

No. 21-468

IN THE
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, ET AL.,
Petitioners,

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS
SECRETARY OF THE CALIFORNIA DEPARTMENT OF
FOOD & AGRICULTURE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR THE NORTHEAST ORGANIC
DAIRY PRODUCERS ALLIANCE AS *AMICUS
CURIAE* IN SUPPORT OF RESPONDENTS**

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CORPORATE DISCLOSURE STATEMENT

The Northeast Organic Dairy Producers Alliance is a nonprofit, voluntary association. It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

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STATEMENT OF INTEREST¹

The Northeast Organic Dairy Producers Alliance (“NODPA”) is the largest organic dairy grassroots farmer organization in the country and is dedicated to organic dairy farmers’ interests, peer mentoring, and communication between producers. NODPA’s mission is to enable organic dairy family farmers to have informed discussions about matters critical to the well-being of the organic dairy industry as a whole, with particular emphasis on: (1) establishing a fair and sustainable price for their product at the wholesale level; (2) promoting ethical, ecological, and economically sustainable farming practices; (3) developing networks with producers and processors of other organic commodities to strengthen the infrastructure within the industry; and (4) establishing open dialogue with organic dairy processors and retailers in order to better influence producer pay price and to contribute to marketing efforts. NODPA promotes its members’ interests nationally and in Washington, D.C.

NODPA supports measures that, like Proposition 12, regulate markets to enable consumers to purchase food products that are consistent with animal welfare. NODPA submits this brief to provide the Court its perspective on Petitioners’ arguments regarding the practical impact of Proposition 12 on the pork industry. Contrary to Petitioners’ assertions that Proposition 12 will harm small farmers or

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this *amicus* brief.

require uniform, nationwide compliance with California’s regulations, NODPA’s experience in the dairy industry is that the existence of a particular, limited market for differentiated products (like organic dairy or crate-free pork) creates opportunities for small farmers. NODPA’s experience in the dairy industry is also inconsistent with Petitioners’ assertions that it is “infeasible” to segregate and trace multiple, differentiated products as they travel through the food supply chain.

NODPA agrees with Respondents that Proposition 12 does not violate the dormant Commerce Clause. In particular, NODPA disagrees with Petitioners’ attempt to characterize Proposition 12 as having the kinds of effects that would subject it to *per se* invalidation as an extraterritorial regulation. *See* Pet. Br. 16.

ARGUMENT

I. Proposition 12 Is Likely to Lead to Differentiation and Segregation of Products in the Pork Supply Chain, Rather than the Uniformity Petitioners Allege.

The core of Petitioners’ argument that Proposition 12 violates the dormant Commerce Clause by “regulat[ing] wholly out-of-state conduct” is their assertion that it is “impractical[] . . . [to] trac[e] a single cut of pork” to a sow housed in compliance with Proposition 12. Pet Br. 27-28. As a result, Petitioners argue, “farmers everywhere will be required to conform their *entire* operations with Proposition 12 for all their sows.” *Id.* at 28-29; *see also id.* at 16 (“because it is impracticable, in the complex, multi-stage pork production process, to trace a single

cut of pork back to” a sow housed in compliance with Proposition 12, “buyers of market hogs *everywhere* will demand that their suppliers comply with Proposition 12”) (emphasis added). Nationwide industry consolidation around Proposition 12’s requirements because of this alleged impracticality, Petitioners argue, will “force[]” smaller farms “from the market,” as they will be “caught between the prohibitive cost of complying with Proposition 12 and” the prospect of “losing relationships with packers that insist on compliance by their suppliers.” *Id.* at 46.

Based on NODPA’s experience in the food industry, Petitioners’ assertions are implausible. The existence of a new market for food products meeting particular standards for quality, health, or ethical treatment of animals does not result in an industry stampede toward universal compliance, even if the new market is as large as California. Instead, some producers and other industry participants decide that it is in their interest to serve that market, even at higher cost, while others continue to focus on conventional products. Differentiation, far from driving small farmers from the market, creates opportunities for them to serve segments that others with larger footprints may find inefficient for their operations. And the industry develops mechanisms—if they do not already exist—for identifying which products satisfy particular standards. Even in an industry in which an animal or a product may pass through many hands in the journey from the farm of the original producer to the table of the consumer, these kinds of techniques are established and proven by experience.

A. Differentiated Products Are Common in the Agricultural Industry and Create Opportunities for Smaller Suppliers.

Product differentiation is a mainstay of the national food market. It can take many forms, including the same basic product made from different foods or variants (blue corn tortillas versus white or yellow corn tortillas, for example) as well as the same product with ingredients held to different standards (such as conventional grain-fed beef versus grass-fed or grass-finished beef). The reasons for differentiation vary greatly: different appearance, texture, flavor, quality, health benefits, or satisfaction of particular consumer preferences.

Differentiation abounds in the agricultural industry's production of livestock and poultry farming. Its impact is visible in any grocery store's meat, dairy, or poultry aisles. Consider chicken eggs, for example: retailers commonly sell conventional eggs, organic eggs, pasture-raised eggs, and free-range eggs. Beef and dairy products likewise may be conventional or may be labeled as organic or grass-fed.

These designations can, but need not, overlap depending on the circumstances: A poultry product certified as "organic" could be free-range, or not. A cut of beef certified as "organic" could be grass-fed, or not. The federal government, through the U.S. Department of Agriculture ("USDA"), focuses in large part on identification and certification of organically produced agricultural products, through the National Organic Program. *See generally* Agricultural Marketing Service, *National Organic Program*, U.S. Department of Agriculture, <https://www.ams.usda.gov/about-ams/programs->

offices/national-organic-program (last visited Aug. 11, 2022). USDA regulations prescribe requirements for products labeled as “organic,” such as the origin of the livestock, qualities of the feed, certain livestock health-care practices, permission of on-site inspections, and more. *See* 7 C.F.R. §§ 205.1-205.699. Regulation and third-party certification of other designations, such as “free range” or “grass-fed,” vary.

Among other virtues, differentiation benefits smaller farmers and other actors in the supply chain. While smaller farmers may struggle to compete with larger producers to sell conventional products, they may be able to tailor their operations more easily to produce differentiated products at a higher price. The benefit for producers is even greater when, as is the case for organic dairy, the product differentiation is based on production practices many of the smaller producers believe are superior to conventional methods.

B. The Dairy Industry and Other Agricultural Industries Routinely Segregate and Trace Differentiated Products.

Product differentiation requires more than just one farm’s decision to follow particular practices or seek particular certifications. Products in the national food industry typically pass through several sets of hands to get from farm to table. A cattle farmer, for example, will often sell cattle to a processor, who then sells processed cuts of meat to a wholesale distributor, who then sells them to a retailer, who then sells to the consumer. The supply chain for milk and dairy products is similar, but must move particularly quickly given the risk of expiration and spoilage. After a farmer milks a cow, the milk is

stored for a very short period before that farmer or a farm cooperative sells it to a processor, who processes it and may convert it into a product like cheese, yogurt, or ice cream. The processor sells the finished product to a distributor, who in turn sells it to retailers like supermarkets and grocery stores.

At every step in these supply chains, actors must segregate and trace which products satisfy particular requirements that are relevant for them. Organic milk cannot be commingled with conventional milk, for example, if it is to be sold as organic. And while some processors and distributors deal only in particular products, it is more common for the same companies and plants that handle conventional dairy products also to handle organic products. That is true of the market for organic dairy products, which comprises only 6% of sales in the United States, and the markets for conventional beef and organic beef.

Unsurprisingly, companies at each stage of the process have developed techniques to identify which product is which and to ensure that each product complies with the relevant standards. Containers with organic milk are labeled as such; likewise with organic or grass-fed beef, or organic or free-range eggs. In addition, processors that handle organic dairy products frequently process organic dairy at the beginning of the day, after the machines have been cleaned, to prevent commingling with non-organic dairy that passes through the same machines later in the day. Segregating differentiated products from one another and tracing them as they transit the supply chain is a familiar, routine part of daily operations.

C. The Steps Required for Compliance with Proposition 12 Are Consistent with Those for Other Food Products.

Proposition 12 prohibits the sale in California of pork products from breeding pigs confined with inadequate floorspace, or from those breeding pigs' immediate offspring. Cal. Health & Safety Code § 25990(b)(2). Petitioners assert that “it is impracticable, in the complex, multi-stage pork production process, to trace a single cut of pork back to a particular sow housed in a particular manner.” Pet. Br. 16. The result, they say, is that “farmers everywhere will be required to conform their *entire* operations with Proposition 12 for all their sows.” *Id.* at 28. Those arguments are implausible and inconsistent with the reality of mass-market agricultural production in the United States.

The *amicus* brief of Agricultural and Resource Economics Professors explains well “why, as a matter of both economic theory and empirical data, Petitioners’ central economic arguments are erroneous and implausible.” Agric. & Res. Econ. Professors’ Br. 4. NODPA’s real-world experience with agricultural supply chains adds further support for the conclusion that only some pork producers will choose to comply with Proposition 12’s requirements, while most “processors and marketers . . . are likely to choose to segregate their supply chains and supply both compliant and non-compliant products.” *Id.* at 5. Neither the structure of the pork industry nor the requirements of Proposition 12 make this context materially different from others.

First, tracing compliance with Proposition 12’s space requirements is not significantly different from tracing compliance with other standards or

requirements. The primary difference between Proposition 12 and existing requirements for organic products, for example, is that Proposition 12 (as a legal requirement for sale of products in California) effectively guarantees that there will be a significant market (California) for Proposition 12-compliant pork. The market for organic products, by contrast, is driven entirely by consumer demand.

That fact, however, changes relatively little with respect to the requisite supply-chain logistics. Marketers or distributors that would like to sell pork products in California will require the processors from whom they purchase pork to configure their operations to be capable of identifying which pork can legally be sold in California. Therefore, for example, the offspring of sows that are not housed in conditions that satisfy Proposition 12's requirements will be segregated from the offspring of sows housed in compliance with Proposition 12 through the same methods used in other contexts. *See, e.g.*, Barringer Br. 12-19, 30-33 (describing existing methods in pork industry that can be used for Proposition 12-compliant pork).

Second, participants in the pork market will have clear economic incentives to establish processes to segregate and trace Proposition 12-compliant pork. The pork industry may be “vertically segmented” and “complex.” Pet. Br. 28. But while that may increase the overall cost of segregation and tracing, *but see* Barringer Br. 35, it does not change the fundamental market incentives at play. The idea that processors and distributors who wish to sell pork both inside and outside California will instead simply require all their pork suppliers to comply with Proposition 12's requirements “is directly counter to . . . economic

incentives.” Agric. & Res. Econ. Professors’ Br. 11. It is also counter to common sense.

Complying with standards that go above and beyond conventional methods typically costs more; that is the case in the pork industry, the dairy industry, and elsewhere. Therefore, to realize a similar profit on Proposition 12-compliant pork, farmers, processors, and distributors likely will need to charge a higher price. Indeed, California voters were informed that Proposition 12 likely would result in higher pork prices for California consumers. *See State Resps. Br. 43.* But for pork sold outside California (that is, in the vast majority of the U.S. pork market), farmers, processors, and distributors who “sell more expensive, Proposition 12-compliant pork” would generally “be undercut by [their] lower cost competitors and lose market share.” Agric. & Res. Econ. Professors’ Br. 11.² Producers and distributors are unlikely to make that sacrifice given the availability of segregation and tracing.

Third, Petitioners’ argument that tracing is impracticable because “sow farmers will not know whether any cut from their pigs will be sold in California” is a red herring. Pet. Br. 29. Processors that choose to sell Proposition 12-compliant pork will

² Pork that satisfies Proposition 12’s requirements most likely will be sold primarily in California. To the extent consumers outside California also prefer crate-free pork, however, those preferences can create additional demand for Proposition 12-compliant pork. *See generally, e.g.,* Maisie Ganzler, Bon Appétit Management Company, *No Free Lunch: What “Gestation-Crate-Free” Pork Actually Means* (July 7, 2016), <https://www.bamco.com/blog/free-lunch-gestation-crate-free-pork-actually-means/> (describing a private company’s work with its suppliers to fulfill its orders for crate-free pork).

likely distinguish in their purchase orders between pigs that must be the offspring of a sow housed in compliance with Proposition 12 and pigs that need not meet that requirement. Processors that do not sell Proposition 12-compliant pork will not make such a distinction in their purchase orders. Regardless, a farmer need not know the ultimate destination of his product to know whether he can fulfill an order for Proposition 12-compliant pork.

Fourth, industry practice in response to Proposition 12 has overtaken Petitioners' arguments. Respondents' briefs, for example, explain how a number of suppliers have structured their operations to offer Proposition 12-compliant pork. *See* State Resps. Br. 29 & n.14; Intervenor-Resps. Br. 5-6. The industry as a whole, however, has not changed. And conventional pork continues to be available in other states. There is no indication that the overall industry is converging on Proposition 12-compliant pork or that it has proven to be difficult to segregate compliant from non-compliant pork.

* * *

The pork industry may be segmented and complex. It may cost more money for those who choose to raise Proposition 12-compliant pork (and processors or packers may offer premiums to producers to supply Proposition 12-compliant pork). But the impact of Proposition 12 will not be universal compliance based on supposed impossibility or impracticability of segregating and tracing which pork meets Proposition 12's requirements. The same tools the agricultural industry has used for years will apply in this context as well.

II. Proposition 12's Restrictions Are Unlike Those in *Southern Pacific*.

NODPA supports Respondents' arguments that Proposition 12 does not violate the dormant Commerce Clause. See State Resps. Br. 13-48; Intervenor-Resps. Br. 26-50. Moreover, NODPA's experience with segregation and tracing in the food industry, described above, helps demonstrate how dissimilar this case is to *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), one of the principal cases to which Petitioners analogize to argue that Proposition 12 violates a *per se* dormant Commerce Clause restriction against state laws that regulate extraterritorially. See Pet. Br. 26-27; see also *id.* at 31-32.

In *Southern Pacific*, this Court held that an Arizona law prohibiting the operation within the State of a railroad train with more than a particular number of cars violated the dormant Commerce Clause. 325 U.S. at 763-64. The Court did not apply a *per se* rule, but rather examined "the nature and extent of the burden" the regulation imposed "on interstate commerce" and the "relative weights of the state and national interests involved." *Id.* at 770. Based on the nature of the rail industry, the Court found that "if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system." *Id.* at 771. And it concluded that the Arizona law, which required fewer cars per train than other states permitted, posed a "substantial obstruction to the national policy proclaimed by Congress" and, in effect, "control[led] train operations" outside Arizona "because of the

necessity of breaking up and reassembling long trains” simply in order to travel through the State. *Id.* at 773, 775.

Petitioners argue that, similar to *Southern Pacific*, “Proposition 12 disrupts a national market and controls, in practical effect, how hogs are raised in Iowa, North Carolina, and every pig-producing State, regardless of their local laws.” Pet. Br. 32. But as explained above, that is simply untrue and implausible.

Proposition 12 does not have the kind of impact on wholly out-of-state commerce that the Arizona law at issue in *Southern Pacific* did. The practical effect of Arizona’s law was often to “control[] the length of passenger trains all the way from Los Angeles to El Paso,” 325 U.S. at 774-75, for no reason other than that a train traveling directly from New Mexico to California must travel through Arizona—regardless of any plans to stop there.³

The pork supply chain is not at all like the national railway system. Pork that is not destined for California is not subject to Proposition 12’s restrictions as a matter of either law or practical effect. Distributors, processors, and farmers can choose whether investment in the methods necessary to sell Proposition 12-compliant pork is in their interests in a way that is untrue for rail operations. And they can choose not to sell pork in California, without sacrificing the ability to sell in other states,

³ Respondents correctly note that *Southern Pacific* also differs from this case because the trains that were the objects of regulation there were “*instrumentalities* of interstate commerce” that affected the free flow of freight and passengers. Intervenor-Resps. Br. 21-22; *see also* State Resps. Br. 39, 41.

or they can segregate Proposition 12-compliant pork for sale in California from non-Proposition 12-compliant pork for sale in other states.

Thus, contrary to Petitioners' arguments, farmers, processors, and distributors based in "Iowa, North Carolina, and every pig-producing State" are free to raise their hogs however they desire, with the exception of pork products to be sold in California.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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