. 83, 125 (2020) (Kavanaugh, J., concurring in part (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). And if there is a dispute as to that holding, as there appears to be,

that only increases the acute need for this Court's clarification.

III. The *Marks* Issue Here Makes This Case Even More Of A Perfect Vehicle.

The opposition also incorrectly contends that there is no dissonance among the circuits with respect to the interpretation of split Supreme Court opinions and whether and how to account for dissenting opinions, claiming that *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023) conclusively resolved the question. First, *Sackett's* holding was made in light of the fact that "[n]either party contends that a [previously splintered case] controls"; considering the lack of dispute, the Supreme Court summarily agreed that the Court was "unable to agree on an opinion of the Court" in that previous case. *Sackett*, 598 U.S. at 659 & n.3 (2023). This is hardly a conclusive determination of the open *Marks* question. But more importantly, in making that statement, *Sackett* cited to *Nichols v. United States*, 511 U.S. 738, 745-46 (1994)—which itself acknowledged that the *Marks* inquiry has "obviously baffled and divided the lower courts that have considered it." And as explained in the petition, the fact that *Marks* works in one case does not mean it works in all cases. *See United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011)("[A] strict application of *Marks* is not a workable framework for determining the governing standard established by *Rapanos*.").

The opposition fails to grapple with these arguments. Rather than recognize that *Marks* is an open issue, Respondents attempt to wave it away. But this only demonstrates the point made in the petition: different circuits take different approaches, and guidance is desperately needed to clarify the meaning

and import of splintered Supreme Court opinions.[4]

IV. This Case Is Of Vital Importance.

The opposition additionally tells this Court that "all is well" in the Nation with respect to interstate trade, and that there have been no simmering plans of interstate economic warcraft. Nothing could be further from the truth. Tit-for-tat lawmaking is now already occurring. A few examples worth noting: Florida, along with several other states, began enacting variations of cultivated meat bans to protect in-state agricultural interests. News Release, *Governor DeSantis Signs Legislation to Keep Lab-Grown Meat Out of Florida* (May 1, 2024), https://www.flgov.com/eog/news/press/2024/governor-desantis-signs-legislation-keep-lab-grown-meat-out-florida.

Last month, a New York county clerk blocked Texas from filing a legal action against a New York

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[4] Nor did Petitioner waive any argument in connection to this point. Petitioner's position below was that *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1025 (9th Cir. 2021) ("*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*]."). Indeed, Petitioner contended throughout the argument that the panel should have relied upon the collective view of the majority of Justices in *NPPC II*. *See, e.g.*, *id.* at 7:54-9:00; 18:35-19:37; 21:25-22:16; 23:52-24:20. Petitioner's position has always been that *NPPC I* is not binding here, because it raised different legal theories and was in a different procedural posture. And in no way did Petitioner concede that *NPPC I* bound the Ninth Circuit; and, in any event, a Ninth Circuit decision (*NPPC I*) could *never* bind this Court, which is all that matters now.

doctor for prescribing and sending abortion pills to a Texas woman, using a so-called "telemedicine abortion shield law." Press Release, Ulster County Clerk's Office, *Statement from Acting County Clerk Taylor Bruck on Filing from Texas Attorney General Ken Paxton* (Mar. 27, 2025), https://clerk.ulstercountyny.gov/news/countyclerk/327-clerk-rejects-filing-texas-attorney. And just this term, the Court denied a motion for leave to file a bill of complaint in a case involving yet another interstate trade dispute, in a suit alleging that California—along with several other states—"are attempting to 'dictate interstate energy policy' through the aggressive use of state-law tort suits." *Alabama v. California*, 145 S. Ct. 757, 758 (2025) (Thomas, J., dissenting).

The opposition has ignored these state commerce conflicts and failed to address the concerns raised in the petition about incentivizing tit-for-tat trade wars brewing across State legislatures. The examples above are only more evidence of increased interstate hostility that this Court needs to tamp down to ensure a national common-market—in other words, to ensure "[a] unity of commercial, as well as political, interests." THE FEDERALIST NO. 11, at 90 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

V. The Remaining Claims Plainly Fall Inside The Scope Of The Questions Presented.

Finally, rather than properly address the undisputed existence of three additional claims in the complaint—preemption under the Packers and Stockyards Act, violation of the Privileges and Immunities Clause, and violation of the Due Process Clause—Respondents meekly claim they aren't "fairly included" within the questions presented. It's unclear how they think so. The text of the question presented

expressly references the "many other viable counts," (Pet. ii) and the brief includes sections specifically discussing each of the claims. Moreover, discrimination is at the heart of the offending conduct for all of the claims, as set forth in the petition. Thus, Petitioner is not bootstrapping questions that "exist side-by-side, neither encompassing the other." *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (recognizing a scenario in which multiple questions may be subsidiary to a larger question). It is obvious that all of these claims are properly part of the case, dismissed prematurely, and part of what this Court should consider on the merits.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

RYANN A. GLENN
HUSCH BLACKWELL LLP
13330 California Street
Suite 200
Omaha, NE 68154

ELDON MCAFEE
BRICK GENTRY P.C.
6701 Westown Parkway
Suite 100
West Des Moines, IA 50266

MICHAEL T. RAUPP
Counsel of Record
CYNTHIA L. CORDES
HUSCH BLACKWELL LLP
4801 Main Street,
Suite 1000
Kansas City, MO 64112
(816) 983-8000
michael.raupp@
huschblackwell.com

Counsel for Petitioner