

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 AMICI CURIAE THE STATE PORK
PRODUCER ASSOCIATIONS OF IOWA, MINNESOTA,
INDIANA, NEBRASKA, MISSOURI, MICHIGAN,
MONTANA, NORTH DAKOTA, OHIO, OKLAHOMA,
WISCONSIN, THE STATE FARM BUREAUS OF IOWA,
MINNESOTA, MISSOURI, AND NEBRASKA, THE
INDIANA AGRICULTURAL LAW FOUNDATION AND
THE MINNESOTA AGRIGROWTH COUNCIL IN
SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Iowa Pork Producers Association, Iowa Farm Bureau Federation, Minnesota Pork Producers Association, Minnesota Farm Bureau Federation, Minnesota AgriGrowth Council, Indiana Pork Producers Association, Indiana Agricultural Law Foundation, Nebraska Pork Producers Association, Nebraska Farm Bureau Federation, Missouri Pork Producers Association, Missouri Farm Bureau Federation, Michigan Pork Producers Association, Montana Pork Producers Council, North Dakota Pork Council, Ohio Pork Council, Oklahoma Pork Council and the Wisconsin Pork Association submit this amici curiae brief in support of Petitioners.¹

From major pork producing states, these state organizations represent the interests of farmers who, despite being located across the country from California, will bear the brunt of the impacts from Proposition 12 with additional capital expenditures, increased operating costs, intrusive inspection and certification requirements, and grave biosecurity risks that California seeks to impose. Iowa is the largest pig producing state in the country and, as of March 1, 2022, has an inventory of 23 million pigs (including 900,000 breeding pigs and 22.1 million

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

market hogs), which is nearly one-third of the total swine herd in the United States. *See* USDA Nat'l Agric. Stat. Serv., Quarterly Hogs & Pigs 8 (March 30, 2022), <https://bit.ly/3OkNCYa>. Minnesota is the second largest pig producing state in the country with an inventory of 8.6 million pigs (including 530,000 breeding pigs and 8.07 million market hogs). *Id.* Similarly, Indiana is the fifth largest pig producer with 250,000 breeding pigs and 5.2 million total pigs in inventory, Nebraska is the sixth largest with 430,000 breeding pigs (3.6 million pigs total) and Missouri is the seventh largest with 420,000 breeding pigs (3.3 million pigs total) in inventory. *Id.* Ohio and Oklahoma are ranked eighth and ninth with a combined 660,000 breeding pigs and 4.7 million total pigs in inventory. *Id.*

These seventeen organizations are thus uniquely positioned to discuss the difficulties that their farmer-members will face as a result of California's implementation of Proposition 12.

The Iowa Pork Producers Association is a grassroots organization with more than 4,500 members across Iowa. The organization serves as a unified voice that represents the interests of Iowa's pork producers and promotes a sustainable, socially responsible, and globally competitive pork industry.

The Iowa Farm Bureau Federation is an independent, non-governmental, voluntary organization of farm families that was founded in 1918. The organization is the largest general farm organization in Iowa with more than 153,000 member families,

which include farmers who raise pigs and farmers who grow feed for livestock.

The Minnesota Pork Producers Association celebrates the story and advocates to protect the interests of the state's pork producers. The organization is funded by voluntary contributions from more than 700 farmer-members who raise the majority of pigs produced in Minnesota and work to establish the pork industry as a responsible supplier of high-quality pork.

The Minnesota Farm Bureau Federation consists of 78 county farm bureaus with nearly 30,000 member families who are farmers, ranchers, and others who have an interest in the future of agriculture. The organization was formed in November 1919 and, for the past 102 years, has advocated on behalf of the beliefs and policies of its members to promote agriculture.

The Indiana Agricultural Law Foundation is a 501(c)(3) charitable organization established in 2005 by Indiana Farm Bureau, Inc. Throughout its existence, INAgLaw has effectively promoted a better understanding of legal issues facing Indiana agriculture through educational programming and support of precedent-setting litigation.

The Indiana Pork Producers Association's advocacy arm represents the policy interests of Indiana pork farmers who voluntarily join its membership.

The Michigan Pork Producers Association is an East Lansing-based commodity organization that administers producer-funded pork promotion, consumer information, and research programs, and monitors public policy activities affecting Michigan's 2,000 pork producers.

The Minnesota AgriGrowth Council is a non-profit, nonpartisan, member association that champions long-term sustainability, competitiveness, and growth in Minnesota's agriculture and food industry. The organization has approximately 150 members (consisting of both individual persons and other organizations) that seeks to access opportunities and create common solutions to challenges facing our agri-food system.

The Missouri Farm Bureau Federation was founded in 1915 as the first state Farm Bureau in America and serves over 143,000 member families. Compliance with California Proposition 12 will force massive new costs and restrictions and limit our members' marketing options and opportunities.

The Missouri Pork Producers Association represents Missouri's Pork Industry through promotion, education, research, and public policy. We strive to ensure that our members and allied industry partners have the freedom to operate while enhancing their opportunities for success.

The Montana Pork Producers Council is a grassroots organization where approximately 98% of the hogs are produced by Hutterite Colonies. The organization serves as a unified voice that represents

the interests of Montana's pork producers and promotes a sustainable, socially responsible, and globally competitive pork industry.

The Nebraska Farm Bureau Federation is the state's largest general farm and ranch organization, representing more than 58,000 member families in every county in Nebraska. Its farm and ranch member families raise and grow every commodity produced in the state of Nebraska including but not limited to corn, cattle, soybeans, hogs, wheat, sorghum, poultry, hay, and produce.

The Nebraska Pork Producers Association is a grassroots, incorporated, non-profit organization established in 1961. The organization's vision is to ensure opportunities for success for Nebraska's producers of pork, regardless of size or production style, as well as the state's youth in the pork industry.

The North Dakota Pork Council represents the pig farmers of North Dakota and serves to promote the pork industry to consumers by establishing trusted relationships with its citizens.

The Ohio Pork Council is a grassroots organization representing the interests of more than 2,500 members raising pigs across Ohio. The organization works to promote a viable, sustainable, and socially responsible pork industry.

The Oklahoma Pork Council, a farmer-led organization, represents the interests of all Oklahoma pig farmers. The Oklahoma Pork Council promotes pork products, educates consumers about the pork

industry, funds research, and advocates on behalf of our producers.

The Wisconsin Pork Association represents the state's pork industry with a commitment of enhancing the success of all sizes and types of production in the state. WPA continues to promote and protect the state's pork industry in order to ensure its success now and in the future.

SUMMARY OF ARGUMENT

This Court has a long history of applying the Commerce Clause of the United States Constitution to ensure free trade between the states. Although California's Proposition 12 may initially appear to regulate only the sale of whole pork meat within California, the practical impact of this law, and the regulations by which California proposes to implement this law, is to require pig farmers located in the states in the center of the country (and elsewhere throughout the world) to subject themselves to California's complex regulatory regime and inspection agents. The effects of this law will be felt across the entire pork supply chain, threatening our Nation's supply of safe and wholesome pork. California has unconstitutionally exceeded its state authority by regulating commercial transactions and business activity occurring entirely in other states.

ARGUMENT

Through Proposition 12 and the California Health and Safety Code, California regulates the housing of breeding pigs which are housed, fed, bred, and give birth to piglets outside of California within Amici's states. Whole pork meat sold in California is required to originate from a piglet that was born to a breeding pig which was housed in an enclosure providing a minimum of 24 square feet of usable floor space per breeding pig. *See* Cal. Health & Safety Code § 25991(e). The housing of the piglets which grow and eventually become whole pork meat is not regulated by the offending California laws.² Instead, California regulates breeding pigs located in other states and countries and requires an accounting of the birthing sow's housing through every pound of pork marketed from its offspring. California's law greatly impacts farmers located in the amici states by restraining trade and business transactions occurring wholly outside the state of California.

The Commerce Clause of the United States Constitution was intended " 'to create an area of free trade among the several States,' " *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370 (1976) (quoting

² In contrast, the California law's regulation of veal and eggs is direct to the food products sold. Veal is the meat product from the regulated calves, and eggs are the direct product of the regulated laying hens. The regulation of housing for calves and laying hens does not extend to their offspring. The breeding pig regulations go a step farther and are enforced through their offspring. *See* Cal. Health & Safety Code § 25990.

McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944)); U.S. Const. art. I, § 8, cl. 3. “[I]n general Congress has left it to the courts to formulate the rules” to preserve “the free flow of interstate commerce.” *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945)). The amici organizations respectfully request that this court preserve the free flow of intrastate and interstate commerce in pigs, market hogs and pork products by invalidating Proposition 12 and the related California laws restricting the housing of breeding pigs.

The legal analyses of the important constitutional issues presented in this case are fully addressed in the Petitioners’ submissions to this court. This submission will focus on the practical impacts of California’s implementation of Proposition 12 on pork production throughout the Nation—and the substantial disruption it will cause to a critical component of our food supply—is significant.

A. California Extensively Regulates Commercial Transactions Involving Pigs that Occur Entirely Outside of California.

On its face, the statutory language may appear to only regulate transactions involving whole pork meat that occur within California. Under the statute, a business owner or operator shall not knowingly engage in the sale of whole pork meat within the state that is the meat of a breeding swine or immediate offspring who was confined with less than 24 square

feet of usable floorspace per pig. Cal. Health & Safety Code §§ 25990(b)(2), 25991(e)(3). But an examination of scope and practical effects in the context of raising pigs demonstrates that the statute and proposed regulations will impact farmers across the country in transactions occurring entirely outside of California.

1. Most pigs grown in the United States and the packers who process these animals into pork products are not located in California.

Understanding the practical effects of California's Proposition 12 begins with the general background of pig farming in the United States. Live feeder pigs or market hogs are predominantly sold as commodities under United States Department of Agriculture's grading standards. 7 C.F.R. § 54.1 et. seq.; USDA Agric. Mktg. Serv., Grades and Standards for Swine and Pork, <https://bit.ly/3xrV4tG> (last visited June 9, 2022). Pork marketed from the offspring of a breeding pig meeting Proposition 12's requirements is indistinguishable from a pork product marketed from the offspring of a breeding pig in non-compliant housing; and therefore, consumers would be unable to distinguish Proposition 12 compliant product absent a label. However, some vertically integrated companies sell branded products or custom products meeting their wholesale customer's specifications for preferential prices. And other farmers may sell pork products directly to consumers in local markets rather than the commodity market. Most pork products sold in the United States or exported to other countries

develop through the supply chain as commodities rather than as special-order products.

Most pigs in the United States are raised in the Midwest with Iowa and Minnesota as the largest hog producing states based on current inventories. *See* Quarterly Hogs & Pigs, *supra* at 8. In contrast, California’s total inventory of pigs as of December 1, 2021, was just 82,000. *See* USDA Nat’l Agric. Stat. Serv., Quick Stats (2021) <https://quickstats.nass.usda.gov> (search the Animals & Products sector, Livestock group, Hogs commodity, and Hogs – Inventory data item). The reason for this geographic distribution of pig production is quite simple. The Midwest is the largest producer in the world of the two primary components of pig feed – corn and soybeans. Feed costs, which account for approximately one-half of the cost of growing a market pig, are lower in this region than in other states. Further, most packers have also located their processing facilities in these same areas to be near the supply of finished market hogs to minimize transportation costs.

The transactions along the supply chain are usually related to the pig’s production cycle. The biological cycle of a pig begins when a sow or gilt³ is bred. After a gestation period of approximately 115 days, the sow will give birth to, or farrow, a litter of

³ A sow is a female pig that has previously had at least one litter of pigs, while a gilt is a female that has not yet had a litter of pigs. California uses the term “breeding pig” to describe a sow or a gilt over six months old.

piglets with ten to fourteen piglets in each litter. The piglets are weaned approximately three weeks after they are born, after which they may be referred to as “weaned pigs” or “nursery pigs.” In most cases,⁴ the pigs will be raised until they are ready for market. In the meantime, the sow that farrowed the piglets will come into heat again approximately five days after the piglets are weaned and may be re-bred at that time. A typical breeding sow will farrow approximately two litters per year.

After the pigs are weaned, the growing period of a market pig generally lasts approximately 22 to 24 weeks (approximately 26 weeks from birth) and may be divided into two phases: (i) a nursery phase begins when the pigs are weaned and continues until they reach approximately 40 to 60 pounds (usually between six and ten weeks after birth), after which the pigs may be referred to as “feeder pigs” or “finishing pigs”; and (ii) a finishing phase that continues until the pigs reach market weight (which can vary significantly but is generally around 240 to 300 pounds).

Historically, pig farming occurred mostly on small, diversified farms that grew crops and raised multiple species of livestock—these farmers typically had a small number of breeding pigs they would breed and raise the offspring produced from birth until they were ready to market (referred to as a farrow-to-finish

⁴ Some weaned pigs may be raised to maturity and kept for future breeding.

operation). Over the last 40 years, however, pig production in the United States has shifted dramatically to meet consumer demands. Today, most pigs are raised on farms that specialize in one phase of production. For example, most breeding pigs are housed in gestation and farrowing facilities. After new pigs are weaned, they are moved from the sow farm to a nursery barn, and eventually moved again to a finishing barn, at different locations where they are housed with a group of other pigs that are approximately the same age and size.⁵ This specialization and grouping of similar animals allows pig farmers to feed specialized rations and provide specialized care that improves animal welfare and meat quality, maximizes efficient use of land and feed, reduces input costs, prevents or mitigates disease outbreaks, and improves the environmental sustainability of the farm.

Most pig farmers continue to operate independent farms that are generally smaller and operate a single phase of the production cycle. According to the 2017 Agricultural Census, 58,180 independent pig farmers had 24.9 million pigs in inventory. Nat'l Agric. Stat. Serv., 2017 Census of Agriculture: U.S. National Level Data Table 23, <https://bit.ly/3Ohi4Cl> (last visited June 12, 2022). Depending on the farmer's specialty, an independent farmer may own

⁵ In some cases, the nursery and finishing phases may be combined at a single farm, which is often referred to as a wean-to-finish operation.

and operate a breeding pig farm, a pig nursery farm, a farm that finishes the pigs to market weight or a combination of these phases of production. The Ag Census tracks six different configurations for pig farms. *Id.* Pigs at these different stages of production are bought and sold by independent pig farms on the open market to fill the pig inventory on their farm. A piglet born on a breeding pig farm may be bought and sold two to three times before it is eventually sold to a packer to be processed into pork. These transactions occur near the locations of the pigs or between the major pork producing states – not in California.

Some pig farmers use a vertically integrated production model in which the farmer will typically own one or more sow farms and will contract with other farmers to provide nursery and finishing barns and labor to care for the pigs. Under this model, the farmer will own the pigs from the time they are born until they are marketed and sold to a packer to be processed into pork. According to the 2017 Agricultural Census, there were 8,259 contractors and contract growers with 47.5 million hogs in inventory. *Id.* Integrated production models generally involve larger numbers of sows and pigs. Pigs are transferred between farms and pigs from more than one sow farm may be combined with pigs from another sow farm for care and housing in a nursery or finishing barn. These transactions between the pig owner and the farmers taking care of the pigs also occur where most pigs are located – outside of California.

Smaller independent pig farmers could be excluded from the market entirely or be required to condition their purchase of weaned or feeder pigs on certification of compliance with California's laws. In other words, the practical effect of California's implementation of Proposition 12 is to burden intrastate (in other states), interstate and international commerce involving the sale of live pigs entirely outside of California's jurisdiction.

2. California Proposition 12 requirements are not limited to whole pork meat sold in California but also regulate live animal sales and breeding pig housing outside of California.

Thus, although Proposition 12 ostensibly regulates only the sale of pork in California, its requirements for housing a breeding pig impact the entire supply chain because of the requirement it be traced from the sow to each piglet and then to each package of pork meat, such as bacon, ham, roast, or pork chops, sold in California. To comply with the law, retailers and wholesalers who purchase pork for resale in California will necessarily require the packers who process and package such pork (virtually all of whom are located outside of California) to provide written certification that the pork complies with Proposition 12's requirements. *See* Cal. Health & Safety Code § 25993.1.

To meet these demands, the packers, in turn, will be required to demand certification from the pig

farmers who sell market hogs. The sale of live market hogs by pig farmers to packers almost certainly occurs outside of California since almost all pigs are raised outside of California and almost all the processors are located outside of California. And this requirement will move across the supply chain to the feeder pigs or weaned pigs purchased to fill the finishing barns until the sow farm, required to be certified by the state of California or its agents, is reached.

Implementation of California's Proposition 12 through the regulations proposed by the California Department of Food and Agriculture clarify its intent to regulate pig farming outside of California.⁶ The proposed regulations require all pork distributors⁷ in California, and "any out-of-state pork distributors selling whole pork meat into California for purposes of human food use in the state," to register each facility annually with the California Department of Food and Agriculture. Animal Confinement Proposed

⁶ Proposition 12 directed that "[t]he Department of Food and Agriculture and the State Department of Public Health shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019." Cal. Health & Safety Code § 25993(a) (emphasis added). Almost three years after the deadline, the state still has not promulgated final regulations for the implementation of the law.

⁷ The proposed regulations define a "pork distributor" as "a person or facility engaged in the business of commercial sales or distribution of whole pork meat (as a pork producer or otherwise) to an end-user in California." Animal Confinement Proposed Second Modified Text § 1322 (June 9, 2022), <https://bit.ly/3NVjToG>.

Second Modified Text § 1322 (June 9, 2022), <https://bit.ly/3NVjToG>. Every pork distributor agrees as a condition of registration to provide the department or its agent with access to each facility and its business records for inspection and audit even if such facility is located outside of California. *Id.* at § 1322.3(b).

As another condition of such registration, a pork distributor must maintain records that are “sufficient for purposes of an audit trail” that “document in a traceable manner” that pork sold in California is compliant pork. *Id.* at § 1322.5. An “audit trail,” in turn, requires documentation that pork sold in California be “from pork producers that hold a valid certification as a certified operation issued pursuant to Article 5 of this Chapter.” *Id.* at § 1322. Thus, the proposed regulations effectively require that pork producers (defined as pig farmers who operate breeding pig farms) be certified by the State of California, regardless of where they are located, if the processor who eventually receives the market hog to process into pork, sells any whole pork meat to a retailer or wholesaler for resale in California.

To obtain certification, a pork producer must file an application with the State of California and subject themselves to onerous recordkeeping requirements (including all production records and records of all sales of hogs) and submit their farms, offices, and records for annual inspections by an agent of California. *Id.* at §§ 1326.1, 1326.2. In addition to the required annual inspections, the California

Department of Food and Agriculture “may require that additional inspections be performed by an accredited certifying agent or the Department.” *Id.* at § 1326.5(a)(2). In other words, Proposition 12 requires hog farmers who own and operate breeding pig farms to submit information about their operation to the State of California and allow any person designated by the state to travel to and enter their farms (whether those farms are located in the Midwest, Canada, or anywhere else) to inspect their operations and records. It is difficult to conceive of a more direct or intrusive regulation of activities occurring entirely outside of California’s jurisdictional boundaries.

3. Currently available traceability methods for commodity pork production are insufficient to create the required audit trail from each pork cut to the specific breeding pig.

The traceability of pigs in the United States has largely been for purposes of animal disease prevention and medical records from birth until the animal is marketed, but the techniques are not infallible. California law requires each cut of whole pork meat to be traced to “a breeding pig” that was housed with 24 square feet of floor space. Notably, the law does not provide for tracing groups of offspring derived from a group of breeding pigs. It requires individual tracing.

Pig farmers employ several methods to track their animals for the prevention of animal disease and keeping animal health records. These methods may include ear notches, ear tags, tattoos or brands, or

electronic identification tags. They are geared toward tracking an animal from birth to market weight, but they are not foolproof. For example, ear tags or electronic tags can fall off and be lost. Tattoos and brands can fade or rub off and can be difficult to detect. Additionally, all these methods fail to provide traceability for individual cuts of pork after an animal is marketed and processed into pork products.

The federal Animal Plant and Health Inspection Service (APHIS) regulates the interstate sale and transport of live swine to prevent the spread of animal disease. 9 C.F.R. § 71.19. Pigs are to be individually identified while in interstate commerce if they are commingled with pigs from another source, unloaded at a livestock market, transferred to a new owner, or arrive at the new designation in interstate commerce. *Id.* Pigs that are part of an integrated pig production system that do not change owners are not required to be individually identified. *Id.* Neither are a group of pigs required to be individually identified if they are being transported in interstate commerce to a packer. *Id.* Current federal traceability requirements only apply to the interstate sale or transport of live pigs. Federal regulations do not extend to in-state sales or transport of live pigs, or to the resulting pork products, all of which are common within the amici states. In contrast to the federal regulations, California proposes to regulate live breeding pigs located in other states which are not in interstate commerce through recordkeeping, audits, certification, and inspection requirements.

It is not practically possible within the current pork production processes to trace a single package of bacon, or any other pork cut, back to the specific sow who gave birth to the pig unless a pig is individually processed, and its pork cuts segregated during storage and distribution. Packers efficiently process thousands of carcasses daily in assembly line fashion to supply our nation and export trading partners with affordable, safe, and wholesome pork protein products. Tagging or stamping each piece after a cut as each animal is processed into hundreds of different cuts is not practical and risks introducing adulterants into the food supply. DNA testing of each of the hundreds of pork cuts for the genetic connection to the breeding pig is theoretically possible, but it is time consuming and costly. *See*, Gary Smith, et.al., *Post Slaughter Traceability*, 80 *Meat Sci.* 66-74 (Sept. 2008). Access to the comparison genetic information by California regulators, meat processors or distributors may also be limited by patents and proprietary business information. Additionally, pork from separate animals are often combined to meet the packaging quantity or weight requirements of the customer.

Traceability of meat can be done through single carcass processing, such as in very small local processing businesses, but not at the volumes and processing speeds necessary to serve the California market. *Id.* During processing, a single market pig is turned into as many as 150 parts, which would also have to be segregated from non-compliant pork after processing while being transported and stored prior to

sale. See *Traceability for the Pork Industry: Challenges and Opportunities*, Pork Info Gateway (June 3, 2006), <https://bit.ly/39qRkR7>.

Large groups of Proposition 12 compliant pigs could be segregated as a group if the packer is paid a premium by a customer to close its plant or certain processing lines to other pig farmers. This scenario most often occurs with large vertically integrated farms for specific customers with branded products. However, even in this scenario, the pork products would be traced as a group to the group of breeding pigs. Each individual pork product would not be identified as coming from a particular pig who was born from a specific breeding pig meeting the requisite housing requirement. “Individual pig traceability and 100 percent identification of each pound of pork back to the live animal is much more difficult to manage and may not be practical at this time in the USA.” *Id.* Inefficiencies exist as the processing areas are shut down and cleared ahead to allow for segregation of the Proposition 12 compliant animals. Additionally, certification of groups of animals does not seem to meet the requirements of the proposed regulations, which requires traceability to “a breeding pig” rather than a group of breeding pigs. See *Animal Confinement Proposed Second Modified Text §§ 1322, 1322.1, 1322.8, and 1324.1* (June 9, 2022), <https://bit.ly/3NVjToG>.

When the plant’s capacity is bought out or dedicated, the market is disrupted as no other pig farmer can sell their pigs for processing during the

shutdown. “Non-compliant farms lose because their market becomes smaller as the covered pork market separates out, which results in a price decrease of non-covered pork.” Hanbin Lee et. al, *Economics of Mandates on Farm Practices: Lessons from California’s Proposition 12 Regulations on Pork Sold in California* Agric. and Applied Econ. Ass’n (2021). California’s law puts the tens of thousands of independent U.S. pig farmers in the disadvantageous position of making a choice between borrowing more money to remodel or expand to make their facilities compliant (making their farms less financially stable with no corresponding human health, animal welfare or environmental benefits) or foregoing eligibility for selling in the California market and being paid less for their pork (affecting their ability to service their current debt).

B. The Implementation of California’s Proposition 12 Will Force Many Small, Independent Pig Farmers to Exit and Further Concentrate the Pork Supply Chain.

The effect of these regulations will be catastrophic for small, independent pig farmers. Because of their size, pig farmers who operate small, independent sow farms that sell weaned pigs on the open market are less likely to have access to the millions of dollars in additional capital necessary to remodel existing facilities or build new facilities to comply with the requirements of Proposition 12. Dr. Steve Meyer estimates that pig farmers in the United States will

be forced to invest between \$294 million and \$348 million of additional capital and will incur additional costs of \$13.05 and \$13.69 per pig (a 9.2 percent increase) to comply with the requirements of California's Proposition 12. (Pet. App. 350a-351a). Entirely new farrowing facilities complying with Proposition 12 are estimated to cost about 22 percent more. Dr. Barry Goodwin, *California's Proposition 12 and its Impacts on the Pork Industry* 9 (May 25, 2022). With dramatically higher construction costs and inflation rates, current remodeling or construction costs are conservatively at least another 15% higher. *Id.* at 7. Because of the millions of dollars required to become compliant, access to credit is critical; however, higher interest rates further increase the cost of borrowing and the economic burden of compliance.

The financial standing of smaller pig farms tends to be less favorable than larger farms in terms of efficiencies, debt to asset ratios, net income, and profit margins. *Id.* at 10-12. Thus, many of these farmers who raise breeding pigs and produce piglets will be forced to either sell non-compliant weaned pigs or exit the business. These effects will then spread downstream to the independent pig farms who finish the pigs to market weight and do not own their own sow farm but instead purchase weaned pigs from other farmers. If they are not able to provide documentation that their market hogs originated from a certified breeding pig farm, packers are likely to significantly discount the price they will pay for these market hogs if they purchase the hogs at all.

Thus, for small, independent hog farmers, the best-case scenario is that they will be able to comply with minimal remodeling or be able to sell non-compliant pigs to local direct to consumer markets; however, the more likely scenario is that they will suffer significantly reduced revenue or shut down entirely. As Dr. Goodwin succinctly explained:

These costs will have a more severe impact on smaller, independent operations. As I have shown, these operations tend to be less efficient and have lower profit margins. Smaller operations also have less access to the credit needed to finance renovations and new construction. Thus, one important outcome of Proposition 12 will be an increase in the exit of smaller hog operations. The pork industry will become more concentrated with fewer but bigger farm operations. The stresses placed upon the entire production and marketing chain will also favor larger processors, thereby leading to ever-increasing consolidation and concentration of the industry.

Id. at 22. The potential impact on farmers becomes even more acute because of the threat of inconsistent regulations in other states. If California can impose its regulatory requirements on farmers located in other states and countries, then other states may do likewise. Thus, after hog farmers in the amici states invest millions of dollars to remodel or build new pig barns with housing that provides the 24 square feet of

space per pig required by California, New York may pass a law requiring 25 square feet of space per pig. And what if one of the amici states chooses to protect farm workers and animals by requiring individual maternity pens (rather than group housing) on pig farms located within its borders? It is unreasonable to expect pig farmers to repeatedly invest millions of dollars to comply with ever-changing, arbitrary standards imposed by other states.

The pork industry plays a crucial role in the economies of the amici states. According to a study prepared for the Iowa Pork Producers Association in 2020, hog production, marketing, further processing, and other related economic activity contributed \$40.8 billion in output and more than 147,000 jobs (and \$6.84 billion in labor income) to Iowa's economy and generated \$893 million in state and local taxes and \$1.3 billion in federal taxes., Decision Innovation Solutions, 2020 Iowa Pork Industry Report 7 (2020), <https://bit.ly/3HtHtX3>. And a recent report published by the University of Minnesota Extension Service estimates that hog farmers in Minnesota generate \$1.5 million in economic activity per farm and that a loss of just 15 percent of hog production in Minnesota would result in \$660 million in lost output and the loss of 2,100 jobs. Joleen Hadrich, Megan Roberts, & Brigid Tuck, *The Role of Hog Farmers in Minnesota's Rural Economy*, Univ. of Minn. 1 (2020), <https://bit.ly/3O87P3c>. Yet California's efforts to project its extreme animal activist regulations into Iowa, Minnesota, and the other amici states threatens to fundamentally disrupt the rural economy and

threatens the livelihood of residents of states halfway across the country.

C. Proposition 12 is Inconsistent with Sound Scientific Evidence for Animal Welfare.

As the Petitioners alleged in their Complaint, most sow farms in the United States (72 percent) currently house pregnant sows and gilts in individual maternity pens throughout gestation. (Pet. App. 204a.) This system limits the ability of the sow or gilt to turn around but protects the animal from aggression and injury from other animals and competition for access to food and water; improves hygiene and prevents disease by separating food from manure; allows the farmer to provide individualized feed rations and veterinary care to the animal; reduces sow stress; and protects farm workers from injuries from sows, which can weigh more than 400 pounds. (Pet. App. 151a, 172a-175a, 185a-186a, 222a.) Other sow farms house pregnant sows and gilts in group pens with other animals; these pens typically provide 16 to 18 square feet of space per sow, but these farms also generally use individual pens for 30 to 40 days from the time a sow finishes weaning a litter until a new pregnancy is confirmed. (Pet. App. 173a-175a, 186a-191a, 204a.)

The Proposition 12 restrictions decrease the effectiveness of insemination services and diminishes the health of recently born piglets. Animals who are intermingled frequently under the Proposition 12 compliant system will lead to increased morbidity and

mortality as the animals fight for social dominance and compete for water and food. “Producers that have adopted production practices consistent with the proposition have already realized lower conception rates, lower farrowing rates, and increased non-productive sow days.” *Goodwin* at 2. Advertised efforts to promote the welfare of gestating sows through Proposition 12 have not achieved their goal.

Animal husbandry is at the heart of hog production. Like all agriculture, it is modernizing through innovative technology and new techniques. The pork industry has a proud tradition of responsible animal care that it maintains to this day. See *Maintaining the Pork Industry Tradition of Responsible Animal Care Through Applying Scientifically Sound Animal Care Guidelines*, Pork Info. Gateway (April 9, 2012), <https://bit.ly/38R5iaK> (crafting a “U.S. Pork Producer Code of Practice” that includes “management and husbandry practices for good swine care” such as “[p]roviding personnel with training to properly care for and handle each stage of production for which they are responsible with zero tolerance for mistreatment of swine in their care” and “[p]roviding transportation that avoids undue stress caused by overcrowding, excess time in transit, or improper handling during loading and unloading quality in the natural environment”). Today’s livestock producers practice animal welfare, including by adopting new technologies, new facilities, science-based understanding of animals’ cognition among innumerable other developments. See Samaneh Azarpajouh et al., *Application of Precision Livestock*

Farming Technologies in Swine Welfare Management: What is Possible Today?, Pork Info. Gateway (July 1, 2020), <https://bit.ly/3rO0Xh8> (identifying a growing interest in automated swine welfare assessment through precision livestock farming, “which increases the farmer’s ability to keep contact with individual animals in the growing livestock production intensification” through new technologies including video imaging, real-time image processing, pressure mats and force plates, and others); Donald G. Levis, *How to Evaluate Facility Maintenance for Animal Well-Being*, Pork Info. Gateway (Apr. 17, 2012), <https://bit.ly/3aR481t> (describing swine facility factors for evaluation such as floor surfaces, pen partitions, and water, ventilation, heating, cooling, and feed systems); and, Candace Cronney, *Cognition and Welfare of the Pig*, Pork Info. Gateway (Apr. 9, 2010), <https://bit.ly/2KBR2KR> (assessing the cognitive abilities of pigs and their implications for production management; opining that behavioral and mental needs must be understood and considered along with physical and physiological needs).

The Pork Quality Assurance® Plus is a certification program for pig farmers sponsored by the Pork Checkoff and state pork producer organizations such as the amici pork producer organizations. This program “is an education and certification program designed to help pig farmers and their employees continually improve production practices. It addresses food safety, animal well-being, environmental stewardship, worker safety, public health and community.” *Pork Quality Assurance® Plus*

Certification, Pork Checkoff, <https://bit.ly/3Oj8hvf> (last visited June 7, 2022). A similar program, Transport Quality Assurance®, “trains pig transporters, producers and handlers how to handle, move and transport pigs. It includes training on the potential impacts transporting can have on pig well-being and pork quality.” *Transport Quality Assurance® Certification*, Pork Checkoff, <https://bit.ly/3tCDDFz> (last visited June 7, 2022). In Iowa, the largest pork producing state, more than 14,500 hog farmers are certified in Pork Quality Assurance® Plus and more than 7,400 people are certified in Transport Quality Assurance®. *Animal Care*, Iowa Farm Animal Care, <https://bit.ly/3xrV10V> (last visited June 7, 2022).

As part of the We Care® initiative of the National Pork Board and National Pork Producers Council, together with the state organizations, pig farmers commit to six Ethical Principles, the first of which is food safety, and the second of which is animal well-being (which includes, among other things, an affirmation of an ethical principle to “[p]rovide proper care, handling and transportation for pigs *at each stage of life*” (emphasis added)). *We Care® Ethical Principles*, Pork Checkoff, <https://bit.ly/3MVuHSk> (last visited June 6, 2022) (principles approved March 7, 2008).

State organizations have taken these initiatives further with additional efforts to educate, protect and address animal welfare concerns. For example, in 2012 the Iowa Pork Producers Association

and the Iowa Farm Bureau Federation formed the Iowa Farm Animal Care Coalition (IFAC). *About Us*, Iowa Farm Animal Care, <https://bit.ly/3b4TqXl> (last visited June 7, 2022). IFAC is “a first-of-its-kind network of professionals, veterinarians, animal behavior scientists and farmers committed to addressing Iowans’ questions regarding farm animal care and sharing one vision – that every Iowa farm animal receives proper, humane animal care.” *Welcome to Iowa Farm Animal Care*, Iowa Farm Animal Care, <https://bit.ly/3QshNyb> (last visited June 7, 2022). Farmers with a question about animal care or anyone wanting to report a farm animal concern may contact IFAC by calling the help line or submitting an online form, or both. *Services*, Iowa Farm Animal Care, <https://bit.ly/3zHaH30> (last visited June 7, 2022). An evaluation team of animal care experts may visit the farm to evaluate animal care if voluntarily hosted by the animal owner. *Id.*

Also, through the Pork Checkoff, the industry invests funds “in animal welfare, environmental and production studies that help producers meet the challenges of responsible pork production.” *About Pork Checkoff*, Pork Checkoff, <https://bit.ly/3QrbDP2> (last visited June 6, 2022). So do taxpayers, providing education to current farmers and the next generation through efforts such as Iowa State University’s Farm Animal Behavior and Welfare laboratory, which uses a multi-disciplinary approach utilizing “physiology, immunology, neuroscience, cognitive abilities, behavior and performance and health” in an effort “to develop sound scientific measures for animal welfare.”

Farm Animal Behavior & Welfare, Iowa State Univ. Coll. of Agric. & Life Sci.: Dep't. of Animal Sci., <https://bit.ly/3HuqZOo> (last visited June 6, 2022).

Animal welfare is inextricably linked to swine production and pig farmers are thoroughly committed. The goal of swine production is not just meat—it is meat raised and processed safely, humanely, and ethically.

D. The Implementation of California's Proposition 12 Significantly Increases the Risk of Spreading Swine Diseases.

Finally, the implementation of California's Proposition 12 would significantly increase the risk that sow farms face from swine diseases, thereby threatening the health and welfare of the animals. With respect to swine diseases, the introduction, outbreak, and spread of swine diseases can have catastrophic consequences both for individual farms and for pork production as a whole.

African Swine Fever (ASF) virus is a fatal and highly infectious hemorrhagic disease that broke out in China in August 2018. Researchers estimate that more than 40 million pigs died in China from the impacts of the virus and that the outbreak caused an economic loss of approximately \$111.2 billion. *See The \$100 Billion Dollar Toll of a Pig Epidemic in China*, 598 *Nature* 11 (Oct. 1, 2021). In 2021, the USDA confirmed that ASF was detected in the Dominican Republic. Lyndsay Cole & Mike Stepien, *USDA*

Statement on Confirmation of ASF in the Dominican Republic, USDA: Animal & Plant Health Inspection Serv. (July 28, 2021), <https://bit.ly/3mR7rud>.

The significant impact that a disease such as ASF would have on pork production in the United States is shown from farmers' past experiences with other swine diseases. For example, Porcine Epidemic Diarrhea virus (PEDv) emerged in the United States in 2013 and spread throughout the U.S. hog population. More than 50 percent of sow farms in the United States experienced an outbreak of PEDv in 2014. The virus caused acute diarrhea and vomiting in pigs and has a mortality rate of between 80 and 100 percent in suckling pigs. Largely as a result of this virus, the number of commercial hogs processed in 2014 decreased by more than 5.2 million (a 4.64 percent decline) from 2013. Lee L. Schultz & Glynn T. Tonsor, *Assessment of the Economic Impacts of Porcine Epidemic Diarrhea Virus in the United States*, 93 *J. Animal Sci.* 5111, 5111-13 (2015).

Not surprisingly, the PED virus also upended the hog market. The average price of a weaned pig increased from \$40.83 in 2013 to \$59.47 in 2014 (before it went back down to \$37.93 in 2015). Similarly, the average price of market hogs in Iowa and Minnesota increased from \$86.77 per cwt. (i.e., 100 pounds) in 2013 to \$100.67 per cwt. in 2014 (reaching a high of \$115.78 per cwt. in April 2014) before dropping to \$68.98 per cwt. in 2015. These market disruptions reflect that dramatic impact that the outbreak of the PED virus had on the supply of weaned pigs and

market hogs during this time period. Lee Schultz, *Historical Hog & Lamb Prices*, Iowa State Univ. Extension 1-4 (2021), <https://bit.ly/39wNCW7>.

Given the threat that disease outbreaks pose to their animals, hog farmers invest significant resources to maintain the biosecurity of their farms. Because many viruses can be introduced to a farm by people (either directly or from particles attached to their boots, clothing, or vehicles), most sow farms implement strict biosecurity procedures that restrict visitors and vehicles entering the farm to essential personnel and, even for these people, require that the person have been away from all other swine for at least 24 to 48 hours—and in some cases as much as 72 hours—before entering the farm. These farms also require authorized visitors to shower into and out of the barn, where clothing is provided by the farm (after the shower), and visitors cannot bring any outside supplies or materials (e.g., paper, pens, cameras) into the barn. *See* Laura Valeria Alarcón, Alberto Allepuz, & Enric Mateu, *Biosecurity in Pig Farms: A Review*, 7 *Porcine Health Mgmt.*, Jan. 4, 2021 at 4-5. Because the spread of ASF across the United States would be catastrophic to animal health, the food supply, pig farmers and their communities, and the economy, the USDA encourages pig farmers to “follow strict biosecurity practices” to help prevent an outbreak of ASF in the United States. *See African Swine Fever (ASF)*, USDA: Animal & Plant Health Inspection Serv. (May 24, 2022), <https://bit.ly/3mStWz2>.

In this context, the proposed rules by which California intends to implement Proposition 12—and, in particular, the requirement that each sow farm be inspected by a certifying agent accredited by California at least annually—poses an extreme risk of spreading animal diseases among hog farms and decimating hog production in the United States through a disease outbreak. Unlike existing laws in other states such as Iowa, *see* Iowa Code §§ 459.207(3)(b), 459.304(6), 459.601(3) (2021), the regulations by which California proposes to implement Proposition 12 do not require inspectors to follow the farm’s biosecurity requirements. Given the number of inspections that will be needed to implement the law, it is highly questionable (to be charitable) that California could find a sufficient number of inspectors to comply with biosecurity requirements and perform the inspections it seeks to require.

But even if the biosecurity requirements were followed, the mere fact of inspectors regularly traveling from sow farm to sow farm to perform these invasive inspections presents a significant risk of spreading diseases. Recognizing this threat, and even though it has statutory authority to enter livestock buildings if a farm’s normal biosecurity requirements are followed, the Iowa Department of Natural Resources adopted a Standard Operating Procedure stating that “due to biosecurity and safety concerns, inspectors will not enter confinement buildings.” Iowa Dep’t of Nat. Res., *Iowa Department of Natural Resources Confinement Facility (non-NPDES) On-Site*

Inspection Standard Operating Procedure 2 (2013),
<https://bit.ly/3xxYTNM>.

In addition to traceability and other practical problems for pig farmers caused by California's proposed regulations, requiring sow farm inspections by California's agents introduces serious risks to the well-being of both the animals and the farm.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that this Court reverse the decision of the 9th Circuit Court of Appeals and hold California Proposition 12 and the related statutes and regulations unconstitutional under the United States Constitution.

Respectfully submitted,

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