

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 FOR BUTCHERBOX AS *AMICUS*
CURIAE SUPPORTING RESPONDENTS**

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INTEREST OF AMICUS CURIAE

Amicus Curiae ButcherBox Op Co, LLC (“ButcherBox”) is a privately held company and no publicly held corporation owns stock in ButcherBox. ButcherBox is a limited liability company organized under the laws of the Commonwealth of Massachusetts.

ButcherBox is the largest direct-to-consumer brand delivering humanely raised meat and sustainably sourced seafood to more than 450,000 members across the United States. All ButcherBox pork suppliers—including Niman Ranch’s network of 650 independent family hog farmers—are 100% compliant with Proposition 12. Hogs within the ButcherBox supply chain are raised on pasture or in deeply bedded pens and are never given antibiotics or added hormones, ever. This amicus memorandum offers the perspective of a claims-based industry leader that demonstrates the ability to source, at scale, proteins of high animal welfare to meet the nation’s demand for humanely raised meat and seafood. Like other non-California businesses, ButcherBox has been able to meet Proposition 12 requirements since the company’s inception in 2015 and will continue to uphold high standards for animal welfare within our supply chain.¹

¹ Pursuant to Supreme Court Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or part, nor did any person or entity, other than amicus or its counsel, financially contribute to the preparing or submitting of this brief. All parties consented to the filing of this brief. Sup. Ct. R. 37.3(a).

BACKGROUND & PRELIMINARY STATEMENT

During the November 6, 2018 election, California voters approved Proposition 12, the Farm Animal Confinement Initiative, which amended requirements in Chapter 13.8, sections 25990 through 25994 of the California Health and Safety Code. The initiative passed with 62.7% voter approval. *See* Cal. Sec’y State, Statement of Vote: 2018 General Election. The law prohibits animals from being confined in a manner that prevents lying down, standing up, fully extending their limbs, or turning around freely. *See Proposition 12, Farm Animal Confinement*, CAL. DEPT OF FOOD AND AGRIC. AGRICULTURE, https://www.cdffa.ca.gov/AHFSS/pdfs/prop_12_faq.pdf (last visited Aug. 11, 2022). It also provides specific standards for cage-free designs and minimum floor space for the named animals, including veal calves, breeding pigs, and egg-laying hens. *Id.* Additionally, Section 25990 specifically prohibits a farm owner or operator from knowingly causing any covered animal to be confined in a cruel manner and prohibits a business owner or operator from knowingly engaging in the sale, within California, of shell eggs, liquid eggs, whole pork meat or whole veal meat, from animals housed cruelly. *Id.* Thus, the requirements of Proposition 12 apply to all covered products sold in the state, irrespective of whether the products originate from animals raised on farms within or outside the borders of California. In the present action, Petitioners challenge both the definition of “confined in a cruel manner” (effective as of December 2018), as well as the definition increasing

the enclosure-size requirements for breeding pigs (effective as of January 1, 2022).

However, as Respondents contend, Proposition 12 is simply an encapsulation of Californians' preference for humane products. This successful voter initiative represents Californians' collective choice to support the protection of the covered animals from unnecessary suffering and cruel mistreatment by excluding products of such mistreatment. Petitioners' request to invalidate the statute stems from an incorrect belief that producers' preferences for the status quo of production standards should outweigh Californians' concern for the nature of the products they are buying and the practices of companies seeking to sell products in their state.

Contrary to what Petitioners may wish, states have not lost the ability to pass laws or regulations that benefit their citizens by protecting public health or addressing local concerns. The Supreme Court should only intervene if Proposition 12 proves to be discriminatory against out-of-state commerce or is found to have been motivated by economic protectionism. *Fulton Corp v. Faulkner*, 516 U.S. 325, 330 (1996). Proposition 12 does no such thing.

Instead, Proposition 12 aims to regulate *what* meat products are sold in California, not *where* they are produced. Furthermore, compliance with Proposition 12 does not require a farmer, packer, or processor to move its operations to California. On the contrary, the regulation applies evenly to meat sold in the state. Additionally, not only are many

producers in the United States already meeting and/or prepared to meet California's new standards—which demonstrates their recognition of shifting demand—the proposition does not compel any producer to participate: The United States continues to have diverse national markets for the production and sale of covered meats. These markets currently serve many different customer specifications including organic, all-natural, antibiotic-free, crate-free, etc., meats. To date, producers have selected which consumers they would like to serve. After the passing of the initiative, this continues to be true. In short, whether to meet Proposition 12's standards is a competitive decision.

ARGUMENT

I. Proposition 12 is a specific requirement imposed on the in-state sale of meat and reflects the will of consumers in California.

Proposition 12 is, in part, a manifestation of Californians' regarding the products that will be sold in the State, and its desire to ensure that those products are generated by humanely treated animals.

In requiring the producers of covered animals who choose to sell in California, to meet residents' expectations, the proposition undoubtedly serves local interests. As Californians' sentiments towards environmentally responsible businesses change and develop over time, so too should the laws concerning the relevant business processes within the state.

Compliance with Proposition 12 does not restrict or control the autonomy of individuals selling products in California. The law is merely a requirement that products sold in California should not be produced through modernized intensive factory farming practices that are unnecessarily cruel. While compliance with Proposition 12 will undoubtedly require short-term investments for those who wish to continue to sell products within California, they are by no means a barrier to market participation.

In fact, the proposed confinement guidelines are currently being met by a variety of profitable large- and small-scale producers. For instance, there are producers of various sizes currently enrolled in the Niman Ranch hog producer program. *See Our Family Farmers, Niman Ranch*, <https://www.nimanranch.com/raised-with-care/our-family-farmers/> (last visited August 15, 2022)).

Additionally, some producers within the state of California as well as beyond—such as the aforementioned Niman Ranch—are exceeding the animal welfare standards proposed by Proposition 12, like the farrowing crate size minimum. These producers are proof that there *are* marketing opportunities and consumer preferences for humanely produced food products. In fact, when ranking values in order of importance in their buying decision-making process, ButcherBox customers and national meat shopper survey respondents similarly rated humanely raised as their second most important concern, after “free from antibiotics” or “free from substances I wish to

avoid.” See, e.g., Foundation for Meat & Poultry Research & Education, *Power of Meat* at 45 (2017)

Thus, these firms, like ButcherBox, have decided that the elimination of practices such as veal, calf and sow gestation crates are a beneficial strategy to differentiate themselves within the marketplace and meet the needs of consumers willing to pay a higher premium for more humanely sourced options. For example, from 2019 to 2022, ButcherBox increased pounds of pork sold by nearly 70%, demonstrating the high and growing demand for humanely raised pork products from those consumers willing to pay a higher premium for more humanely sourced options. All the more so now that consumers have expressed their preference and will through Proposition 12.

By extension, the voter-driven nature of Proposition 12 and its utility as a way of setting guidelines for businesses that are in line with consumer preferences within the state, may be extended to several other examples such as Environmental, Social and Corporate Governance (ESG) protocols and policies adopted by companies: Many private market participants have found it advantageous to adopt different animal welfare requirements and share this information with the public. For example, as part of its 2021 Sustainability Report Update, Chipotle announced that it was already compliant with Proposition 12, and that “100% of [its] pork came from suppliers meeting our animal welfare standards, meaning they do not use gestation and farrowing crates, routine tail docking, or teeth clipping, and are raised

outdoors in bedded barns.” See *2021 Chipotle Sustainability Report Update* at 22.² Similarly, the fast-food restaurant, Wendy’s, has also announced their intention to eliminating gestation stalls by the end of 2022. *Gestation Stall Policy*, WENDY’S, <https://www.wendys.com/csr-what-we-value/food/responsible-sourcing/pork/gestation-stall-policy> (last visited Aug. 11, 2022) . Wendy’s has also committed to meet other states’ more stringent requirements to the extent they are applicable to their operations. Concerning Proposition 12, Wendy’s has stated they have been “[o]n track to source our bacon for California from suppliers who meet this more restrictive standard starting in 2022.” *Id.*

State laws are meant to reflect the local preferences of their constituents. Proposition 12 sets requirements based on the clearly communicated preferences of Californians for animal products that can be legally bought and sold within California. Yet, these sentiments are not unique to Californians: According to the *2022 Power of Meat Report*, “45% of consumers agree with the statement that ‘Animal welfare concerns impact my food purchase decisions.’” See Foundation for Meat & Poultry Research & Education, *Power of Meat* (2022).³ In looking at data on the same statement from 2020 and 2021, researchers have reported a

² Available at https://www.chipotle.com/content/dam/chipotle/global-site-design/en/documents/sustainability/CHP_2021_SustainabilityReport_Revised_5-20.pdf

³ Available at <https://www.fmi.org/forms/store/ProductFormPublic/power-of-meat-2022>.

sustained interest in this topic each year with 43% of consumers agreeing in 2020 and 44% agreeing in 2021. *Id.* This data demonstrates that consumers across the United States are shifting their mindsets around animal welfare concerns and that laws such as Proposition 12 are not just representative of California voters. California residents simply are among the first groups of consumers to move on that concern on a government level. Thus, Proposition 12 is simply a representation of Californians' preference for products from better-treated animals and—by extension—from what Californians perceive as a better way of doing business in the state.

II. States have the power to pass business-related laws that are in line with the reasonable ethical and moral interests of their residents.

State legislatures and voters have the power—if not the imperative—to use the law to effectuate voters' ethical and moral expectations for businesses operating within their respective states. Proposition 12 articulates its goal as, among other things, “prevent[ing] animal cruelty” resulting from “extreme methods of farm animal confinement”, thereby effectuating a legitimate state interest. Cal. Prop. 12 at § 2, as approved by voters (Gen. Elec. Nov. 6, 2018). A ruling against Proposition 12 would dilute this legitimate use of California's power.

To Californians, whether motivated by the beliefs that the meat they purchase and consume should be the product of practices that treat animals

humanely as an indirect duty towards man or as a direct duty towards animals, or by other reasonable beliefs, it is clear that the current conditions on intensive factory farms seeking to sell products within California fail to comport with their standard of animal welfare. In its October 2021 member survey, ButcherBox found that “[w]hen given a variety of topics related to improving the meat ecosystem, the statement, ‘building a food system that is better for the animal’ was the most important topic to the survey respondents as a reason to purchase meat.” Through Proposition 12, voters have taken an ethical stance on what products will be sold in the state.

Thus, a Supreme Court ruling against Proposition 12 would suggest that state consumers are incapable of determining which standards should apply to goods sold in-state. It would disregard Californians’ right to define what is “good, moral, or appropriate” for products available in their marketplace. Furthermore, because the gravamen of Petitioners’ argument is a complaint about the cost of complying with Proposition 12’s requirements, the Court would be suggesting that business interests are more important than consumer interests to the extent that animals’ needs are not congruent with higher production output and profit. The Supreme Court would be forcing California to remain in an archaic state where the anti-cruelty statutes are meaningless words that cannot in any way influence what products Californians can buy and consume.

Ultimately, a ruling against Proposition 12 would bind states to accept the lowest common denominator—with no ability to demand higher standards—of businesses who seek to enter their markets. By extension, such a ruling would mean that Californians could not demand better mileage and emission standards for cars sold in the state, could not hold national energy companies to more environmentally friendly methods, and could not prohibit the use of potentially toxic chemicals in the production of toys and household goods. Californians would be obligated to accept whatever goods companies wanted to sell in their state with no ability to prohibit dangerous, unhealthy, or otherwise unacceptable items or practices.

However, the states have not lost the ability to pass laws or regulations that benefit their citizens by protecting public health or addressing local concerns. The community's morality coupled with state power is necessarily adequate for grounding state action. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.”).

III. Proposition 12 does not violate the dormant Commerce Clause.

The dormant Commerce Clause stands for the premise that states may not enact laws that discriminate against or unduly burden interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl.3. However, nothing in the Supreme Court's precedent

prohibits a state from enacting laws pursuant to its police powers that do not discriminate against interstate commerce, and which serve legitimate local interests of protecting the welfare of local citizens with only minimal burdens on commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970).

The burdens posed by Proposition 12 is minimal, at best, and does not outweigh the enormous local benefits. Proposition 12 is, in part, intended to prevent animal cruelty by phasing out extreme methods of farm animal confinement for products sold in California.

California's interests in preventing complicity in animal cruelty are sufficient to outweigh any burdens that Proposition 12 might impose for businesses seeking to sell their products in the state. The law codifies in-state product and animal welfare standards that producers like Perdue Premium Meat Company (PPMC) and retailers (such as ButcherBox and Whole Foods Market) have been advancing for some time. *See Perdue Farms' Coleman Natural Foods pork brand now 100% crate-free*, REFRIGERATED & FROZEN FOODS (Sept. 14, 2018) (announcing that Perdue Farm's Coleman Natural Foods brand is now third-party verified, 100% crate-free, including both for gestation and farrowing)⁴; *see also Meat Department Quality Standards*, WHOLE FOODS MARKET, <https://www.wholefoodsmarket.com/quality-standards/meat-standards> (last visited Aug. 11,

⁴ Available at <https://www.refrigeratedfrozenfood.com/articles/95617-perdue-farms-coleman-natural-foods-pork-brand-now-100-crate-free>

2022) (writing that any meat sold at Whole Foods is not raised in cages, crates or crowded conditions). These producers and retailers serve as examples that the standards promulgated by Proposition 12 are not only morally desirable for consumers across the United States, but fiscally plausible.

Finally, “[m]ost statutes that impose a substantial burden on interstate commerce do so because they are discriminatory” or “purport to regulate extraterritorially.” *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1032-33 (C.D. Cal. 2019) (quoting *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013)). Petitioners argue that phrases such as “unnecessary suffering” or “cruel treatment” are too broad and could lead to abusive enforcement and produce inconsistent results. However, Petitioners ignore that Proposition 12 sets forth specific guidelines and requirements. Proposition 12 is neither an ambiguous nor an aspirational piece of legislation that would otherwise lead to consumer confusion (e.g., no labeling issues) or invite arbitrary and discriminatory enforcement. *United States v. Clark*, 912 F.2d 1087, 1090 (9th Cir. 1990) (“A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement.” (internal citation omitted)). Through their ballot initiative, Californians have identified the practices that, because they inflict needless suffering on animals, result in unacceptable products that cannot be sold within the State. Additionally, the Animal Health and Food Safety Services Division of the

California Department of Food and Agriculture has established clear definitions for the statutory requirements, procedures, and exceptions to confinement. In other words, legislators and voters are by no means prohibiting farmers from conducting business in California. Rather, Proposition 12 simply codifies residents' preferences for product standards that comport with new social norms. The statute also makes no distinction between in-state and out-of-state pork producers. Thus, Proposition 12 is narrowly tailored to capture the proven social, environmental, and economic benefits of humane farming, and these important benefits far outweigh any incidental burden placed on interstate commerce, especially as producers can also separate their facilities with non-compliant and complaint pork. *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1151 (9th Cir. 2012) (noting that "the Commerce Clause does not protect the particular structure or methods of operation in a retail market" (internal citation omitted)).

CONCLUSION

For all the reasons above, *Amicus Curiae* ButcherBox, join with the Respondents in requesting that this Court safeguard Californians' interest in improved animal welfare and their right to demand higher moral standards of businesses for those who seek to enter their markets. Proposition 12 is not an exclusionary law, it creates specific requirements for all shell eggs, liquid eggs, whole pork meat, or whole veal meat sellers within its borders. As proven by the many in and out of-state producers already meeting these more stringent standards, it is evident that the law would continue to have a limited impact on interstate commerce. Deference to industry custom should not warrant the Court to rule in favor of Petitioners.

Respectfully submitted,

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