



Question for justices: Does California put US pigs in clover?

Ellyn Ferguson

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California voters flexed their regulatory power in 2018 when they approved a ballot measure requiring pork products sold in the state to come from the offspring of sows raised according to the Golden State's animal welfare rules.

Lawyers for the National Pork Producers Council and the American Farm Bureau Federation will argue before the Supreme Court on Tuesday that Proposition 12 goes too far and upends a regulatory balance that justices established 52 years ago. Dubbed the bacon case, the decision could have far-reaching consequences. The case has the Biden administration pitted against California, and both sides' supporters include attorneys general and prominent industry, animal rights, political and other groups.

California is fine with pork products as long as the pig is born to an adult female kept in a 24-square-foot space under conditions that allow the sow to turn around without touching her enclosure. Anything less is defined as keeping the animal in a "cruel manner."

Retailers who sell pork goods that don't meet the test face a \$1,000 fine or 180 days imprisonment per transaction. The proposition, which also set minimum space requirements for calves raised for veal and egg-laying hens, passed with 7.5 million votes, or 62.7 percent of ballots cast.

The council and the Farm Bureau said Proposition 12 gives California an outsize regulatory reach across state lines to push hog producers to either make costly changes to operations or be forced out of a market of more than 39 million people.

"If any part of a pig is sold in California, the sow it came from must be Proposition 12-compliant," they said in a brief filed with the court. "And sow farmers cannot say with certainty that no meat from any of their pigs will be sold in California, after those pigs pass through nursery and finishing farms, a packer-slaughter plant, then distributors, before their meat reaches consumers."

The organizations said that even farmers who don't plan to sell into California would probably have to change their operations "in every aspect of caring for sows, including feeding, breeding, medical care, and farm labor" so retailers feel comfortable buying from them. All of this, the

organizations said, means people who live outside California would likely pay more for pork as the costs are passed on.

In its brief, California argued that the opponents of Proposition 12 are the ones overreaching in their argument that the law is unconstitutional.

“The only Proposition 12-compliant pork that out-of-state businesses must produce is the pork they choose to supply to California’s market; they are free to produce as many other pork products as they want, and to sell them to markets outside of California,” lawyers for the state wrote.

California said there is nothing extraordinary about the law.

“Proposition 12 is no different in that respect from other longstanding state sales restrictions that require out-of-state producers to use particular labels or to conform to specific quality or safety standards if they choose to participate in the enacting State’s market,” the state said.

Attorneys general from 12 states and the District of Columbia have filed briefs in support of California’s position, as have the National League of Cities, U.S. Conference of Mayors, the Northeast Organic Dairy Producers Alliance, animal protection organizations such as the Humane Society of the United States, worker safety advocates involved in occupational health and safety issues for food and agriculture laborers, the National Council for Occupational Safety and Health, the National Joint Council of Food Inspection Locals, Food Chain Worker Alliance, HEAL Food Alliance and nonprofit groups Public Justice and Towards Justice.

An amicus brief supporting California by Sen. Cory Booker, D-N.J., argued that the state has the authority to regulate which pork products can be sold in-state because Congress hasn’t regulated on the matter.

The case is officially known as the National Pork Producers Council et al. v. Karen Ross. Ross is the secretary of the California Department of Food and Agriculture.

Justices will look at two questions raised by the case. The first is whether Proposition 12 violates the doctrine of the dormant commerce clause, an implicit prohibition in the commerce clause against state laws that are protectionist and interfere with the conduct of interstate business. The commerce clause gives Congress broad authority to regulate business among states.

The other question posed is whether the law passes muster under the balancing of costs test the Supreme Court established in the 1970 case of *Pike v. Bruce Church*, which requires a state’s interest in setting a regulation to outweigh the costs that would be imposed on commerce.

California's regulatory reach

At a Cato Institute review of upcoming Supreme Court cases in September, panelist Ilya Shapiro said California often sets regulatory trends in the U.S.

“California has regulations in lots of industry areas that effectively set the standard nationwide. If you’re a car manufacturer, you’re not going to have one type of fuel emissions for cars sold in

California and another kind for the rest of the country,” said Shapiro, senior fellow and director of constitutional studies at the Manhattan Institute.

California is a big agricultural state, but it has less than 1 percent of the nation’s breeding pigs. Californians, however, eat about 13 percent of pork sold in the U.S.

Leon Barringer, a large animal veterinarian who filed a brief in support of California, said the pork industry already traces products and would be able to keep California-bound meat separate from pork going to other state markets.

Two University of California, Davis, agricultural economists, Richard Sexton and Daniel Sumner, said arguments that Proposition 12 will force all pork producers to comply even if they don't sell into California are “based on fundamentally flawed and implausible economic premises.” The two economists, who didn't file in support of either side in the case, said California consumers who will pay more at the grocery store will be most economically affected.

The case has caught the attention of trade groups representing hog farmers in Canada and Mexico that back the arguments of the two agriculture organizations. The National Association of Manufacturers, the Pharmaceutical Research and Manufacturers of America and the U.S. Chamber of Commerce have also filed amicus briefs laying out reasons the Supreme Court should rule against California.

The Biden administration backs the pork producers. Solicitor General Elizabeth Prelogar filed an amicus brief in June recommending that the Supreme Court reverse the decision by the 9th Circuit Court of Appeals that said opponents of the state law had failed to make a sufficient argument that it violated the commerce clause.

Prelogar advised the justices to send the case back to the lower court. Twenty-six state attorney generals have submitted briefs supporting Supreme Court action to overturn the lower court’s decision in California’s favor.

At a Heritage Foundation discussion in September, former Solicitor General Paul Clement and former acting Solicitor General Jeffrey Wall said it is difficult to predict how justices will decide the case.

If California wins, Wall said there could be a surge in states adopting rules or laws that create a disjointed legal landscape.

“What about when Arkansas says pork has to be produced in its current methods in order to be sold in the state? Or to take a much more controversial example, what about when states say you can only do business here if you have particular kinds of abortion policies and some states say we want you to have abortion-friendly policies and some say we don’t,” Wall said.

Clement said the potential for states overreaching could increase with a ruling for California.

“Maybe they’ll decide for California in the end, but it does seem like, that compared to most cases, the prospect for balkanization is more obvious here than in the cases where it is kind of obscured,” Clement said.

Whatever the outcome, Shapiro of the Manhattan Institute said the case could clarify the precedent from the 1970 case.

“Pike’s half-century balancing test, which has allowed plenty of lawyers to bring home the bacon, will be retired and replaced by something perhaps that will be more clear regulation,” he said.