

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 OF AMICI CURIAE
SMALL AND INDEPENDENT FARMING BUSINESSES,
STATE FARMERS UNIONS, AND FARM ADVOCACY
ORGANIZATIONS IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici curiae are small and independent farming businesses, state farmers unions, and farm advocacy organizations. *Amici* respectfully submit this brief in support of Respondents. *Amici* each has extensive experience with the farming practices at issue in this litigation, and each believes that Proposition 12 is a farmer-friendly statute that protects animal welfare while providing important new production and marketing opportunities to family farmers. Moreover, as discussed in more detail herein, *amici* strongly disagree with many of Petitioners' characterizations about Proposition 12's likely effects on the pork industry and the farmers who supply it. As organizations and businesses who have operated in the pork industry for decades, or that advocate on behalf of American pork farmers, *amici*'s perspective will aid the Court's understanding of how Proposition 12 will impact the Nation's farmers.

Amicus Socially Responsible Agriculture Project (SRAP) has, for more than 20 years, served as a mobilizing force to help communities protect themselves from the damages caused by industrial livestock operations and to advocate for a food system built on regenerative practices, justice, democracy, and resilience. SRAP's team includes technical experts, independent family farmers, and rural residents who have faced the threats of factory farms in their communities. When asked for

¹ Counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

help, SRAP offers free support, providing communities with the knowledge and skills to protect their right to clean water, air, and soil and to a healthy, just, and vibrant future.

Amicus Farm Aid is a nonprofit organization whose mission is to keep family farmers on the land. Since the first Farm Aid concert in 1985, Farm Aid has raised \$64 million to support its work to help farmers thrive, expand the reach of the Good Food Movement, take action to change the dominant system of industrial agriculture, and promote food from family farms. Farm Aid believes fair and competitive markets are necessary for thriving family farms, healthy rural communities, and clean water and air.

Amicus Indiana Farmers Union works to protect and enhance the economic well-being and quality of life of family farmers. Indiana Farmers Union is a home for producers who are committed to conserving Indiana's natural bounty.

Amicus Iowa Farmers Union's members have worked together since 1915 to strengthen the independent family farm through education, legislation and cooperation and to provide Iowans with sustainable production, safe food, a clean environment, and healthy communities. Iowa Farmers Union is a grassroots member organization of family farmers and ranchers, advocates, and consumers committed to promoting family agriculture in Iowa.

Amicus Northwest Farmers Union represents farmers in Idaho, Oregon, and Washington. It focuses on advocating for local, state, and federal policies that help socially and environmentally responsible farms do what they do best: provide their local communities

with delicious, nutritious food while benefiting the local ecosystem.

Amicus Pennsylvania Farmers Union (PFU) has been the voice of family farmers, rural residents and consumers across the state since its founding. PFU believes the needs of Pennsylvania's farm economy are every bit as important as the policy priorities of Wall Street and Corporate America.

Amicus American Grassfed Association supports, advocates, and promotes American grass-fed and pasture-based farms and ranches from the farm to the marketplace and in government policy, by maintaining a credible, transparent national standard for animals humanely raised on pasture and partnering to support rural economies.

Amicus Family Farm Defenders' (FFD) mission is to create a farmer-controlled and consumer-oriented food and fiber system, based upon democratically controlled institutions that empower farmers to speak for and respect themselves in their quest for social and economic justice. To this end, FFD supports agroecology, farm & food worker rights, racial justice, animal welfare, consumer safety & right to know, fair trade—both globally and domestically—as well as food sovereignty.

Amicus Farm Action leads the fight against monopolistic corporate control over our food and farming system. Farm Action represents farmers, ranchers, rural communities, workers, policymakers, advocates, and anyone who eats.

Amicus Institute for Agriculture and Trade Policy (IATP) is a nonprofit that works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm, and trade systems. IATP

aims to reduce the harmful impacts of industrialized animal agriculture and promote regenerative systems based on agroecology principles.

Amicus the National Sustainable Agriculture Coalition (NSAC), founded in 2009, is an alliance of 130-plus member organizations and their combined 2+ million members. NSAC advocates for federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. NSAC works to advance farming opportunities for independent family farmers by advocating for federal policies that remove barriers they face, including the inability to compete with large farms and corporate interests for coveted farmland or lucrative markets.

Amicus the Organic Farmers Association (OFA) is a nonprofit membership organization that represents U.S. certified organic farmers. OFA's mission is to provide a strong and unified national voice for domestic certified organic producers, by supporting a farmer-led national organic farmer movement and national policy platform, and facilitating collaboration and leadership among state, regional, and national organic farmer organizations.

Amicus Callicrate Pork is a pork production company that is part of Callicrate Cattle Company. Callicrate Pork's meat is regeneratively and ethically raised and processed on-farm.

Amicus Gunthorp Farms specializes in quality meat that is a favorite among some of the best chefs in the Midwest. All of Gunthorp Farms' animals are raised on pasture without the use of antibiotics. Gunthorp Farms has an on-farm USDA-inspected processing plant where it harvests, processes, and packages

all of its animals before delivering to upscale restaurants and retailers.

Amicus North Country Smokehouse is a third generation, family-owned smokehouse located in Claremont, New Hampshire. Its mission is to make better-for-you pork accessible to everyone through its conscious and concerted agri-food system. North Country Smokehouse has been handcrafting artisanal smoked meats for more than a century. Its vertically integrated operation includes more than 400 family-farms, grain mills, husbandry, harvesting, and further processing facilities. Every farm is audited on a seasonal, annual rotation, and certified by Global Animal Partnership, Certified Raised & Handled, and USDA Organic.

Amicus Ranch Foods Direct was established in Colorado Springs in 2000 to sell high-quality, naturally raised beef directly to customers. Since then, it has grown into a prominent, well-respected marketing outlet in the community for small farmers and food producers selling a wide range of meat and other goods from throughout the region.

Amicus Walnut Hill was established in Sharpsville, Pennsylvania in 2008 by Michael, Karen, and Amelia Kovach to help reconnect people to the food they eat. The high-quality meat it produces come from humanely raised animals.

Amicus White Oak Pastures is a six-generation, 152-year-old family farm in Bluffton, Georgia. Its farming practices focus on regenerative land management, humane animal husbandry, and revitalizing its rural community. White Oak Pastures uses a zero-waste production system that utilizes each part of the

animals, which it pasture-raises and hand-butchers on its farm.



SUMMARY OF THE ARGUMENT

This case represents an effort by the largest pork processing companies in the U.S. to maintain their steadfast grip on an industry they worked systematically to consolidate and control. Proposition 12 does not discriminate against out-of-state commerce, nor does it enact the kind of “economic protectionism” this Court’s Dormant Commerce Clause cases typically involve. *See, e.g., Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008). Yet Petitioners challenge California’s popularly enacted measure—voted in by a two-thirds majority—because they view it as a threat to the long-standing dominance of a small group of multinational agribusinesses. Unwilling to compete on the merits in the new and growing market for crate-free pork with smaller farmers who comply with Proposition 12, Petitioners instead ask this Court to nullify Californians’ decision to regulate how pork is sold within their own borders. The Court should reject Petitioners’ efforts to eliminate competition through constitutional litigation.

Proposition 12 was enacted against the backdrop of a growing demand for humanely raised meat, including crate-free products. Small farmers who have capitalized on the burgeoning consumer preference for crate-free pork are well-situated to meet the additional demand that Proposition 12 creates. Indeed, in the four years since Proposition 12 passed, independent family

farmers and food businesses have invested in substantial and profitable adjustments to their business model in reliance on the law. Some have modified production methods, others have expanded their supply chain to reach California, and still others have spent resources informing consumers that their products comply with Proposition 12. Independent farmers have been able to position themselves as healthy competitors in the market for pork sold in California.

The Court should be troubled by the implication of Petitioners' position—because of the sprawling, highly integrated supply chain networks they have created, no State may regulate the products sold within its borders without running afoul of the Dormant Commerce Clause. If the Court accepts Petitioners' invitation and constitutionally insulates vast, vertically integrated supply chains from state regulation impacting their production and distribution, Petitioners—and soon, one assumes, dominant players in other industries—will be beyond the effective reach of the States. The Court should reject Petitioners' position that they are too big to govern, particularly since it is long settled that the nationwide nature of an industry does not prevent a State from regulating it in a non-discriminatory way. *E.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978) (“[W]e cannot adopt appellants’ novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas.”).

A ruling in Petitioners' favor would grant a constitutional privilege to multinational meatpacking giants in a heavily consolidated industry, and stifle healthy competition and enterprise among America's small businesses and farmers. It would also deprive California's

citizens of their right to enact laws to protect the health and welfare of humans and animals within the State's borders. For these reasons, described more fully herein, the Court should affirm the ruling below.



ARGUMENT

I. PROPOSITION 12 IS CONSISTENT WITH MARKET GROWTH AND ROBUST COMPETITION.

A. The Largest Pork Integrators Have Highly Consolidated the Pork Industry, Inhibiting Competition and Innovation.

The U.S. meatpacking industry has steadily and substantially consolidated over the last 50 years. Between 1948 and 2015, four million U.S. farms disappeared even though total farm output doubled during the same period. Consolidation has been particularly stark in the pork industry: In just 19 years, between 1993 and 2012, *the United States lost about 70% of its hog operations.*² The result is that, today, four multinational corporations—Smithfield Foods, Inc., Tyson Foods, Inc., JBS USA Holdings, Inc., and Cargill Inc.—control a whopping 66% of the hog-processing market. These four entities, which Petitioner National Pork Producers Council represents as their trade association, have vertically integrated nearly

² Food & Water Watch et al., *The Anticompetitive Effects of the Proposed JBS-Cargill Pork Packing Acquisition 14* (2015) (hereinafter “JBS-Cargill White Paper”), <https://perma.cc/67LV-5JUH>.

every aspect of the pork production process; they are thus commonly referred to as “integrators.”³

Through an aggressive campaign of mergers, acquisitions, joint ventures, and captive supply contracts that favor ever-larger farming operations, these multinational integrators generally control every aspect of the supply chain—from owning and breeding live hogs, processing and selling live pork, and supplying retailers with the vast majority of pork sold on grocery shelves. In doing so, the integrators have essentially eliminated any ability of independent farmers to compete on quality or through innovation, which has had the effect of “shrinking the number of farms doing business in the region’s rural communities.”⁴

A policy brief by the Organization for Competitive Markets aptly summarized the effect the integrators’ domination has had on American farmers and farm workers:

Corporate consolidation has had a devastating impact on small businesses. Between 1990 and 2016, federally inspected slaughterhouses decreased by 36 percent. * * * Jobs and wages have disappeared along with the slaughterhouses. According to the Bureau of Labor Statistics, the animal slaughtering and processing industry employed a total of 506,000 people in 2005. By May 2016, the industry

³ Notably, the same four integrators also dominate several other agricultural sectors.

⁴ Allen Barkema & Mark Drabenstott, *Consolidation and Change in Heartland Agriculture, Economic Forces Shaping the Rural Heartland* 74-75, Fed. Reserve Bank of Kansas City (1996), <https://perma.cc/3SYV-RBHM>.

employed only 80,780 people and their average wage was down to half of that of all manufacturing jobs in the U.S. * * * Farmers and ranchers have seen farm income decline along with the rise of corporate consolidation. *Since 2013, U.S. farm income has dropped by \$43.6 billion.*⁵

The integrators' aggressive consolidation campaign has thus effected a massive transfer of wealth from rural, independent farmers to a few multinational corporations.

Given the integrators' continually increasing purchasing power, many smaller pork producers who used to operate independently have been forced to enter into captive production contracts with particular integrators. Such contracts "essentially convert independent farmers that own their livestock into contract employees that perform services for the pork-packing industry."⁶ In the typical contract scenario, the integrator retains ownership over hogs and feed, but outsources to the farmer the tasks of growing them and managing the waste, requiring the farmer to provide the intensive labor and infrastructure necessary to do so. The farmer thus cedes control of his own land and livestock to the integrators, which dictate every aspect of how he does his work—what (and how much) he feeds the hogs, as well as how he houses them, cleans them, and medicates them. The result is that the integrator owns all the elements of the supply chain

⁵ Angela Huffman et al., *Consolidation, Globalization, and the American Family Farm* 6 (Aug. 2017) (emphasis added), <https://perma.cc/3HR8-3ELD>.

⁶ JBS-Cargill White Paper, *supra* note 2, at 14.

that appreciate in value (live hogs, processed pork), and the farmer is responsible for the elements that depreciate in value (housing, manure, equipment).

This integrator-manufactured system is terrible for farmers. Contract farmers are often left poorly compensated and saddled with debt, while the integrators have the power and incentive to “extract lower prices and distort and conceal prices.”⁷ Exacerbating the situation is the geographic segmentation of the market; integrators often have a regional monopoly, so in many rural communities, a hog farmer only has one integrator he can contract with, thus further depressing his ability to negotiate on price or other contractual terms.⁸ A Purdue University study estimated that the more concentrated (and less competitive) a market is, the less farmers receive for live animals.⁹ Between 1988 and 2012, when contract farming

⁷ *Id.*, at 14; Caius Z. Willingham and Andy Green, *A Fair Deal for Farmers*, The Center for American Progress (May 7, 2019), (“With only a handful of processors with which they can do business, hog farmers have little choice but to enter into contracts that compensate them through opaque and often manipulatable pricing formulas that saddle farmers with burdensome terms and quite often large levels of debt.”), <https://perma.cc/J5RV-MUH3>.

⁸ JBS-Cargill White Paper, *supra* note 2, at 5 (“In some cases, there is only one buyer at hog auctions as a result of market consolidation.”).

⁹ *Id.*, at 6 (noting that Purdue study “estimated that a marketplace with 20 equally sized pork packers (akin to the national market in the late 1980s) would pay about 5 percent less than a perfectly competitive marketplace; a marketplace with eight firms would pay 18 percent less; and if there were only four firms, they would pay 28 percent less than a perfectly competitive market.”).

proliferated, the market share of the top pork integrators increased from 34 percent to 64 percent, while prices farmers were paid for their hogs fell 18%.¹⁰

The rise in production contracts also perpetuates the homogeneity of the production model: The only way contract farmers can compete with others using the same contract production methodology is “to pack more animals into [their] sheds, pump them fuller of antibiotics so they don’t die from infections that flourish amid overcrowding, raise breeds that live lives of pain but grow with astonishing speed, create massive manure lagoons that poison streams and turn air acrid.”¹¹ The market power integrators wield has thus nearly eliminated the opportunity for alternative, non-integrator controlled supply chains to develop.

The integrators’ near-total control over every aspect of the production process has also harmed consumers, who are left with no meaningful choice of brands and pork products. Since demand for food is inelastic, “concentrated market power in the food sector can distort competition, raise prices and erode equity more significantly than sectors where consumers are more responsive to prices.”¹² Even small price increases significantly affect consumers, and when aggregated, lead to considerable transfers of wealth to pork integrators. As of May 2022, small farmers were earning \$2 less per pound of pork than in 1982; consumers, however,

¹⁰ *Id.*, at 7.

¹¹ Ezra Klein, *Farmers and Animal Rights Activists Are Coming Together to Fight Big Factory Farms*, VOX (Jul. 8, 2020), <https://perma.cc/9ADZ-LNVR>.

¹² JBS-Cargill White Paper, *supra* note 2, at 20.

are only paying \$1 less per pound at checkout. Pork processors capture this other dollar in reduced earnings to farmers.¹³ And though farmers are earning less, grocery prices have increased because of a highly concentrated industry that leaves few options.¹⁴

Thus, over the past five decades—and especially during the past two—the pork industry has transformed from one in which truly independent farmers competed in the market on price, quality, and product variation into a highly consolidated, vertically integrated system that pays farmers less and reduces consumer choice. The dominant integrators have reaped the benefits of the homogenization they initiated and perpetuate, which is why they now seek to stifle the new competition Proposition 12 will engender.

When one understands the structure of today's pork production market, it is easy to understand why the industry's dominant players abhor Proposition 12—it threatens to disrupt the dominance of a few, massive corporations that have enjoyed unprecedented profits due to their vertical and horizontal integration.

B. There is a Growing Demand for Crate-Free Pork, but the Integrators Currently Control Access to the Market.

In recent years, demand for crate-free pork has significantly increased in the U.S. According to a 2021 Harris Poll Survey, 66% of Americans consider gestation

¹³ Food & Water Watch, *The Economic Cost of Food Monopolies: The Hog Bosses* (May 2020), <https://perma.cc/F56Q-S85V>.

¹⁴ Scott Horsley, *A Handful Of Big Meat Packing Companies May Be Pushing Up The Price Of Groceries*, NPR (Sept. 13, 2021, 6:45 PM), <https://perma.cc/E9L2-KYUU>.

crates unacceptable, while 73% are more likely to buy pork products from companies committing to end confinement of pregnant pigs.¹⁵ A 2018 industry survey and report found that more than “70% of supermarkets stocking products with claims about improved animal welfare report that sales from these products have increased” in the studied three-year period; the report also projected a demand curve similar to that for organic products, “with increasing awareness creating a strong burst of consumer demand, pushing these products to the forefront of retailer and supplier plans.”¹⁶

Small producers have taken stock of this growing demand. For instance, *amicus* North Country Smokehouse, an independent meat processor that distributes nationally and sources exclusively from farms that are certified as humanely raised, noted in a September 2021 press release:

Consumers’ growing demand for the ethical treatment of animals has led to a massive shift in the supply chain, with an increasing amount of humanely raised meats claiming their rightful space on retail shelves.¹⁷

Proposition 12 reflects this increasing demand, as two thirds of California voters voiced their preference

¹⁵ *Majority of Pork-Buyers Prefer Retailers That Don’t Use Gestation Crates*, Crate Free USA (Jan. 12, 2021), <https://perma.cc/39Q3-93DW>.

¹⁶ Wade Hanson, Technomic & ASPCA, *Understanding Retailers’ Animal Welfare Priorities 2* (2018), <https://perma.cc/ZRL5-P587>.

¹⁷ *Making Prop 12 Compliant Pork Accessible*, PR NEWSWIRE (Sept. 20, 2021, 12:42 PM), <https://perma.cc/FR5P-AT7E>.

for crate-free product.¹⁸ And Californians are not alone. About ten states so far have passed laws to end or limit confinement of sows.¹⁹ For example, in 2021, Massachusetts passed a similar bill, An Act to Prevent Cruelty to Farm Animals, that, like Proposition 12, was supported by family farmers.²⁰ Notably, after spending millions of dollars unsuccessfully opposing this measure, the integrators ultimately complied with Massachusetts' modest new requirements.²¹

Big retailers and fast-food companies have also taken notice of the growing demand for humanely raised pork. Consumers' "growing desire for cruelty-free animal handling has influenced food retailers, who in turn are forcing the U.S. industry to change its livestock husbandry practices."²² In recognizing their customers' evolving preferences, large companies like Burger King, Safeway, and Kmart, among others, have

¹⁸ Lynne Curry, *Could Crate-Free Pork Become the New Industry Standard?*, CIVIL EATS (Oct. 26, 2020), <https://perma.cc/YZH6-LQBS>.

¹⁹ Wayne Pacelle, *National Legislation Introduced to End Gestation Crates in Pig Industry*, Center for a Humane Economy (Mar. 10, 2022), <https://perma.cc/WW49-TCHN>.

²⁰ Chris Lisinski, *Mass. Legislature Passes Animal Welfare Law Changes, Set to Ease Egg Supply Fears*, GBH NEWS (Dec. 20, 2021), <https://perma.cc/Y2J8-9ENB>.

²¹ Ashley Chang, *What Does Question 3 Mean for Animals in Massachusetts?*, The Humane League (Feb. 3, 2022), <https://perma.cc/9TAT-7BLE>.

²² David Jackson and Gary Marx, *Pork Producers Defend Gestation Crates, but Consumers Demand Change*, CHICAGO TRIBUNE (Aug. 3, 2016, 4:15 AM), <https://perma.cc/D8Q3-YX3V>.

committed to eliminating use of gestation crates.²³ These major players primarily buy their pork products from the largest integrators, who have made no public indication that they are unwilling or unable to comply with these new demands from some of their largest customers.

Independent farmers are willing to meet this demand, and in doing so, can access some of the wealth and power that has accumulated only for pork integrators, and redistribute it back to local communities, businesses, and families.

However, their eagerness and ability to meet this demand is insufficient, because integrators currently wield their market power to determine which products get shelf space. Heavy consolidation in the entire food supply chain—“from seeds and fertilizers to slaughterhouses and supermarkets to cereals and beers”²⁴—allows a few multinational companies to limit independent farmers’ access to the market; corporate integrators determine which products are distributed through wholesalers.²⁵ Corporate integrators exert influence over which products are distributed through the wholesale system and ultimately to grocery stores in part

²³ See BIO at 4-5.

²⁴ Nina Lakhani et al., *Investigation Shows Scale of Big Food Corporations’ Market Dominance and Political Power*, THE GUARDIAN (Jul. 14, 2021, 6:00 AM), <https://perma.cc/FP32-JCCT>.

²⁵ Carrie Stadheim, *Grocers File Lawsuit Against Meatpackers for Violating the Sherman Act*, THE FENCE POST (Jun. 15, 2020), (noting allegation by grocery stores in a price-fixing lawsuit that the meatpackers’ “gatekeeping role has enabled them to collusively control both upstream and downstream beef pricing”), <https://perma.cc/629F-83M4>.

through slotting fees, payments the integrators make to a retailer in exchange for shelf space.²⁶

Given the hefty profits retailers make through slotting fees, “the supplier is the [grocery] store’s real customer,”²⁷ generating far more revenue for grocers than independent competitors seeking to access shelf space. Contributing to the lack of market access is the increasing consolidation in the wholesale food and retail industry, which further amplifies the integrators’ influence through slotting fees. Large food companies “can lord over entire categories,” and given the “opacity” of negotiations with retailers, corporate integrators exert downstream influence over distribution and display of food items.²⁸ Despite the seemingly diverse array of brands at grocery stores, “most of our favorite brands are actually owned by a handful of food giants, including Kraft Heinz, General Mills, Conagra, Unilever, and Delmonte.”²⁹ Thus, even if an independent farmer, who produces crate-free pork, saw the growing demand of humane pork, it would be difficult to actually sell to customers, given the layers of obstacles the farmer faces.³⁰

²⁶ Sophie D’Anieri & Charlie Mitchell, *Exclusionary Slotting Fees in Grocery Retail* 63, REFORMING AMERICA’S FOOD RETAIL MARKETS (Yale Univ. June 2022), <https://perma.cc/49B3-ACMP>.

²⁷ *Id.*

²⁸ *Id.*, at 65.

²⁹ Lakhani, *supra* note 22.

³⁰ Lakhani, *supra* note 22 (“And then there’s the slotting fees—payments by big-brand manufacturers for eye-catching product placement. This makes it very hard for new independent brands

Another way in which multinational integrators and other consolidated food companies influence retailer offerings is through category management, a marketing practice in which products are divided into categories and managed as free-standing businesses.³¹ Dominant manufacturers in a category (referred to as “category captains”) often influence retail decisions related to planning and management of a single category—even with respect to competitor brands.³² Powerful category captains can “affect[] what products are available in the store, where products are located on shelves, when they will be advertised, and at what prices they will be offered to consumers.”³³ This type of “exclusionary conduct”—which “can impede competition, limit new entry, lessen consumer choice, reduce product quality, and stifle product innovation”—has increased in recent years, as category captains have infiltrated meat, poultry, and seafood products, among others.³⁴

A Special Report to the Family Farm Action Alliance found that this concentrated ownership grants a few companies “the power to make decisions in food and agriculture. Who decides where and what

to get a break. And when they do get a tiny foothold, it often doesn’t last.”).

³¹ Gregory T. Gundlach & Riley T. Krotz, *Exclusionary Slotting Fees in Grocery Retail* 71, REFORMING AMERICA’S FOOD RETAIL MARKETS (Yale Univ. June 2022), <https://perma.cc/49B3-ACMP>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

food will be produced, who produces it and how, and who will get to eat it?”³⁵

Against this backdrop—where integrators control not only the supply lines but also access to grocery store shelves independent farmers would otherwise fill—Proposition 12 has effectively opened up access to the market by mandating that those who sell pork within the state establish a traceable supply of pork. “Compliance can be shown through written certification that pork meat originates from breeding sows housed according to Proposition 12 confinement standards.”³⁶ This provides a regulatory incentive to pork sellers to choose easily traceable supply chains, like those many independent producers have developed. Thus, where independent farmers struggled to meet demand because of barriers to entry in the consolidated pork and wholesale food industries, they now have a better chance to compete.

C. Far from Causing Greater Market Concentration, Proposition 12 is Likely to Facilitate Competition in an Otherwise Concentrated Market.

While enacted to protect the health of Californian consumers and rid the State’s markets of inhumane products, Proposition 12 came with a major ancillary benefit: It enhances opportunities for independent farmers to successfully compete in the growing market

³⁵ Mary K. Hendrickson, et al., *The Food System: Concentration and Its Impacts* 1 (Nov. 19, 2020), <https://perma.cc/JAZ7-KNCB>.

³⁶ California Dep’t Food & Agric., *Prop 12 FAQ* (Mar. 5, 2021), <https://perma.cc/2NVE-X4FT>.

for crate-free pork.³⁷ By solidifying California’s demand for this product and facilitating the means for independent producers to bring crate-free pork to consumers, Proposition 12 promotes much needed diversity in the production model.

Independent farmers, who, until recently, had been relegated to production contracts as their only means of guaranteed income, have emerged as possible contenders in this burgeoning market. Family farmers may not have the same technology required for large-scale industrialized production, but they are better equipped to supply the specialty product market, particularly where, as with Proposition 12, regulators provide the means of inspecting to ensure and document compliance with animal welfare standards.³⁸

Rather than “drive further consolidation in the industry,” as Petitioners (ironically) suggest, Br. of Petitioners at 15, Proposition 12 is far more likely to loosen the stranglehold the dominant integrators have long held over pork production. For example, in June of this year, Smithfield Foods closed its only California pork processing plant, citing rising costs of business in California. (Petitioners do not contend that such a closure implicates the Dormant Commerce Clause, because they do not challenge Proposition 12’s in-state effects.) This exit from the California market of one of the largest integrators inevitably introduces opportunities for smaller, more nimble farming operations

³⁷ See also BIO at 4-5 (noting “industry practice is rapidly changing in response to market demands” and citing Burger King’s recent announcement that it is “committed to eliminating the use of gestation crates for housing pregnant sows”).

³⁸ Barkema, *supra* note 4, at 65.

to fill the void and produce the product Californians have made clear they desire.

The enhanced competition Proposition 12 engenders is already manifesting. Many farmers are investing in new confinement systems to comply with Proposition 12.³⁹ And many small farmers who were already compliant—or who exceeded compliance—now have a robust, well-defined market in which to sell their product. For example, *amicus* Gunthorp Farms, an Indiana operation that sells hogs across the country, raises all of its hogs outdoors, meaning its sows are housed outside of extreme forms of confinement. With the passage of Proposition 12, there is now space in the Californian market for Gunthorp Farms to sell its hogs. As another example, many small farmers that produce humanely raised pork—like *amicus* North Country Smokehouse, based in New Hampshire—actively market themselves as Proposition 12 compliant.⁴⁰ North Country Smokehouse, and producers like it, are already benefitting from Proposition 12.

Crate-free consumer preference can thus be an essential component to the survival of America's small pork farmers. Proposition 12's loudest critics are companies running concentrated animal feeding operations; independent farmers who have long since

³⁹ See generally Elizabeth Cox, Cal. Dep't of Food and Agriculture, *Lessons About Proposition 12 From Recent Pork Producer Visits* (2022), <https://perma.cc/Q9BA-9VAQ>.

⁴⁰ *Our Ranges: Pork Worthy of Your Convictions*, duBreton, <https://perma.cc/K8NX-H9BU> (last visited Aug. 4, 2022).

adopted group housing have had no complaints.⁴¹ While it may be more expensive for multinational agribusinesses to comply with Proposition 12, independent farmers—who by definition have fewer gestation crates—are stepping up to the challenge, and are positioning themselves as new, vibrant competitors in the expanding market for crate-free pork.

II. THE DORMANT COMMERCE CLAUSE DOES NOT PROTECT THE INTEGRATORS’ PREFERRED WAY OF DOING BUSINESS.

Petitioners argue that Proposition 12 violates the Dormant Commerce Clause because it would “disrupt[] a national market,” Br. of Petitioner at 32, *i.e.*, the fully integrated and captive supply chain the largest pork producers have erected. But Proposition 12 does not target the integrators; it does not discriminate against out-of-state commerce, nor does it enact the kind of “economic protectionism” this Court’s Dormant Commerce Clause cases typically involve. *See, e.g., Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38. Instead, it applies equally to all producers who wish to access the California market. Petitioners’ primary complaint, therefore, is that it will affect their preferred mode of supplying pork more than it will affect their putative competitors.

Yet the Court has recognized that a law creating such an impact does not run afoul of the Dormant Commerce Clause, and it has refused to substitute its judgment for state lawmakers even where statutes have an outsized effect on large, interstate companies.

⁴¹ Natasha Daly, *California Voted to Improve Pig Welfare. the Pork Industry Is Facing a Reckoning.*, NATIONAL GEOGRAPHIC (Aug. 13, 2021), <https://perma.cc/TJ8N-GQ5R>.

In *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, for example, the Court refused to strike down a Maryland statute that prohibited producers and refiners of petroleum products from operating retail service stations within the State. A group of large, interstate petroleum companies claimed that the statute impermissibly burdened interstate commerce because “the burden of [the] state regulation [only fell] on some interstate companies.” *Id.*, at 126. The Court disagreed, holding that a statute that affects some interstate producers more than others does not unduly interfere with interstate commerce. *Id.* The Court explained that even the withdrawal from the Maryland market by some major refiners did not demonstrate that the statute impermissibly burdened interstate commerce. *Id.*, at 127. The Court also recognized that independent producers could enter the market to replace the supply lost by withdrawing producers, just as producers here have and will continue to enter the California market for pork to replace any lost supply from any withdrawing integrators and producers. The Court explained:

Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers’ supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

Id. The Court further recognized that it was not within its purview to evaluate a statute's merits, only its constitutionality:

[T]he Clause protects the interstate *market*, not particular interstate *firms*, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.

Id. at 127-28 (emphases added).

As in *Exxon*, the issue here is not whether Proposition 12 adequately protects the public health or appropriately remedies the inhumane conditions in which livestock are raised. This is particularly true given that Proposition 12 applies to the largest integrators and the smallest independent farmer alike. *See id.* at 126 n.16 (“The sales by independent retailers are just as much a part of the flow of interstate commerce as the sales made by the refiner-operated stations.”). Thus, Petitioners’ complaint that the statute will inordinately affect a small group of integrators should not factor into the constitutional analysis. *Id.*, at 127 (“The fact that the burden of state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.”).

III. PETITIONERS' WARNINGS ABOUT PROPOSITION 12'S POTENTIAL EFFECTS ARE INAPPOSITE AND UNFOUNDED.

A. Petitioners' Arguments About Supply Shocks and Price Increases Are Not Fit for Constitutional Consideration.

Petitioners attempt to scare the Court with hypotheticals about supply shocks and cost increases that will affect, among other groups, low-income communities and schools. *See, e.g.*, Br. of Petitioners at 15. But such pleas are properly directed to Congress or state lawmakers, both of which can better make the relevant economic judgments. And the Court should be especially wary of constitutionalizing such policy considerations, because predictions about supply, demand, and prices, like those Petitioners assert, often turn out to be wrong. They should not serve as the basis for rigid constitutional rules.

To take just one example, at the height of the COVID-19 pandemic, the integrators successfully lobbied the federal government to exempt the industry from following normal COVID-19 worker safety protocols, citing the possibility of emergency meat shortages.⁴² But a May 2022 report from the House Select Subcommittee on the Coronavirus Crisis determined that the industry's warnings of "an impending protein shortage were flimsy if not outright false."⁴³ While the largest integrators and industry associations

⁴² See generally House Select S. Comm. on the Coronavirus Crisis, *Staff Report* (Comm. Print 2022), <https://perma.cc/WZ62-MEDL>.

⁴³ *Id.* at 1 (cleaned up).

issued these dire warnings to justify special treatment, the reality was pork producers easily could have met demand—in March 2020, the industry had approximately 622 million pounds of frozen pork on hand, “an amount well above levels predating the pandemic.”⁴⁴ In fact, during the first three quarters of 2020, foreign-owned integrators Smithfield and JBS exported to China 90 percent and 370 percent more, respectively, than they had during the same period in 2017.⁴⁵ And despite citing increased labor costs as the justification for the industry’s drastic price increases, the major pork integrators have enjoyed record profits in each year of the pandemic.⁴⁶

At the end of the day, then, the integrators had no problem meeting the surge in global demand COVID-19 created—and profiting handsomely while doing so. The Court should thus look skeptically on Petitioners’ grim assertion that the adjustments Proposition 12 will require could threaten “the Nation’s food security.” See Br. of Petitioners at 20.

So too should the Court refuse to credit Petitioners’ warnings that Proposition 12 will lead to higher prices, for two reasons. *First*, like Petitioners’ concerns about Proposition 12’s effect on supply, arguments about whether a statute will or will not raise prices is inapposite to any constitutional analysis. “[A]n evaluation of the economic wisdom of the statute * * * cannot

⁴⁴ *Id.* at 10.

⁴⁵ *Id.*

⁴⁶ Andrea Shalal, *Meat Packers’ Profit Margins Jumped 300% During Pandemic – White House Economics Team*, REUTERS (Dec. 10, 2021, 4:20 PM), <https://perma.cc/F6C7-JXJH>.

override the State’s authority to legislate against what are found to be injurious practices in their internal commercial and business affairs.” *Exxon*, 437 U.S. at 124. Such arguments are best directed not to unelected judges but to those considering whether to enact a statute.

Second, and in any event, Petitioners *did* make this very argument to California voters, who considered and rejected it. The opposition to Proposition 12 campaigned on purported increases in price, and the ballot measure explained the possible fiscal side effects of the law.⁴⁷ Californians thus understood that Proposition 12 could cause them to spend more at the grocery store. Still, two thirds of them chose to enact the law.

The Court has held that when “the most palpable harm” of a regulation (higher prices) is “likely to fall upon the very people who voted for the laws,” the Dormant Commerce Clause is not offended. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (“Here, the citizens and businesses of the Counties bear the costs of the ordinances. There is no reason to step in and hand local businesses a victory *they could not obtain through the political process.*”) (emphasis added). In *United Haulers Association*, the Court held this to be true of ordinances enacted by municipalities’ elected officials, *id.*, at 337—it stands to reason that the principle is even stronger where, as here, the very citizens who would purportedly pay higher prices voted directly (rather

⁴⁷ *Proposition 12*, Legislative Analyst’s Office, The California Legislature’s Nonpartisan Fiscal and Policy Advisor (Nov. 6, 2018), <https://perma.cc/9S77-FFTV>.

than through their representatives) for the measure at issue.

Notably, rather than the growing demand for humanely raised pork products, the biggest driver of price increases in recent years has been the integrators themselves, both by the consolidation described above, *supra* Section I.A, and by withholding supply and through purported collusion. The integrators currently face myriad antitrust lawsuits for price-fixing, which have already resulted in substantial settlements. These suits allege that Smithfield, JBS, Tyson, and other large pork integrators conspired to inflate prices by restricting output through coordinated supply cuts, and through illicit information-sharing between competitors.⁴⁸ Whatever the end result of these lawsuits, there is no dispute that, as the May 2022 House report concluded, in the meatpacking industry there is “a high degree of coordination among competitors.”⁴⁹

These fundamental realities—most of which the major integrators constructed and profit handsomely from—are more directly related to how much farmers earn and how much consumers pay for pork than one State’s transitioning to a new, more humane production method.

⁴⁸ Matthew Perlman, *Pork Buyers Say ‘Essential’ Tag Bolsters Their Antitrust Case*, LAW360 (May 12, 2020, 6:28 PM), <https://perma.cc/GM6E-JBUB>.

⁴⁹ House Report, *supra* note 42, at 5.

B. Experience Teaches That Integrators Can Supply Demand for Varied Pork Products Without the Dire Consequences Petitioners Warn of.

Petitioners also decry that Proposition 12 will cause a nationwide conversion to crate free pork. See Br. of Petitioners at 2 (“Proposition 12 will transform the pork industry nationwide.”). As with their assertions about supply shortages and price increases, this concern is inapposite to the Dormant Commerce Clause analysis, particularly since there is nothing burdensome or discriminatory about producers or even other States coming into conformance with Proposition 12. *E.g.*, *Exxon*, 437 U.S. at 128 (“The evil that appellants perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that [provisions like Maryland’s challenged statute] provisions are warranted. The problem thus is not one of national uniformity.”).

But even if Petitioners’ concerns were cognizable, they suffer another flaw: Their factual assertions are simply unsupported, as Petitioners conveniently forget that there already exists a diversity of *demand*—distinct from homogeneity of the production model—in the pork industry. Before Proposition 12’s passage, consumers were demanding organic pork, antibiotic-free pork, or hormone-free pork (to name just a few examples), and the large integrators have had no problem serving this demand.

Independent of Proposition 12, pork processors must meet various customer specifications for this varying demand; organic, antibiotic free, hormone free and crate-free pork (a demand that existed prior to Proposition 12) are all already segregated and traced

through the supply chain because customers, and the U.S. Department of Agriculture (USDA) requires that these types of pork not be commingled (and actually remain as advertised). Pork producers are thus well acquainted with the concepts of segregation and tracing, and regularly adjust their operations to account for enhanced requirements of certain production streams.

For example, the USDA regulates use of “organic” labels.⁵⁰ In order to claim a product as organic, producers must permit on-site inspections for every component of the operation, including seed sourcing, soil conditions, crop health, weed and pest management, water systems, inputs, contamination and commingling risks and prevention, and record-keeping. Despite these requirements, nearly all major pork integrators have organic pork lines, and yet this has not eliminated the much larger market for nonorganic pork.

As another example, the USDA has Animal Raising Claims Labeling Guidelines, which regulate, among other things, how producers can use a “Raised Without Antibiotics” claim on their meat products. For a producer to claim that its products are antibiotic free (Raised Without Antibiotics or No Antibiotics Administered), the animal cannot have been given antibiotics within the last 150 days. This requires extensive documentation, including: (i) a detailed written description explaining controls for ensuring that the animals are not given antibiotics from birth to harvest or the period of raising being referenced by the claim; (ii) a signed and dated document describing how the animals are raised to support that the claims

⁵⁰ Miles McEvoy, *Organic 101: What the USDA Organic Label Means*, U.S.D.A. (Mar. 13, 2019), <https://perma.cc/Z6ML-V8BB>.

are not false or misleading; (iii) a written description of the product tracing and segregation mechanism from time of slaughter or further processing through packaging and wholesale or retail distribution; and (iv) a written description for the identification, control, and segregation of nonconforming animals/product (*e.g.*, if beef raised without the use of antibiotics need to be treated with antibiotics due to illness).⁵¹ To cater to the demand for antibiotic free pork, producers have followed these strict regulations. Smithfield Foods, for example, created a product line, Pure Farms, that meets “the highest level of USDA standards with minimal processing and no antibiotics, steroids, hormones or artificial ingredients.”⁵² Cargill, as another example, segregates its hogs to cater to the demand for antibiotic free pork, and has said:

Today, Cargill houses approximately 27,000 sows that produce antibiotic-free pork, and production has reached 12,000 hogs per week. As Cargill’s antibiotic-free pork line continues to grow, products can be found in retail meat cases, at national restaurant chains like Panera® and on many grocery stores’ private-label menus. * * * The growth of antibiotic-free herds demonstrates Cargill’s dedication to broadening its pork

⁵¹ Food Safety & Inspection Service, USDA, *Animal Raising Claims Labeling Guidelines Update 22-26* (Sept. 1, 2021), https://www.fsis.usda.gov/sites/default/files/media_file/2021-09/Animal-Raising-Claims-labeling-and-Non-GMO-slides-2021-09-01.pdf.

⁵² *Smithfield Foods Introduces Pure Farms Antibiotic-Free Product Line*, NATIONAL HOG FARMER (Feb. 21, 2017), <https://perma.cc/8EXV-YUGM>.

portfolio and fulfilling customers' desires for greater transparency in the foods they eat.⁵³

The priorities of Smithfield, Cargill, and other processors are (understandably) to chase customer demand; supplying demand ensures profits. Despite the industry's investments to segregate antibiotic free pork for major customers like Panera, and other grocery stores and restaurants all over the country, the Nation has not experienced a mass conversion to antibiotic free pork.

And what is true of domestic demand is true abroad: Processors who seek to take advantage of export markets must similarly create pork products that meet the particular requirements of those consumers. For the European Union, for example, the USDA has a program—Pork for the European Union—in which the U.S. has instituted certain control mechanisms surrounding its export of pork. In particular, producers are required to implement stringent identification requirements, in order to maintain segregation and tracing, in the event of a violation.

Moreover, there are several control and segregation procedures to follow, to ensure animals in this program are not commingled with other animals; all operating procedures related to control and segregation of non-hormone treated animals must be documented. Though this was thought to require changes to the production model, the integrators all complied, allowing them to enter a new market and capitalize on a growing foreign demand for U.S. pork. For example, Tyson responded by prohibiting the use of ractopamine in

⁵³ Press Release, Cargill, Incorporated, *Raising Antibiotic-Free Pigs* (Jan. 1, 2015), <https://perma.cc/ETT6-WHY2>.

market hogs it purchases. As of February 2020, Tyson began “offering a limited amount of ractopamine-free pork to export to customers by working with farmers who raise hogs without it, and by segregating the animals and products at processing plants.”⁵⁴

While corporate integrators seek to block small farmers from entering new markets by preventing any variation to their production model, the integrators themselves readily make changes to their production model, and institute expensive mechanisms to ensure segregation and traceability, to enter new markets themselves. Proposition 12 will therefore not disrupt supply or demand, nor “transform the pork industry nationwide,” Br. of Petitioners at 2, any more than did these other recent developments.



CONCLUSION

The most fundamental principle of business is to create supply to meet demand. The industrial evolution of the agriculture industry in the mid-twentieth century is due in part to the changing nature of consumer demand; supplying consumers who were interested in prepared food products and prioritized convenience required a technological revolution that transformed agriculture production.⁵⁵ Corporate packers know this; they have invested in the capital to supply these

⁵⁴ Press Release, Tyson Foods, Inc., *Tyson to Help Meet Growing Demand for U.S. Pork by Prohibiting Ractopamine Use* (Oct. 17, 2019), <https://perma.cc/WYN9-D9GT>.

⁵⁵ Barkema, *supra* note 4, at 64.

customers. However, demand has evolved again, now to encompass crate-free pork. Just as large processors have adjusted their production and distribution model to gain entry into export markets with differing demand and customer specifications, they can now adjust their model to cater to growing demand for humanely raised pork—or, if they think that will be too costly, let that demand be met by independent farmers who eagerly seek to enter this market and take advantage of new opportunities springing up in California.

Petitioners frame Proposition 12 as nothing but a costly, regulatory hindrance, but one major benefit of the statute is that it promotes diversity in production. If the Court sides with Petitioners, it would be helping multinational agribusiness use their enormous market power to slow the flow of products available to meet the market demand. California's Proposition 12 fully opens the valve of supply to match consumers' preferences. Independent farmers in and out of California who have always produced crate free pork have expected new opportunities in California and made business plans in reliance on this law coming into effect; and farmers who were not previously in compliance with the law, made investments in infrastructure to ensure compliance, with the similar expectation that this law would remain in effect. Petitioners seek to manipulate the state authority and consumer preference to ensure no disruption to their production methodology and market dominance. Petitioners pursue the Court's heavy hand in distorting the market in their favor; the Court should allow consumer choice and free enterprise to prevail.

For the foregoing reasons and those stated in the Petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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