

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	
TRIUMPH FOODS, LLC, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:23-cv-11671-WGY
)	
ANDREA JOY CAMPBELL, <i>et al.</i> ,)	
)	<i>Leave to File Requested on</i>
Defendants.)	<i>October 10, 2023</i>
_____)	

**PROPOSED BRIEF OF IOWA, LOUISIANA, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA,
SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WYOMING AS AMICI
CURIAE IN SUPPORT OF PETITIONERS**

BRENNA BIRD
ATTORNEY GENERAL

Eric Wessan
Solicitor General
Office of the Attorney General
1305 E Walnut Street, 2nd Floor
Des Moines, Iowa 50319
(515) 823-9117
eric.wessan@ag.iowa.gov

Dated: October 10, 2023

Attorney for Amicus Curiae the State of Iowa

TABLE OF CONTENTS

INTRODUCTION & INTERESTS OF THE AMICI CURIAE.....5

ARGUMENT5

I. Question 3 Sets of the Stage for States’ Racing to the Bottom.....5

II. Question 3 Will Harm Agricultural States and Consumers.....7

III. Question 3 Violates the Constitution.....10

CONCLUSION.....13

CERTIFICATE OF FILING AND SERVICE14

TABLE OF AUTHORITIES

Cases

Brown v. Maryland,
 12 Wheat. 419 (1827)..... 11

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
 520 U.S. 564 (1997) 11

Carroll v. Lanza,
 349 U.S. 408 (1955) 12

Comptroller of Treasury of Md. V. Wynne,
 575 U.S. 542 (2015) 11, 12

CTS Corp. v. Dynamics Corp. of Am.,
 481 U.S. 69 (1987) 7

Nat’l Pork Producers Council v. Ross,
 598 U.S. 356 (2023) 8, 11, 12

Woodruff v. Parham,
 75 U.S. 123 (1869) 11

Statutes

Mass. Gen. Laws Ch. 129 App., § 1–5..... 6, 13

Other Authorities

2020 Iowa Pork Industry Report (May 2020)..... 6, 7

Barry K. Goodwin, *California’s Proposition 12 and its Impacts on the Pork Industry*
 (May 13, 2021) 9

Brian Deese, *Addressing Concentration in the Meat-Processing Industry to Lower
 Food Prices for American Families*, The White House (Sept. 8, 2021)..... 10

Chris Lisinski, *New Mass. Law on Pork Sales Takes Effect This Month* (Aug. 8,
 2023), NBCBOSTON..... 7

Elizabeth R. Rumley, *States’ Farm Animal Confinement Statutes*, Nat’l Agric. Law
 Ctr. 13

Douglas Laycock *Equal Citizens of Equal and Territorial States: The Constitutional
 Foundations of Choice of Law*,
 92 Colum. L. Rev. 249 (1992) 12

Erica Shaffer, *Rabobank: California’s Prop 12 a Call to Lead on Animal Welfare*,
 Meat+Poultry (2021) 8

Jennifer Shike, *Here’s a Look at Pork Price Spreads*, PORK BUSINESS (May 15, 2023)
 10

Robert G. Natelson, *What the Constitution Means by “Duties, Imposts, and
 Excises”—and “Taxes” (Direct or Otherwise)*, 66 Case W. Rev. 297, 320 (2015).... 12

Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev.

1133 (2010)..... 13
The Editorial Board, *Massachusetts Want Your Bacon*, WALL STREET JOURNAL,
(Aug. 10,2022)..... 10

INTRODUCTION & INTERESTS OF THE *AMICI CURIAE*

Suppose Iowa voters began to worry about overfishing and the inhumane harvesting of Atlantic shellfish. So the Iowa legislature passes a law about how lobsters, clams, and steamers must be harvested to be lawfully sold in the State. For example, lobsters must be able to turn around in the lobster cages that capture them. Perhaps the Atlantic fishermen think that the rules are unworkable and would dramatically raise the cost of otherwise ethical fishing. Iowa neither employs nor consults experts within the field—the Atlantic fishing community is simply not that large. And so, without fishermen to raise their concerns with local legislators or voters, this new hypothetical law is enacted.

While that law equally affects Atlantic fishermen across the country, it likely would impose greater compliance costs on States that have a more meaningfully sized fishing industry than Iowa. Even more so if other Midwestern states joined the ethical crusade. That is no different from the current approach of some States that do not raise hogs trying to impose unworkable restrictions in States that do. And while consumers in the regulating States will pay higher prices as a result, the economic implications are far greater—and more troubling.

The States of Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming submit this brief in support of Plaintiffs because that is what Massachusetts is doing here—imposing a detrimental and overly burdensome regulatory scheme on the almost entirely out-of-Massachusetts pig farmers and pork

processors in their respective States.

One part of Question 3, the Prevention of Farm Animal Cruelty Act, governs “farm owner[s and] operators within the Commonwealth of Massachusetts.” Mass. Gen. Laws Ch. 129 App., § 1–2. But Question 3 also makes it unlawful for a business to sell within Massachusetts “any . . . [w]hole pork meat that the business owner or operator knows or should know is the meat of a covered animal [or]of the immediate offspring of a covered animal” if the covered animal was “confined in a cruel manner,” as defined by the Question. *Id.* § 1–3. “Whole pork meat” includes uncooked pork, like bacon, ham, roast, and brisket. *Id.* § 1–5.

On its face, Question 3 appears only to regulate sales of pork that occur in Massachusetts. But its reach is much broader. Question 3’s application and accompanying regulations will deny market access to out-of-state pork farmers and processors unless their farming practices comply with Massachusetts’s dictates.

Question 3’s broad sweep will harm agricultural states. Iowa, for example, is the top pork-producing and -exporting state in the United States. *2020 Iowa Pork Industry Report 7* (May 2020), available at <https://perma.cc/3DFZ-SV5N>. The pork industry employs more than 147,000 Iowans and contributes billions of dollars annually to Iowa’s economy. *Id.*

Beyond Iowa, hog farmers are critical to many States’ economies. Massachusetts Question 3 will disrupt the pork industry by imposing stringent requirements inconsistent with industry practices on hog farmers and pork processors across the country. Those mandates will substantially burden the

interstate pork market and increase the price of pork for all Americans. For these reasons, these States have a critical interest in the outcome of this litigation—which should be decided for Plaintiffs.

ARGUMENT

I. Question 3 Sets the Stage for States’ Racing to the Bottom

Question 3 creates a “risk of inconsistent regulation by different States.” *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). Here, Massachusetts’s requirements for pig farms and pork processors deviate from lawful industry practices across the country. Massachusetts itself has few hog farmers or pork producers—most live elsewhere. That means, in effect, that the State is trying to regulate a market in which it lacks expertise and economic stake.

Iowa, for example, produces a lot of pork. In 2020, the pork industry contributed \$40.8 billion in output, and more than 147,000 jobs to Iowa’s economy. *2020 Iowa Pork Industry Report*, at 7. Hogs generated \$893 million in state and local taxes and \$1.3 billion in federal taxes. *Id.* That same year, Iowa had more than 5,400 pig farms and housed nearly one third (over 24 million) of the nation’s hogs. *Id.*

Contrast Iowa with Massachusetts, which purchases nearly all pork sold in within its borders from other states. Chris Lisinski, *New Mass. Law on Pork Sales Takes Effect This Month* (Aug. 8, 2023), NBC BOSTON, <https://perma.cc/24J7-NE2M>. Its residents annually consume 396 million pounds of pork but produce only 1.9 million in state. Thus, Massachusetts produces less than one-half of one percent of the pork it eats. *Id.* Yet Question 3 directs pork-producing States to reorganize their industries based on the “moral” sensibilities of its voters—the equivalent of Iowa, a

land-locked state, passing a law on the “humane” harvesting of shellfish.

Upholding Question 3 could also drag other States into a regulatory “race to the bottom” that extends beyond just pork. For example, imagine Washington—the State with the highest minimum wage—refusing to allow sale of products from States with a lower minimum wage. Or imagine a State prohibiting “the retail sale of goods from producers that do not pay for employees’ birth control or abortions.” Brief of Indiana and 25 Other States as Amici Curiae, p. 33, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023). Upholding Question 3 invites States to upend national markets based on “flavor of the day” policy preferences and so “effectively force other States to regulate in accordance with those idiosyncratic state demands.” *Nat’l Pork Producers Council*, 598 U.S. at 407 (Kavanaugh, J., concurring in part and dissenting in part).

II. Question 3 Will Harm Agricultural States and Consumers.

Question 3 will force out-of-state farmers to face enormous compliance costs. Economic studies conducted on California’s nearly identical law, Proposition 12, are instructive. Those studies estimated that compliance will cost hog producers in the United States between \$294 million and \$348 million. Brief of Iowa Pork Producers Ass’n, *et al.* as Amici Curiae, p. 17, *Nat’l Pork Producers Council*, 598 U.S. 356.

To contextualize those numbers, an “average barn might cost \$1,600 to USD 2,500 per sow, or \$3 million to \$4.5m million in total.” Erica Shaffer, *Rabobank: California’s Prop 12 a Call to Lead on Animal Welfare*, MEAT+POULTRY (2021), <https://perma.cc/TUZ5-SX5V>. But Proposition 12 will raise those costs to “average[e] as much as \$3,400 per sow.” *Id.* That potential doubling of cost for farmers will put

some out of business and will dramatically raise costs for consumers. And it stems from law changes like Question 3's "elevated building costs." *See id.*

Small, independent hog farmers will be hardest hit. Small farmers generally have "a lower return to investments and therefore will likely realize less favorable terms of credit," and "will be the least able to undertake the changes that would make facilities conformable." Barry K. Goodwin, *California's Proposition 12 and its Impacts on the Pork Industry* (May 13, 2021), at 8–9. Those costly regulations could "hasten the concentration of the hog Industry, with smaller farmers exiting the sector, leaving a US hog industry that has fewer but larger farms." *Id.* at 10.

Indeed, the problem isn't isolated to Massachusetts. The potential financial effect on farmers will increase if other States impose similar unworkable regulations with their own idiosyncrasies inconsistent with those in Massachusetts. For example, farmers in Iowa could invest millions of dollars to remodel their hog farms to comply with Massachusetts's requirements only to find New York enacting a law imposing larger housing requirements per pig. *See* Brief of Iowa Pork Producers Ass'n, *et al.* as Amici Curiae, p. 17. How many States must hog farmers comply with? There is a real risk of forcing those farmers to continuously "invest millions of dollars in capital expenditures" to "comply with everchanging standards that other states choose." *Id.* at 18.

While Question 3 is expensive, non-compliance may cost the pork industry more. If farmers and pork processors do not adjust to the new rules, they may be shut out of New England entirely. Massachusetts wants to impose its new requirements

on any pork transiting through the State. Because Massachusetts “is [the] distribution hub for Vermont, New Hampshire, Rhode Island, and Maine,” Question 3 “could affect the production and sale of pork across a broad swath of the country.” The Editorial Board, *Massachusetts Want Your Bacon*, WALL STREET JOURNAL, (Aug. 10, 2022), <https://perma.cc/9HR8-9KDQ>.

The increased costs on pig farmers and pork processors will make American consumers squeal about higher pork prices. Pork prices are already high enough. In 2021, pork prices rose 12.1 percent from the previous year. Brian Deese, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, The White House (Sept. 8, 2021), <https://perma.cc/AJ7F-XFAA>. And in October 2022, pork prices hit a record level of \$5.05 per pound. Jennifer Shike, *Here’s a Look at Pork Price Spreads*, PORK BUSINESS (May 15, 2023), <https://perma.cc/N23H-CA5H>. Massachusetts’s out-of-touch regulations will only continue to inflate pork prices.

Moreover, hog farmers are not necessarily those who will be hardest hit. High pork prices will disproportionately impact low-income households. Laws like Question 3 and Proposition 12 may “lead to a decline in the number of options” and “make certain pork products too expensive for lower-income people.” Alicia Wallace, *Pork Is Already Super Expensive. This New Animal-Welfare Law Could Push Prices Higher*, CNN BUSINESS (Oct. 17, 2021), <https://perma.cc/42YJ-CF7J>. That shift will hurt the pocketbooks of folks who have long relied on pork as a low-cost, high protein option for feeding their families.

Question 3 also jeopardizes Americans' health and safety. Scientific literature suggests that animal-confinement regulations, like those mandated by Question 3, could worsen animal health and welfare and risk standardized sanitary practices. For example, housing hogs in larger spaces may increase the risk of disease transmission. Those bigger confines mean that pigs are more likely to come into nose-to-nose contact and share water and feeding systems. *See* Brief for American Association of Swine Veterinarians as Amicus Curiae, p. 4–19, *Nat'l Pork Producers Council*, 598 U.S. 356. Unfortunately, Question 3 leads to real risks to human health.

III. Question 3 Violates the Constitution.

Beyond the Commerce Clause, laws like Question 3 may also implicate other constitutional provisions like the Import-Export Clause and the Full Faith and Credit Clause. *See Nat'l Pork Producers Council*, 598 U.S. at 408 (Kavanaugh, J., concurring in part and dissenting in part).

Under the Import-Export Clause, “No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws.” Art. I, § 10, cl. 2. Recent opinions indicate that the Supreme Court may be ready to apply the Import-Export Clause to interstate commerce, consistent with that Clause's original meaning. *See Nat'l Pork Producers Council*, 598 U.S. at 408 (Kavanaugh, J., concurring in part and dissenting in part); *Comptroller of Treasury of Md. V. Wynne*, 575 U.S. 542, 573 (2015) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621–637 (1997) (Thomas, J., dissenting); *Brown v. Maryland*, 12 Wheat. 419, 438–439, 449 (1827); *but see Woodruff v. Parham*, 75 U.S. 123 (1869) (limiting

the Import-Export Clause to foreign trade). Indeed, “not all duties were taxes: Some were imposed not for revenue but merely to regulate (or effectively prohibit) trade in particular articles.” Robert G. Natelson, *What the Constitution Means by “Duties, Imposts, and Excises”—and “Taxes” (Direct or Otherwise)*, 66 Case W. Rev. 297, 320 (2015).

Justices Scalia and Thomas have explained that the Import-Export Clause prevents States “from imposing certain especially burdensome” taxes and duties on imports from other States and not just from foreign countries. *Wynne*, 575 U.S. at 573.

Here, Question 3 conditions the sale of pork on “the use of preferred farming, manufacturing, or production practices in another State” where the pork originated. *Nat’l Pork Producers Council*, 598 U.S. at 408 (Kavanaugh, J., concurring in part and dissenting in part). That conflicts with the Import-Export Clause’s original meaning and warrants reconsideration. *See id.*

Question 3 also violates the Full Faith and Credit Clause, which requires each State to afford “Full Faith and Credit” to the “public Acts” of “every other State.” Art. IV, § 1. That Clause prevents States from “adopting any policy of hostility to the public Acts” of another State. *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). According to Justice Kavanaugh, “[a] State’s effort to regulate farming, manufacturing, and production practices in another State (in a manner different from how that other State’s laws regulate those practices) could in some circumstances raise questions under that Clause.” *Nat’l Pork Producers Council*, 598 U.S. at 408 (Kavanaugh, J.,

concurring in part and dissenting in part); *see also* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 115 (2010); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 290, 296–301 (1992). While the Full Faith and Credit Clause does not have so broad a scope as to encompass any law that has extraterritorial effect, the Full Faith and Credit Clause is implicated when an agricultural regulation conflicts with another State’s laws about how pork may be produced in that State.

Massachusetts creates the precise scenario about which Justice Kavanaugh warns. Question 3 regulates pork production in States, like Iowa, in a manner different from how those States regulate pork production. *See* Elizabeth R. Rumley, *States’ Farm Animal Confinement Statutes*, Nat’l Agric. Law Ctr., <https://perma.cc/C9GZ-PZ3U>. Indeed, Question 3 explicitly prohibits certain States from engaging in otherwise legal practices encouraged by those States’ laws if they want to sell pork in Massachusetts. Mass. Gen. Laws Ch. 129 App., § 1–3. Thus, the Full Faith and Credit Clause should preclude Massachusetts from enacting its regulations that conflict with Iowa’s laws and that of other top pork-producing states.

CONCLUSION

For all these reasons, amici curiae ask this Court to consider the ramifications of Question 3 on pork farmers and consumers across America.

Dated: October 10, 2023

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

/s/ Eric H. Wessan
Eric H. Wessan*
Solicitor General
Office of the Attorney General
305 E Walnut Street, 2nd Floor
Des Moines, Iowa 50319
(515) 823-9117
eric.wessan@ag.iowa.gov

**Pro Hac Vice*

Counsel for Amicus Curiae State of Iowa

CERTIFICATE OF SERVICE

I certify that on October 10, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which automatically sends email notification of such filing to registered participants. Any other counsel of record will receive the foregoing via email in PDF format.

/s/ Eric Wessan
Eric Wessan

Counsel for Additional Amici States

JEFF LANDRY
Attorney General of Louisiana

DREW WRIGLEY
Attorney General of North Dakota

LYNN FITCH
Attorney General of Mississippi

GENTNER DRUMMOND
Attorney General of Oklahoma

ANDREW BAILEY
Attorney General of Missouri

ALAN WILSON
Attorney General of South Carolina

AUSTIN KNUDSEN
Attorney General of Montana

MARTY JACKLEY
Attorney General of South Dakota

MICHAEL T. HILGERS
Attorney General of Nebraska

SEAN D. REYES
Attorney General State of Utah

JOHN M. FORMELLA
Attorney General of New Hampshire

BRIDGET HILL
Attorney General State of Wyoming