

No. 21-468

IN THE
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL &
AMERICAN FARM BUREAU FEDERATION,
Petitioners,

v.

KAREN ROSS, *et al.*,
Respondents.

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

**BRIEF OF THE AMERICAN SOCIETY FOR
THE PREVENTION OF CRUELTY TO
ANIMALS AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTERESTS OF *AMICI CURIAE*¹

Amicus curiae, the American Society for the Prevention of Cruelty to Animals (“ASPCA”), is a not-for-profit corporation whose mission is to provide effective means for the prevention of cruelty to animals throughout the United States. Incorporated in 1866 by a special act of the New York State legislature, the ASPCA is North America’s oldest humane organization. Today, it is also one of the largest in existence, with millions of supporters nationwide.

The ASPCA has a well-established farm animal welfare program that seeks to improve the lives of the billions of animals on American farms through outreach with consumers, advocates, farmers, industry, policymakers, and lawmakers. For example, the ASPCA’s “Shop With Your Heart” program assists the increasing number of consumers who prefer to purchase meat, eggs, and dairy products derived from more humanely-raised livestock. In addition, ASPCA experts with substantial knowledge of animal welfare science and welfare certification programs assist farmers and other companies with implementation of sustainable business models built on more humane practices, as well as participation in meaningful certification programs consumers can trust.² The

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief’s preparation and submission. All parties have consented to this filing.

² The ASPCA’s farm animal welfare experts generally recommend that consumers who want higher-welfare meat, eggs, or dairy seek out producers who participate in independent certification programs that have implemented higher-welfare practices, such as pasture-based farming and enriched indoor environments, that are verified by regular, on-farm audits

ASPCA also advocates for a range of laws, regulations, and policies that promote greater protection for farm animals.

Based on this knowledge and experience, the ASPCA is uniquely well-suited to advise the Court on the import of animal welfare as a legally acknowledged, legitimate state interest, and the clearly demonstrated ability of meat producers to segregate their supply chains and ensure that a desired portion of their overall operation produces traceable, and certifiable, higher-welfare products.

INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 12 is a measure approved by the citizens of California requiring that certain food products being sold anywhere within the state be sourced from mother pigs, veal calves, and egg-laying hens raised in cage or crate-free environments. Specifically, Proposition 12 requires that covered products be sourced from breeding pigs provided with at least 24 square feet of usable floor space each, ensuring pregnant pigs are able to lie down, stand up, fully extend their limbs, and turn around freely.

Petitioners, the National Pork Producers Council and American Farm Bureau Federation, allege as part of their Dormant Commerce Clause argument, that the provision of animal welfare through implementa-

including, for example, Animal Welfare Approved, Certified Humane®, and Global Animal Partnerships. *See* ASPCA, Meat, Eggs and Dairy Label Guide, <https://www.aspca.org/shopwithyourheart/consumer-resources/meat-eggs-and-dairy-label-guide> (last visited Aug. 10, 2022). These experts also work directly with selected certification programs (including USDA Organic) to further develop and improve their standards.

tion of Proposition 12 is not a legitimate state interest, and therefore the balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) cannot be satisfied. Through this amicus brief, the ASPCA will demonstrate that animal welfare has been routinely and uniformly recognized as a legitimate state interest by the Courts of the United States, and that a strong interest by California citizens to ensure that animal products from inhumane confinement systems are not sold within the state is, in fact, legitimate for purposes of the *Pike* analysis.

Petitioners also erroneously allege that all producers throughout the United States will be forced to comply with the higher-welfare requirements of Proposition 12. This is demonstrably false. Producers will only need to comply with Proposition 12 if they intend to continue selling their product within the State of California, which will, of course, be a business decision. Producers will remain free to sell their products in all other U.S. States and Territories, regardless of Proposition 12 compliance. Further, there are many producers who currently trace and segregate pigs within their supply chains, so that a portion of their products can comply with chosen certification or quality standards. Supply chains can be, and in fact are, frequently bifurcated. Petitioners' claim that all producers across the country would be required to completely change their production practices is grossly overstated and self-serving.

ARGUMENT

Petitioner's argument that the provision of animal welfare afforded by California's Proposition 12 is not a legitimate state interest is not anchored in American jurisprudence. In fact, the courts of this country have routinely recognized that animal welfare is a legitimate state interest. Further, California's interest in ensuring products sold *within the state* meet a desired animal welfare threshold has a clear in-state impact and is not intended to manipulate *out-of-state* behaviors.

Similarly, Petitioner's assertion that Proposition 12 will create a market in which all producers across the country will have no choice but to convert all of their supply chains to fully comply with California's animal housing requirements is baseless fear mongering. In reality, compliance with Proposition 12 will be a business decision that each private company will be free to make on its own accord, and supply chains can most certainly be segregated for partial compliance with Proposition 12 requirements should a business choose to do so.

I. Animal Welfare Is A Long-Recognized Legitimate State Interest, and California Is Permitted to Regulate What Products Are Sold Within Its Borders

That the protection of animal welfare is a legitimate state interest cannot reasonably be questioned. As this Court has recognized, "[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies." *United States v. Stevens*, 559 U.S. 460, 469 (2010). The Massachusetts Bay Colony regulated against animal cruelty in its 1641 Body of Liberties, stating "No man

shall exercise any Tyranny or Crueltie towards any brute Creature which are usuallie kept for man's use." The Body of Liberties §92 (Mass. Bay Colony, 1641). Other states followed, and by 1913 every State had a law on the books prohibiting animal cruelty. See Emily Stewart Leavitt, *Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1970*, 17 (Animal Welfare Institute, 1970).

Since the legitimacy of protecting animals was so clearly established at the time of the nation's founding, courts have routinely acknowledged that "[p]rotecting the health and welfare of domestic animals is a legitimate governmental interest" *Maryeli's Lovely Pets, Inc. v. City of Sunrise*, No. 14-61391, 2015 WL 11197773 at *4 (S.D. Fla. June 25, 2015); see also *Kerr v. Kimmell*, 740 F. Supp. 1525, 1529 (D. Kan. 1990) ("The court finds that a legitimate local public interest is served by the stated purposes of the Act, i.e., quality control and humane treatment of animals."); *Perfect Puppy, Inc. v. City of East Providence*, 98 F. Supp. 3d 408, 417 (D. R.I. 2015) ("There can be little dispute that promoting the humane treatment of animals is a legitimate local interest.").

By overwhelmingly supporting the passage of Proposition 12, the voters of California made clear that they hold the welfare of mother pigs, veal calves, and egg-laying hens in high regard, and wish to ensure that all covered products sold within their state are guaranteed to meet certain welfare-related requirements. To properly assess the legitimate state interest represented by this law, however, it is essential that focus be placed on precisely what the law achieves. Proposition 12 prohibits *California* farm owners and operators from confining covered animals by certain means, and prohibits the *sale within California* of

food products derived from a covered animal that was confined by certain means. The law does not require out-of-state farm owners or operators to change their practices in any way. Rather, this law permits the citizens of California to ensure that meat raised in a manner that they deem cruel will not be sold within their state.

A review of American jurisprudence again demonstrates that a state has a legitimate interest in regulating products sold within its borders to ensure that state citizens are not complicit in practices that they deem to be cruel. California itself has had two such laws upheld under similar scrutiny, prohibiting sales of foie gras and shark fins.

In *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), producers and sellers of foie gras sought to enjoin enforcement of a California law banning sale of the product within the state. The ban was based on animal welfare concerns, as the production of foie gras results from force feeding ducks to excessively enlarge their livers. In their challenge, the producers claimed that the law violated the dormant commerce clause by discriminating against interstate commerce, and directly regulating interstate commerce. *Id.* at 947. The Ninth Circuit soundly rejected these claims. First, the court acknowledged that “a statute that treats all private companies exactly the same does not discriminate against interstate commerce [and] [t]his is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses.” *Id.* at 948 (internal citations omitted). Because the ban related not to *where* the foie gras was produced, but *how* the foie gras was produced, and prohibited sale of both intrastate and interstate

products that were the result of inhumane force feeding, it was not discriminatory. It also did not directly regulate interstate commerce, because it focused only on in-state behaviors – whether it be the in-state force feeding of ducks, or the in-state sale of ducks that were force fed. *See Id.* at 949. The Ninth Circuit thus found that the foie gras law was Constitutionally permissible, and properly advanced local interests by “discourag[ing] the consumption of products produced by force feeding birds and prevent[ing] complicity in a practice that is deemed cruel to animals.” *Id.* at 952. This Court denied certiorari on this ruling, allowing it to stand as a valid expression of the law.

California’s shark fin law provides another relevant example. In *Chinatown Neighborhood Association, et al., v. Harris*, 33 F. Supp. 3d 1085 (N.D. Cal. 2014), a neighborhood association challenged California’s shark fin prohibition, in part based on a dormant commerce clause argument. The law at issue made it unlawful for anyone to possess, sell, trade, or distribute a shark fin within California. In rejecting the plaintiffs’ dormant commerce claim reasoning, the court found that the law treated all shark fins the same, regardless of origin, and “a ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items.” *Id.* at 1099. The court also vehemently disagreed with plaintiff’s argument that the law imposed California’s regulatory scheme outside of the state’s borders, because the law in fact “only regulate[d] the possession, trade, and distribution of shark fin[s] within California.” *Id.* Under the California law, other states remained free to regulate shark fins within their borders however they chose. As the court surmised,

“[t]hat out-of-state fins may not be sold or distributed in California is only an incidental effect of the law that does not violate the Commerce Clause Absent discrimination of products based on origin, the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.” *Id.* Ultimately, the court upheld the law, finding that California had a legitimate state interest in regulating in-state sale, possession, and distribution of shark fins, even when those fins came from outside of California. The Ninth Circuit affirmed this ruling, and this Court once again denied certiorari, allowing the law to stand.

Ensuring the welfare of animals is, and always has been, a legitimate state interest in the United States of America. The ASPCA was founded on this very notion, and the organization and its millions of supporters have worked for over 150 years to ensure that the protection of animal welfare is seen as a legitimate goal towards which all should strive. California has a legitimate interest in regulating in-state sale of food products that its citizens deem to be derived through cruelty. This state goal remains legitimate, even in the face of incidental impacts upon inter-state business. Proposition 12 should therefore be upheld, according to judicial precedent.

II. Businesses Will Be Free to Choose If and How They Comply With Proposition 12, and Petitioners’ Claims of Forced Compliance Are False

Petitioners argue that by prohibiting the sale of products from certain farming systems, Proposition 12 effectively controls the entire pork industry and will

force producers who otherwise would not choose to meet Proposition 12 standards to transition to gestation crate-free production. This argument is based on the presumptions that all producers will choose to comply with Proposition 12, and that it would be impossible for producers to segregate Proposition 12-compliant products from non-compliant products, forcing the market to transition to entirely Prop-12 compliant systems. However, current market conditions, wherein crate-free and otherwise premium pork products as well as conventional products are successfully segregated and traced throughout the supply chain on a regular basis, prove this presumption false and refute Petitioners' assertions of inevitable, industry-wide adoption of California's chosen standard.

Petitioners correctly describe the vertical integration present in much of the pork industry, wherein various stages of a pig's life often occur at different farms. Generally, these stages are gestation and weaning, where farms raise mother pigs and where piglets are weaned off their mothers, and grow-out or feeder-to-finish, where pigs grow until they reach slaughter weight. Petitioners assert that because of this movement between farms from birth to slaughter, it is often unclear at slaughter where any given pig originated. Though this may be true for some pigs which are not tracked throughout the supply chain, tracing pigs from "end-to-end" is common industry practice currently followed by major pork producers and is required for products that are part of value-added certification programs. This tracing and segregation enable companies to ensure certified and other premium products come from farms raising pigs according to the correct standards, as well as provides necessary origination information should a product be subject to a recall.

All value-added certification programs, like animal welfare and organic certifications, require producers to track and, if necessary, segregate animals throughout the supply chain to ensure end products only come from or are made up of certified animals. Segregation at the slaughter and processing facility is a common requirement and is easily accomplished by processing certified or otherwise value-added/premium animals and products on certain days of the week and/or hours of the day. For example, the widely adopted³ animal welfare certification Global Animal Partnership (“G.A.P.”), whose standards provide breeding pigs with at least 24 sq ft of space, requires all G.A.P. Certified products to come from certified farms and requires integrated systems with different stages of production to certify each stage.⁴ G.A.P. Certified farms must keep transport records of all off-farm animal movement, be able to demonstrate traceability of G.A.P. Certified animals back to birth, and must use slaughter facilities with written segregation policies in place to ensure certified animals and products are kept separate from non-certified animals and products handled at the same facility.⁵ Currently, over 1.5

³ Major pork producers selling products across the country currently hold GAP certification. Examples of GAP-certified producers/companies include Applegate, La Quercia, Pederson’s Natural Farms, Thompson Farms, Thrive Market, Villari Brothers, and Wellshire Farms.

⁴ Global Animal Partnership, PILOT G.A.P. Policy Manual (April 28, 2020), *available at* <https://globalanimalpartnership.org/wp-content/uploads/2020/05/Pilot-G.A.P.-Policy-Manual-v1.1-April-28-2020.pdf> (p.46)

⁵ Global Animal Partnership, PILOT G.A.P. Policy Manual (April 28, 2020), *available at* <https://globalanimalpartnership.org/wp-content/uploads/2020/05/Pilot-G.A.P.-Policy-Manual-v1.1-April-28-2020.pdf> (p.47); Global Animal Partnership, 5-Step®

million pigs are raised under G.A.P. standards, with 1.1 million G.A.P. Certified piglets born annually.⁶ The Certified Humane by Humane Farm Animal Care (“Certified Humane”) program is another widely adopted⁷ animal welfare certification program whose standards provide breeding pigs with at least 28.9 sq ft of space and requires sufficient tracing to show only certified animals make up or provide Certified Humane products.⁸ Any product bearing the Certified Humane label must keep records assuring “complete traceability from the production site through shipping,” including proper separation of any certified and non-certified products at the slaughter facility.⁹ There are currently 18 U.S. companies raising or processing Certified Humane pork, selling over 90 pork products. Niman Ranch, a well-known Certified Humane pork

Animal Welfare Rating Standards for Pigs v2.3, (July 9, 2018), *available at* <https://globalanimalpartnership.org/wp-content/uploads/2018/07/5-Step-Animal-Welfare-Rating-Standards-for-Pigs-v2.3-20180712.pdf> (p.40-42)

⁶ Global Animal Partnership, Annual Report 2021, *available at* <https://globalanimalpartnership.org/flipbook/2021-annual-report/?page=30> (last visited Aug. 10, 2022)

⁷ Major pork producers selling products across the country currently hold Certified Humane certification. Examples of Certified Humane producers/companies include Niman Ranch, DuBreton, Home Place Pastures, and North Country Smokehouse.

⁸ Certified Humane, Program/Policy Manual: Humane Farm Animal Care (2020), *available at* <https://certifiedhumane.org/how-we-work/program-policy-manual/>; Certified Humane, Humane Farm Animal Care Standards: PIGS (January 2018), *available at* https://2gn8ag2k4ou3ll8b41b7v2qp-wpengine.netdna-ssl.com/wp-content/uploads/Standard_Pigs.pdf

⁹ Certified Humane, Program/Policy Manual: Humane Farm Animal Care (2020), *available at* <https://certifiedhumane.org/how-we-work/program-policy-manual/> (p.17)

brand, has over 740 farmers in its supply chain¹⁰ raising just under 300,000 pigs.¹¹

Many companies currently split their production between certified and non-certified production or conventional and premium production to participate in both markets. Pederson’s Natural Farms, a Texas-based meat company available in 33 states¹², offers multiple product lines with different attributes, including G.A.P. Certified, Certified Humane, organic, and Non-GMO Project Verified.¹³ duBreton is a Canadian company that sells throughout the U.S., with multiple product lines that include Certified Humane, G.A.P. Certified, and organic products, as well as “natural” and “raised without antibiotics” lines.¹⁴ Hormel Foods, a major meat company with over \$9 billion in annual

¹⁰ Niman Ranch, Our Family Farmers, <https://www.nimran ranch.com/raised-with-care/our-family-farmers/> (last visited Aug. 10, 2022)

¹¹ Linda Coffey, Ann H. Baier, National Center for Appropriate Technology, *Guide for Organic Livestock Producers* (November 2012), USDA ORGANIC, available at <https://www.ams.usda.gov/sites/default/files/media/GuideForOrganicLivestockProducers.pdf> (p.14)

¹² FoodChain, Pederson’s Natural Farms, <https://foodchainmagazine.com/profiles/pedersons-natural-farms/> (last visited Aug. 10, 2022)

¹³ Pederson’s Natural Farms, *Our Meaty Mission*, <https://pedersonsfarms.com/pages/our-meaty-mission> (last visited Aug. 10, 2022)

¹⁴ duBreton, Our Ranges: Pork Worthy of Your Convictions, <https://www.dubreton.com/en-us/products/our-ranges> (last visited Aug. 10, 2022); Yahoo, *Making Prop 12 Complaint Pork Accessible* (Sept. 20, 2021), <https://www.yahoo.com/now/making-prop-12-compliant-pork-164200493.html>

revenue, splits its production between its conventional and “Natural Choice” lines.¹⁵

Though value-added and premium markets, like animal welfare and organic-certified, are prime examples of supply chains where traceability and segregation are the norm, conventional pork production is also already consistently and reliably tracing its products. The National Pork Board, a promotional body created by the U.S. Department of Agriculture (“USDA”) Agricultural Marketing Service (“AMS”) and made up of pork producers from across the country, itself highlights the importance of “end-to-end” certifications.¹⁶ Its 2021 Sustainability Report lists multiple existing certification programs that require transparency throughout the entire supply chain, including the Pork Quality Assurance Plus (“PQA Plus”) program. PQA Plus is a certification program administered by the National Pork Board that uses blockchain technology to follow pigs through the entire supply chain, requiring participating producers to “be able to reliably trace all animals either individually or as part of a group or lot within the production system.”¹⁷

¹⁵ Hormel, 100% Natural Varieties, <https://www.hormel.com/Brands/Hormel-Natural-Choice-Deli-Meats-Wraps-Snacks-Bacon-Hams-Stacks-Pepperoni> (last visited Aug. 10, 2022)

¹⁶ U.S. Pork Industry, *2021 Sustainability Report* (Feb. 17, 2022), available at https://www.porkcdn.com/sites/porkcheckoff/assets/files/2244_NPB+2021+Pork+Industry+Sustainability+Report+Final.pdf (p.10)

¹⁷ WE Care, *Pork Quality Assurance Plus, Education Handbook* (December 2021, available at <https://www.porkcdn.com/sites/lms/References+and+Resources/PQAv5+Handbook+English+2.8.22.pdf>) (p.12)

71,000 farmers representing roughly 85% of U.S. pork production are currently PQA Plus certified.¹⁸

Smithfield Foods, the largest pork producer in the United States, selling \$6.5 billion worth of pork products in the U.S. last year¹⁹, requires tracing of all pigs back to their farm of origin.²⁰ Smithfield validates that tracing requirement using the USDA’s Process Verified Program (PVP), along with other practices like the separate requirements and segregation of products intended for export to different countries, and products that are part of Smithfield’s “Never Fed Beta Agonists Program.”²¹ Smithfield’s website describes its traceability program as “carefully managing the process from the farm through delivery to your neighborhood store.”²²

¹⁸ WE Care, *Pork Cares: Ongoing Progress*, <https://www.porkcares.org/proof/ongoing-progress/#:~:text=71%2C000%20farmers%20are%20PQA%20Plus,85%25%20of%20U.S.%20pork%20production> (last visited Aug. 10, 2022).

¹⁹ Smithfield, *2021 Sustainability Impact Report* (May 18, 2022), available at <https://www.smithfieldfoods.com/getmedia/7ecf12e2-da3b-4d31-8796-d07e38b39e51/2021-Sustainability-Impact-Report.pdf> (p.8)

²⁰ Smithfield, *2021 Sustainability Impact Report* (May 18, 2022), available at <https://www.smithfieldfoods.com/getmedia/7ecf12e2-da3b-4d31-8796-d07e38b39e51/2021-Sustainability-Impact-Report.pdf> (p.82) “100% of our facilities participate in the U.S. Department of Agriculture’s Process Verified Program (PVP), which validates our programs including our company’s requirement that all pigs are traceable to farm of origin”

²¹ USDA Agriculture Marketing Service, Smithfield Process Verified Program, <https://www.ams.usda.gov/content/smithfield-process-verified-program> (last visited Aug. 10, 2022)

²² Smithfield, *Why Smithfield?*, <https://smithfield.sfdbrands.com/en-us/why-smithfield/> (last visited Aug. 10, 2022)

Finally, it is important to note that meeting Proposition 12 standards and selling into the California market will ultimately be a business decision. There is no requirement that companies or individual farms continue to sell into the state, and many may decide not to transition their farms to gestation crate-free housing systems, either entirely or partially, and instead sell their products in the remaining states and U.S. territories. For companies that do decide to meet Proposition 12 requirements and sell pork products into California, there are numerous examples in the current marketplace, including those identified above, that indicate the ability of producers to trace and segregate animals and products appropriately to ensure compliance with California's law, or any other standards of production. There are many options for producers looking to trace and segregate animals, from animal IDs, blockchain technology, facility-specific product codes, or specific stock keeping units ("SKUs"), all of which are currently utilized throughout the pork industry.

In short, Proposition 12 does not mandate industry-wide compliance of all pork producers. Any producer that does choose to comply will be able to do so using tried and true methods of source tracing that are already common practice within the pork industry. Supply chains can be, and are, segregated to comply with the various certification programs that already flourish within the existing market. Businesses are free to choose, on an individual basis, whether they want to adjust all or part of their supply chain systems to take advantage of compliance with a chosen certification. Compliance with Proposition 12 would be no different, and Petitioners' attempt to argue otherwise is without merit.

CONCLUSION

Despite Petitioners' argument to the contrary, California has a legitimate state interest in ensuring that pork products sold within the state meet the welfare requirements approved by its citizens. In effectuating Proposition 12, California is not dictating housing for animals raised outside of its borders, but instead is ensuring that only humanely raised products are sold within their state. Such state interests have been upheld as legitimate under the law repeatedly, and this case should have the same outcome.

Further, Petitioners' assertion that Proposition 12 will require all producers throughout the country to fully comply with California's animal housing requirements is false. Whether, and how, an individual producer will choose to comply with California's law will be a business decision. If a company should choose not to comply with the California requirements, it will be free to continue selling its product in the numerous other states and territories of the United States. Those that do choose to comply will be able to do so either fully, or as to a portion of their operations, as the segregation of supply chains to achieve compliance with various standards is a common practice in the industry.

The judgment of the Court of Appeals, and California's Proposition 12, should be upheld.

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