



BROOKS MCCORMICK JR  
**ANIMAL LAW &  
POLICY PROGRAM**  
HARVARD LAW SCHOOL

# Potential Reverberations of Pork Producers' Commerce Clause Challenge Before the Supreme Court

**NATIONAL PORK PRODUCERS COUNCIL V. ROSS**

Supreme Court Case No. 21-486

Analysis and Implications | August 2022



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## ABOUT THE PROGRAM

The Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School is committed to analyzing and improving the treatment of animals through the legal system. The Program engages with academics, students, practitioners, and decision-makers to foster discourse, facilitate scholarship, develop strategic solutions, and build innovative bridges between theory and practice in the rapidly evolving area of animal law and policy. For more information, visit <http://animal.law.harvard.edu/> or contact us at [alpp@law.harvard.edu](mailto:alpp@law.harvard.edu).



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## EXECUTIVE SUMMARY

In its coming term, the United States Supreme Court will take up a major case involving states' and cities' ability, consistent with the Commerce Clause of the United States Constitution, to enact public health and safety and environmental measures. The case is a challenge brought by the National Pork Producers Council and the American Farm Bureau Federation to California's 2018 farm animal welfare law, Proposition 12, which requires that certain meat products and eggs sold in California meet minimum humane, health, and safety standards.

The pork producers allege that it will be costly and complicated to meet California's standards and continue serving pork to its market. The lower court threw out the producers' complaint and the Ninth Circuit Court of Appeals affirmed, finding the Constitution and our federalist system leave states free to adopt public health, safety, and morals laws that neither conflict with federal law nor evince economic protectionism or favoritism toward in-state interests. The high court's decision to review the dismissal of the pork producers' case has surprised some court watchers, because federal courts have rejected numerous legal challenges similar to the pork producers' to laws that bear similarities to Proposition 12—in their structure and alleged effects on industries—and the Supreme Court has repeatedly declined requests to step in.

Is the high court poised to endorse a more restrictive construction of the Constitution's Commerce Clause that might preclude states and cities from enacting public health, social welfare, financial, and environmental regulation? If it did, legal challenges to states' and cities' policies setting climate and clean energy standards, regulating cannabis, flavored tobacco, car sales, or firearms, prohibiting price gouging, and restricting the sale of carcinogenic or chemical-containing products, could soon follow—and may succeed in striking down such laws.

*Legal challenges to states' and cities' policies setting climate and clean energy standards, regulating cannabis, flavored tobacco, car sales, or firearms...could soon follow—and may succeed in striking down such laws.*

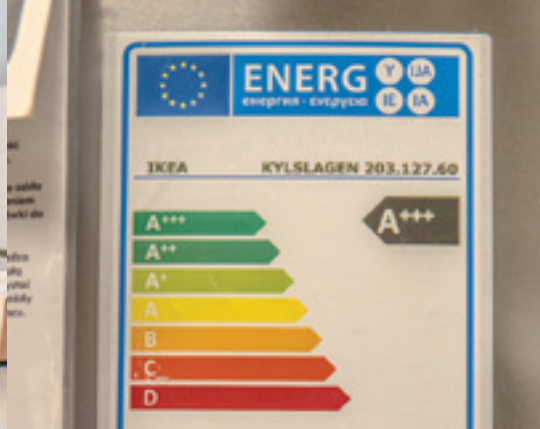
Since the end of the *Lochner* era, during which the Supreme Court routinely struck down economic regulation, states have taken the lead in enacting bold legislation on issues spanning broad subjects and affecting many industries. And courts have found only a small number of such laws violative of the Commerce Clause, under narrow circumstances. As a result, on climate, food and product safety, prescription drug prices, and more, states and cities have been at the vanguard. The Supreme Court's decision to review the pork producers' case adds an asterisk.

This report aims to contextualize Proposition 12's moment before the Supreme Court and analyze what it could portend for industries beyond pig farming and issues beyond animal welfare and public health. We first detail the possible implications of the Supreme Court's coming decision, detailing state laws and local ordinances similar to Proposition 12 in structure or in their potential or alleged effect on a large, consolidated national industry, as well as laws and ordinances that have been subject to past Commerce Clause challenges and may be characteristic of laws and ordinances that would be vulnerable to challenge anew. We will then explain the factual and legal background to the pork producers' challenge, analyze their Commerce Clause claims and Supreme Court petition, and offer a few ways the Supreme Court might rule—lines it might draw or not draw, and statements of constitutional law it might make that would bind lower courts and guide state legislatures and city councils.

The pork producers have portrayed Proposition 12 as an unusually burdensome law targeting an industry with a locus of production almost exclusively outside California, the regulating State. This report analyzes and tests that characterization—of both the law and the industry—and details other constituencies, industries, and laws that could well be influenced by the Supreme Court's ruling in the pork producers' case.



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## POTENTIAL IMPACTS OF THE SUPREME COURT'S COMING DECISION

The plaintiffs National Pork Producers Council and American Farm Bureau Federation’s (collectively, “NPPC”) basic contention, in their lawsuit, is that Proposition 12 offends the “dormant Commerce Clause” and thus violates the United States Constitution. As explained further below,<sup>1</sup> the Commerce Clause in Article I of the Constitution enables Congress to “regulate Commerce...among the several States,”<sup>2</sup> but has long been interpreted by constitutional scholars and federal courts as having not only a law-granting function, but also a restrictive component—the so-called “dormant” or “negative” Commerce Clause. This dormant Commerce Clause, in courts’ view, restricts states and localities from erecting protectionist trade barriers and inconsistently regulating economic activity that demands a single, national rule. A body of law developed by judges has, particularly over the past 50 years, crystallized into various legal standards and tests courts apply when parties bring lawsuits contending that a given state law or local ordinance offends the dormant Commerce Clause and thus must be struck down as unconstitutional. NPPC contends Proposition 12 offends several of these standards.<sup>3</sup>

While later sections of the report will go into depth on the history, context, and content of NPPC’s lawsuit and Supreme Court petition,<sup>4</sup> because the Court’s decision could have such profound, yet deeply uncertain, results, we begin by mapping out some of the likely reverberations.

1. An explanation of the origin of the dormant Commerce Clause and brief summary of its principles is below, at p. 18.
2. Art. I, Clause 3, Section 8.
3. An analysis of NPPC’s legal claims is below, at p. 16.
4. The plaintiffs’ petition seeking Supreme Court review and all briefs filed in the Supreme Court matter to date are available on the Court’s docket page for the petition: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-468.html>. This report will cite the pork producers’, or Petitioners’, brief as “Pet.” Karen Ross, in her official capacity as Secretary of the California Department of Food and Agriculture; Tomas Aragon, Director of the California Department of Public Health; and Rob Bonta, the Attorney General of California, are the “Respondents” in the case. The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook are the “Intervenor Respondents.”

## State Laws That Could Be Vulnerable To Invalidation

Depending on how the Supreme Court resolves the case,<sup>5</sup> innumerable state laws—pertaining to climate, energy, food and agriculture, public health, product safety and sustainability, consumer finance, and more—could be at risk of constitutional challenge and invalidation.

Like Proposition 12's alleged effect on pork producers outside California, many state regulations have significant “upstream” effects on manufacturers, sellers, and market participants outside the regulating jurisdiction, requiring industries to comply with sometimes costly and complicated health, safety, sustainability, and financial standards. It is these standards that NPPC's challenge puts in its crosshairs. A non-exhaustive sample of state laws that could be in jeopardy follows.



### Climate, Energy, and Wildlife

Climate and renewable energy standards like California's Low Carbon Fuel Standard and Colorado's renewable electricity generation standard could be directly at risk of invalidation since they can have significant effects on out-of-state energy producers. Numerous other states and the District of Columbia have such renewable energy standards, including Connecticut,<sup>6</sup> Delaware,<sup>7</sup> Illinois,<sup>8</sup> Maine,<sup>9</sup> Maryland,<sup>10</sup> Massachusetts,<sup>11</sup> Michigan,<sup>12</sup> Minnesota,<sup>13</sup> Missouri,<sup>14</sup> Nevada,<sup>15</sup> New Hampshire,<sup>16</sup> New Jersey,<sup>17</sup> New Mexico,<sup>18</sup> North Carolina,<sup>19</sup> Ohio,<sup>20</sup> Oklahoma,<sup>21</sup> Oregon,<sup>22</sup> Pennsylvania,<sup>23</sup> Rhode Island,<sup>24</sup> Vermont,<sup>25</sup> Washington,<sup>26</sup> Wisconsin,<sup>27</sup> and Washington D.C.<sup>28</sup> In states such as Maine, Connecticut, and New Mexico,

5. An in-depth analysis of NPPC's petition and a few ways the Supreme Court could rule in the case is below, at p. 30.
6. Conn. Gen. Stat. § 16-245a et seq. (44% of all electricity sold in the state must be from renewable energy sources by 2030).
7. Del. Code Ann. 26 § 354 (25% of electricity sold in-state must be from renewables by 2025, 28% by 2030, and 40% by 2035).
8. Ill. Rev. Stat. ch. 220 § 5/8-103; 20 § 3855/1-75; 220 § 5/16-111.5 (25% of electricity sold in-state must be from renewables by 2025-2026).
9. Me. Rev. Stat. Ann. tit. 35-A § 3210 (by 2030, 80% of retail sales of electricity in the state will come from renewable resources; statewide target of 100% renewable sources by 2050).
10. Md. Code Ann., Pub. Util. § 7-701 et seq. (30.1% of electricity from renewable sources in 2022; 50% in 2030, enables Public Utilities Commission to implement renewable portfolio standard for all retail electricity sales in the state).
11. Mass. Gen. Laws Ann. ch. 25A §11F (Class I (new resources): 35% renewable by 2030 and an additional 1% each year after. Class II (resources in operation by 1997): 6.7% renewable by 2020).
12. Mich. Comp. Laws Ann. §§ 460.1001 et seq. (15% of electricity from renewable sources by 2021).
13. Minn. Stat. Ann. §§ 216B.1691; 216B.2401 (26.5% of electricity from renewable sources by 2025 (IOUs), 25% by 2025 (other utilities); Solar: 1.5% by 2020 (other IOUs); Statewide goal of 10% by 2030).
14. Mo. Rev. Stat. § 393.1030 (15% of electric sales in state must be from renewable sources each year).
15. Nev. Rev. Stat. Ann. § 704.7821 (currently, 29% of electricity from renewable sources; 2024-2026, at least 32%; 2027-2029, at least 42%; by 2030, at least 50%).
16. N.H. Rev. Stat. Ann. § 362-F (by 2025—25.2% made up of threshold proportions of thermal, new solar, existing biomass/methane, and existing small hydroelectric).
17. N.J. Stat. Ann. § 48:3-87 (21% of kilowatt hours sold from Class I renewable energy sources by 2020; 35% by 2025; 50% by 2030).
18. N.M. Stat. Ann. §§ 62-16-4; 62-15-1 et seq. (40% renewables by 2025; 80% renewables by 2040).
19. N.C. Gen. Stat. Ann. § 62-133.8 (12.5% renewable).
20. Ohio Rev. Code Ann. § 4928.64 (8.5% renewable by 2026).
21. Okla. Stat. Ann. tit. 17, § 801.4 (target for 15% of all installed electricity generation be from renewable sources by 2015).
22. Or. Rev. Stat. Ann. § 469A.052.
23. 73 Pa. Stat. Ann. § 1648.3 (requiring electric energy sold to retail electric customers be generated from alternative energy sources and in the percentage specified).
24. 39 R.I. Gen. Laws Ann. §§ 39-26.6-1 et seq. (14.5% renewable sources by 2019, with increases of 1.5% each year until 38.5% by 2035).
25. Vt. Stat. Ann. tit. 30 §§ 8001 et seq. (55% renewable by 2017; 75% by 2032).
26. Wash. Rev. Code Ann. § 19.285.040; Wash. Admin. Code 480-109-010 et seq.; 194-37-010 et seq. (15% renewable sources by 2020; 100% greenhouse gas-neutral by 2030; 100% renewable or zero-emitting by 2045).
27. Wis. Stat. Ann. §§ 196.377-78 (10% sold in state must be from renewable sources).
28. D.C. Code § 34-1432 (20% by 2020, 100% by 2032; Solar: 2.5% by 2021; 5% by 2030; 10% by 2041).

moreover, the energy commission or commissioner can direct utilities to enter into long-term contracts or purchase agreements “for energy, capacity, any transmission associated with such energy derived from offshore wind facilities,”<sup>29</sup> and “to evaluate and implement cost-effective programs that reduce energy demand and consumption.”<sup>30</sup>

Besides California, Oregon and Washington also have low-carbon fuel standards.<sup>31</sup> And California and Oregon have greenhouse gas and energy programs, including California’s Cap and Trade Program<sup>32</sup> and Oregon’s 2021 Clean Energy Targets legislation, requiring retail electricity providers to reduce carbon dioxide emissions by 80% by 2030; 90% by 2035; and 100% by 2040.<sup>33</sup>

Like a Kansas regulation canceling producers’ entitlements to assigned quantities of natural gas, previously challenged and upheld under the dormant Commerce Clause,<sup>34</sup> many states regulate oil and gas production in their jurisdictions in a variety of ways.<sup>35</sup>

On wildlife, many states regulate in ways similar to Washington’s previously challenged regulation regarding nuisance “exotic wildlife” species.<sup>36</sup> Hawaii and Alaska, to take another example, protect native wildlife by targeting plastic pollution in their waters, and require that the plastic rings connecting beverage containers and other products be degradable.<sup>37</sup> Some states have acted to further wildlife conservation by banning traffic in their parts, such as ivory and shark fins.<sup>38</sup> Twelve states and the District of Columbia have enacted laws restricting the intrastate sale in ivory and rhinoceros horn, for example.<sup>39</sup>

To the extent these laws have significant effects or impose compliance burdens on businesses and industries located outside the regulating state, their fate may be tied in with that of Proposition 12.

29. Me. Rev. Stat. Ann. 35-A § 3604; Conn. Gen. Stat. § 16a-3n.

30. N.M. Stat. Ann. § 62-17-5.

31. Or. Rev. Stat. Ann. § 468A.266; Wash. Rev. Code Ann. §§ 70A.535.0001 *et. seq.*

32. See 17 Cal. Code Reg. §§ 95801-96022 (establishing cap for greenhouse gas emissions; accounts of carbon emissions associated with electricity consumed in California, regardless of origin); Cal. Pub. Util. Code §§ 8340-41 (setting greenhouse gas performance standard for electric power sold in California, regardless of origin).

33. Or. Rev. Stat. Ann. § 469A.410.

34. *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493 (1989).

35. See, e.g., Fla. Stat. Ann. §§ 377.242 (permits for drilling or exploring and extracting through well holes or by other means); 377.2407 (natural gas storage facility permit application to inject gas into and recover gas from a natural gas storage reservoir); Ind. Code Ann. § 14-37-7-3.5 (protection from waste and endangerment); Ky. Rev. Stat. Ann. § 353.610 (conditions under which permits may be issued; exceptions); Okla. Stat. Ann. tit. 52, § 87.1 (common source of supply of oil-well spacing and drilling units); Wyo. Stat. Ann. § 30-5-109 (rules and regulations governing drilling units).

36. Washington’s regulations were upheld against a dormant Commerce Clause challenge in *Pac. Nw. Venison Producers v. Smith*, 20 F.3d 1008 (9th Cir. 1994). Other, similar state regulations include Alaska Admin. Code tit. 5, § 92.029 (prohibiting “import, release, export, or assist in importing, releasing, or exporting, live game” not identified in the regulation without a permit); Colo. Rev. Stat. Ann. § 33-6-114 (prohibiting import of wildlife); Conn. Gen. Stat. Ann. § 26-55 (prohibiting import of live fish, wild birds, mammals, reptiles, and invertebrates without a permit); Haw. Rev. Stat. Ann. § 150A-6 (preventing import of invasive species, soil, and plants); Mich. Comp. Laws Ann. § 324.36505 (prohibiting transport, sale, import and export of fish, plants, and wildlife on state lists).

37. Alaska Stat. Ann. § 46.06.090; Haw. Rev. Stat. Ann. § 339-22.

38. Some of these statutes have survived dormant Commerce Clause challenges, such as California’s shark fin ban. *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015) (affirming constitutionality of Cal. Fish & Game Code § 2021). Others have been found preempted, in part, by the federal Endangered Species Act and the Convention on International Trade in Endangered Species (CITES), as implemented by federal regulation. See, e.g., *Apr. in Paris v. Becerra*, 494 F. Supp. 3d 756, 763 (E.D. Cal. 2020) (finding partially preempted Cal. Penal Code § 653o as to trade in alligator and crocodile parts); *Los Altos Boots v. Bonta*, 562 F. Supp. 3d 1036 (E.D. Cal. 2021) (same, as to caiman parts).

39. Cal. Fish & Game Code § 2022; D.C. Code Ann. § 22-1862; Haw. Rev. Stat. Ann. § 183D-66; 815 Ill. Comp. Stat. Ann. 357/10; Minn. Stat. Ann. § 84.0896; Nev. Rev. Stat. Ann. § 597.905; N.H. Rev. Stat. Ann. §§ 212-C:1, 212-C:2; N.J. Stat. Ann. § 23:2A-13.3; N.M. Stat. Ann. §§ 17-10-2, 17-10-3; N.Y. Envtl. Conserv. Law § 11-0535-a; Or. Rev. Stat. Ann. § 498.022; Vt. Stat. Ann. tit. 10, §§ 5501, 5502; Wash. Rev. Code Ann. § 77.15.135. Most state wildlife codes generally prohibit the sale of parts of species listed as threatened or endangered, including species so listed by the federal government, regardless of whether that species is native to the regulating state. See, e.g., Cal. Penal Code § 653p; Colo. Rev. Stat. Ann. § 33-2-105; Conn. Gen. Stat. Ann. § 26-311; Del. Code Ann. tit. 7, § 601; 520 Ill. Comp. Stat. Ann. 10/3; Kan. Stat. Ann. § 32-961; Ky. Rev. Stat. Ann. § 150.183; La. Stat. Ann. § 56:1905; Me. Rev. Stat. tit. 12, § 12808; Mich. Comp. Laws Ann. § 324.36505; Minn. Stat. Ann. § 84.0895; Miss. Code Ann. § 49-5-109; Mo. Ann. Stat. § 252.240; Mont. Code Ann. § 87-5-107; Neb. Rev. Stat. Ann. § 37-810; N.H. Rev. Stat. Ann. § 212-A:12; N.J. Stat. Ann. § 23:2A-6; N.M. Stat. Ann. § 17-2-41; Okla. Stat. Ann. tit. 29, § 7-503; Or. Rev. Stat. Ann. § 498.026; 34 Pa. Stat. and Cons. Stat. Ann. § 2167; 20 R.I. Gen. Laws Ann. § 20-37-3; S.D. Codified Laws § 34A-8-9; Tenn. Code Ann. § 70-8-102; Tex. Parks & Wild. Code Ann. § 68.015; Va. Code Ann. § 29.1-564; Wis. Stat. Ann. § 29.604.

## Food Safety and Labeling<sup>40</sup>

As Proposition 12 sets in-state health and humane standards for certain animal-based foods sold in California, other state and local food safety and humane standards are logical candidates to be challenged next, should NPPC prevail and the Supreme Court endorse a more regulation-hostile dormant Commerce Clause doctrine.

Such measures are broad and diverse. For example, numerous states impose egg labeling requirements.<sup>41</sup> Connecticut, Maryland, and Minnesota prohibit the sale of baby or toddler food stored in a container that contains intentionally added bisphenol-A (“BPA”).<sup>42</sup> Similarly, California, Illinois, Indiana, and Vermont prohibit the sale of food or candy in wrappers containing lead.<sup>43</sup> And Alabama, California, Georgia, New Jersey, and Ohio prohibit the sale of infant formula after a specified window of time from production, to protect infants from food-borne illness.<sup>44</sup>

Many states impose analogous requirements for pet foods. California and several other states set safety and composition standards for pet food, requiring particular production processes and inspection certifications to ensure that the food is free of metal and other biological contaminants.<sup>45</sup>

There are hundreds, if not thousands, more local regulations of food safety, packaging, labeling, and production. To the extent any requires out-of-state food sellers, packagers, or manufacturers to comply with the regulating state’s standards, it could be vulnerable to invalidation if the Supreme Court endorses the arguments NPPC is advancing.

## Public Health and Animal Health

The country is in the grip of not one but two viral diseases of zoonotic origin: COVID-19, of course, but also a highly-pathogenic avian influenza (HPAI) epidemic that has resulted in millions of birds being destroyed inside their barns and at least one human case of HPAI.<sup>46</sup> Yet if they have effects on out-of-state businesses, state laws and local ordinances governing public health and animal health could be equally vulnerable to invalidation, depending on the outcome of the NPPC case.

40. A comprehensive list of food safety, labeling, animal health, and other agriculture-related statutes that could be impacted by the Court’s decision in the NPPC matter is provided in a report authored by this Program, concerning the far-reaching implications of a 2018 federal bill, the Protect Interstate Commerce Act, that would have invalidated scores of state agriculture regulations. See Harvard Animal L. & Pol’y Program, *Legislative Analysis of H.R. 4879: the “Protect Interstate Commerce Act of 2018”* (2018), available at <http://hlsalpp.wpengine.com/what-we-do/projects/king-amendment/>.
41. See, e.g., Kan. Admin. Regs. 4-11-3; Ky. Rev. Stat. Ann. § 260.630; Md. Code Ann., Agric. § 4-303; N.C. Gen. Stat. Ann. § 106-245.13 *et seq.*; N.J. Stat. Ann. § 24:11-5; Ohio Rev. Code Ann. § 925.021; 7 Pa. Code § 88.5; Tex. Agric. Code Ann. § 132.044; Wis. Admin. Code ATCP § 88.34.
42. Conn. Gen. Stat. Ann. § 21a-12b; Md. Health Code § 24-304; Minn. Stat. Ann. § 325F.174.
43. Cal. Health & Safety Code § 110552; Ill. Rev. Stat. ch. 410 45/4; Ind. Code Ann. § 16-41-39.4-7; Vt. Stat. Ann. tit. 10, § 6620a. Indiana’s law applies to any packaging that might be ingested by children. Vermont’s applies to all packaging, and also bans other heavy metals as well such as mercury or cadmium.
44. Ala. Code § 20-1-27; Cal. Health & Safety Code § 114094.5; Ga. Comp. R. & Regs. 40-7-1-.13(3)(e); N.J. Stat. Ann. § 56:8-2.27; Ohio Rev. Code Ann. § 3715.521.
45. Cal. Code Regs. tit. 17, §§ 19030 (requiring pet food to be washed and inspected for fecal or other foreign contamination), 19035 (requiring pet food processors to use a magnetic separator in production to remove pieces of metal); Ga. Comp. R. & Regs. 4058.06 (imposing restrictions on additives such as artificial coloring and requiring additives for pet foods sold in the state to be proven harmless); see also Ga. Comp. R. & Regs. 4058.02; Ill. Admin. Code tit. 8, § 200.130; Iowa Admin. Code r. 2142.2(198); 7 La. Admin. Code Pt XVII, 135; 330 Mass. Code Regs. 13.03; 13.06; Mich. Admin. Code R 285.635.3; Mo. Code Regs. Ann. tit. 2, § 70-31.070; 2 N.C. Admin. Code 9D.0102; N.Y. Comp. Codes R. & Regs. tit. 1, § 257.17; Ohio Admin. Code 901:5719; Tenn. Comp. R. & Regs. 0080-05-05-.18; 4 Tex. Admin. Code § 63.2; 2-3 Vt. Code R. § 100.
46. Nell Greenfield-Boyce, *A worrisome new bird flu is spreading in American birds and may be here to stay*, National Public Radio (Apr. 9, 2022), available at <https://www.npr.org/2022/04/09/1091491202/bird-flu-2022-avian-influenza-poultry-farms>. In Iowa alone more than 13.3 million birds in commercial flocks have been “affected,” which likely means they have been mass-killed (“depopulated”) to control the outbreak’s spread. The first human case of the virus was reported in April. See Rina Torchinsky, *The first human case of avian flu in the U.S. is reported in Colorado*, National Public Radio (Apr. 29, 2022), available at: <https://www.npr.org/2022/04/29/1095474268/first-us-avian-flu-human-colorado>.



Continuing with the example of HPAI, the vast majority of states regulate to protect their flocks from avian influenza through reporting requirements, control measures, quarantines, and veterinary permitting systems.<sup>47</sup> Other states regulate the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety.<sup>48</sup> Similarly, after Maryland enacted a law to protect animal health and food safety by prohibiting the sale of commercial poultry feed containing arsenic, animal drug manufacturers began to withdraw their arsenic-containing feed additives.<sup>49</sup>

Many states also protect public and animal health by imposing various agricultural product shipping and sanitation measures, such as Michigan's requirement that restaurant grease and animal carcasses be transported in a "leakproof container."<sup>50</sup> Other similar laws require sanitization of transport containers, temperature controls, covering of agricultural items, and the like.<sup>51</sup>

If such state laws impose standards for agricultural products that are difficult to trace through supply chains (as the pork industry alleges pork products are), or if they represent inconsistent regulation that imposes compliance costs on out-of-state agricultural businesses (as the pork industry alleges Proposition 12 does), they could be in jeopardy.

### Product Safety and Sustainability

Hundreds of state product safety and sustainability standards could also be in danger of being challenged and struck down as unconstitutional if the Supreme Court endorses the doctrine NPPC is pushing.

Like the Vermont labeling standard for proper disposal of mercury-containing light bulbs,<sup>52</sup> previously challenged and upheld under the dormant Commerce Clause,<sup>53</sup> many jurisdictions have energy efficiency standards for a wide variety of products, including California,<sup>54</sup> Connecticut,<sup>55</sup> the District of Columbia,<sup>56</sup>

47. Ala. Admin. Code r. 80-3-6-.35; 80-3-18-.02 et seq.; Alaska Admin. Code tit. 18, § 36.215; Ark. Admin. Code § 125.00.11; Ark. Admin. Code § 125.00.15 et seq.; Cal. Code Regs. tit. 3, § 821.1; Conn. Agencies Regs. § 22-324-1; 3 Del. Admin. Code 901-2.0; 904-15.0 et seq.; Fla. Admin. Code Ann. rr. 5C-3.001, 5C-16.001 et seq.; Ga. Comp. R. & Regs. 40-13-1-.03 et seq.; Ga Comp. R. & Regs. 40-13-4-.02; Haw. Code R. § 4-28-8; Idaho Admin. Code 02.04.03.302; Ill. Adm. Code tit. 8, §§ 85.10, 85.125; 345 Ind. Admin. Code 1-6-2; 4-4-4; Iowa Admin. Code r. 21-64.185(163); 21-65(163); Kan. Admin. Regs. § 9-27-1; 302 Ky. Admin. Regs. 20:040; 20:250; 7 La. Admin. Code Pt XXI, 105; Code Me. R. tit. 01-001 Ch. 206, §§ 4-5; Minn. R. 1721.0360; 2 Code Miss. R. Pt. 101, Subpt. 2, Ch. 12, sec. 112.02; Mo. Code Regs. Ann. tit. 2, § 30-2.010; Mont. Admin. R. 32.3.104; 23 Neb. Admin. R. & Regs. Ch. 1, § 004; Nev. Admin. Code § 441A.085; N.H. Code Admin. R. Agric. 2114.01; N.J. Admin. Code 2:3-1.1; 2:3-7.1 et seq.; 2:5-4.1; N.M. Admin. Code 21.30.4.9; N.Y. Comp. Codes R. & Regs. tit. 1, §§ 45.1; 45.5; 2 N.C. Admin. Code 52B.0603; 52C.0603; N.D. Admin. Code 48.1-09-03-01; 48.1-10-01-01; Ohio Admin. Code 901:1-21-02; Okla. Admin. Code § 35:15-11-41; Org. Admin. R. 603-011-0375; 333-018-0015; 603-011-0212; 7 Pa. Code § 3.113; R.I. Code R. §§ 25-3-27.1.14; 25-15-100, App. IV; S.C. Code Ann. Regs 27-1011, 27-1014; Tenn. Comp. R. & Regs. 0080-02-01-.10; 0080-02-16-.02; 4 Tex. Admin. Code §§ 51.15; 54.9; Utah Admin. Code r. R58-6-4; 2 Va. Admin. Code §§ 5-30-30; 5-141-60; 2-4 Vt. Code R. § 301:III; Wash. Admin. Code 16-54-145; 16-70-020t; W. Va. Code R. 61-1-8; Wis. Admin. Code Amin. Disease & Movement § 10.83.

48. Ala. Code § 2-15-211; Ga. Comp. R. & Regs. 40-13-2-.08; Haw. Code R. 4-17-16 (Weil); Idaho Admin. Code r. 02.04.21.400; 302 Ky. Admin. Regs. 22:080; Md. Code Ann., Agric. § 3-404; Code Me. R. tit. 01-001 Ch. 206, §§ 4-5; Miss. Code Ann. § 69-11-5; Mo. Code Regs. Ann. tit. 2, § 30-4.010; Mont. Code Ann. §§ 81-2-501 et seq.; N.M. Admin. Code 21.32.4.14; 2 N.C. Admin. Code 52B.0207; Ohio Rev. Code Ann. § 942.05; Or. Rev. Stat. Ann. § 600.095; 7 Pa. Code § 3.133; Tenn. Code Ann. § 44-2-404; 4 Tex. Admin. Code § 51.14; Utah Admin. Code r. R58-1-8; W. Va. Code R. 61-1A-3; Wis. Stat. Ann. § 95.10; Wyo. Admin. Code 051.0001.8 § 21.

49. Md. Code Ann., Agric. § 6-107.3; *Arsenic-based Animal Drugs and Poultry*, U.S. Food and Drug Administration, available at <https://www.fda.gov/animal-veterinary/product-safety-information/arsenic-based-animal-drugs-and-poultry>.

50. Mich. Admin. Code r. 287.653. Because Ohio has no such requirement, an Ohio producer wishing to ship such products to customers in Michigan would have to follow Michigan's requirements.

51. Cal. Code Regs. tit. 3 § 1180.13; Fla. Admin. Code Ann. r. 5C-23.003; Idaho Admin. Code r. 02.04.17.040; Minn. Stat. Ann. § 35.82; Mont. Admin. R. 32.3.130; 23 Neb. Admin. Code Ch. 10, 005; 3 Pa. Stat. and Cons. Stat. Ann. § 2352; S.D. Admin. R. 12:68:09:05; Tex. Health & Safety Code Ann. § 144.023; Wis. Admin. Code ATCP § 57.20.

52. Vt. Stat. Ann. tit. 10, § 6621d (repealed by 2005, No. 13, § 4, eff. July 1, 2007).

53. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).

54. 20 Cal. C. Reg. §§ 1601-1609.

55. Conn. Gen Stat. § 16a-48.

56. D.C. Code §§ 8-1771.01 et seq. (standards for lighting, food-holding cabinets and bottled-water dispensers).

Georgia,<sup>57</sup> Maryland,<sup>58</sup> New Hampshire,<sup>59</sup> Nevada,<sup>60</sup> New York,<sup>61</sup> and Oregon.<sup>62</sup> And like the Connecticut electronic waste law,<sup>63</sup> also previously challenged and upheld under the dormant Commerce Clause,<sup>64</sup> Maine,<sup>65</sup> South Carolina,<sup>66</sup> and New Jersey<sup>67</sup> impose similar requirements on electronics manufacturers.

Many states regulate the safety, recyclability, and sustainability of product packaging, in a variety of ways. New Jersey, Oregon, Washington, and Wisconsin prohibit the sale of containers (or products in containers) that contain less than a specific amount of post-consumer recycled content.<sup>68</sup> At least five states prohibit the sale of products containing hydrofluorocarbons (HFCs).<sup>69</sup>

To list a few other examples, New York<sup>70</sup> recently joined a number of states and cities in enacting bans or restrictions on the sale of pavement products containing coal tar, a sealant that is a human carcinogen<sup>71</sup> and linked to environmental contamination.<sup>72</sup> Similarly, dozens of states have set limits in gasoline for methyl tert-butyl ether (MTBE), which the EPA classifies as a probable human carcinogen.<sup>73</sup> And at least six states<sup>74</sup> require gasoline sold in state to include a certain percentage of ethanol or other biofuel, while Maine has a contingent ban on the sale of ethanol-containing fuel.<sup>75</sup>

57. Ga. Code § 8-2-3 (faucets, toilets, showerheads, etc.).

58. Md. Gov. Code § 9-2006 (ceiling fans, washers, bottled water dispensers, and food-holding cabinets).

59. N.H. Rev. Stat. Ann. § 339-G:3 (bottled water dispensers and food-holding cabinets).

60. Nev. Rev. Stat. Ann. § 701.768.

61. N.Y. Energy Law § 16-102 *et seq.*

62. Or. Rev. Stat. Ann. § 469.233.

63. Conn. Gen. Stat. Ann. § 22a-631.

64. *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018).

65. Me. Rev. Stat. Ann. tit. 38 § 1610.

66. S.C. Code § 48-60-40.

67. N.J. Admin. Code § 7:26A-13.9.

68. In New Jersey, for example, plastic carryout bags sold in the state must have at least 20% post-consumer recycled content (and 40% by 2027). N.J. Stat. Ann. § 13:1E-99.141. By 2024, plastic trash bags must contain 5 to 40% post-consumer recycled content depending on thickness (exempting hazardous medical waste bags) and glass containers, 25 to 35%. *Id.* §§ 13:1E-99.142, 13:1E-99.139. And all plastic beverage containers sold must contain at least 15% post-consumer recycled content, increasing by 5% every three years until reaching 50%. *Id.* § 13:1E-99.138. *See also* Or. Rev. Stat. Ann. §§ 459A.550 (glass containers manufactured must contain at least 50% recycled glass); 459A.655 (similar requirement for rigid plastic containers sold in state); Wash. Rev. Code Ann. § 70A.245.020 (plastic containers and trash bags must contain an increasing percentage of post-consumer recycled plastic starting in 2023); Wis. Stat. Ann. § 100.297 (plastic containers in retail sales must contain at least 10% percent recycled or remanufactured material).

69. Cal. Health & Safety Code § 39734; Me. Rev. Stat. tit. 38, § 1613; N.J. Stat. Ann. § 26:2C-61; Vt. Stat. Ann. tit. 10, § 586; Wash. Rev. Code Ann. §§ 70A.60.060; 70A.60.080.

70. N.Y. Env't Conserv. Law § 37-0119.

71. *Coal Tar and Coal-Tar Pitch*, NIH National Cancer Institute, available at <https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/coal-tar#:~:text=Occupational%20exposure%20to%20coal%20tar,tar%20and%20coal%2Dtar%20pitch>.

72. Wendy Koch, *Toxic driveways? Cities ban coal tar sealants*, USA Today (June 16, 2013), available at <https://www.usatoday.com/story/money/business/2013/06/16/toxic-driveways-cities-states-ban-coal-tar-pavement-sealants/2028661/>. A map of state and municipal coal tar bans is available at <https://www.arcgis.com/apps/View/index.html?webmap=5b2684d1744b4b73b9beb0e4b899b2d2>.

73. State MTBE limits vary between 0% and 1% of the fuel, while some state laws are labeling regimes. *See* Ariz. Rev. Stat. Ann. § 3-3491(E); Cal. Health & Safety Code § 43013.3 (Secretary for Environmental Protection may prohibit MTBE on a subregional basis); Colo. Rev. Stat. Ann. § 25-7-139; Conn. Gen. Stat. Ann. § 22a-450a; Ga. Code Ann. § 12-9-70; 415 Ill. Comp. Stat. Ann. 122/15; Kan. Stat. Ann. § 55-527; Ky. Rev. Stat. Ann. § 363.9053; Me. Rev. Stat. tit. 38, § 585-l; Mich. Comp. Laws Ann. § 290.643(5); Minn. Stat. Ann. § 239.761, subd. 6; Mo. Ann. Stat. § 414.043; Mont. Code Ann. §§ 82-15-102; 82-15-110(8); Neb. Rev. Stat. Ann. § 66-1227; N.H. Rev. Stat. Ann. § 485:16-d (authorizes commissioner to "promote such regional or federal efforts as may be required to reduce the ongoing contamination threat posed by MTBE and other gasoline ethers"); N.J. Stat. Ann. § 26:2C-8.22; N.Y. Agric. & Mkts. Law § 192-g; N.C. Gen. Stat. Ann. § 119-26.3; N.D. Cent. Code Ann. § 23.1-13-05; Ohio Rev. Code Ann. § 3704.12; Or. Rev. Stat. Ann. § 646.910; 31 R.I. Gen. Laws Ann. § 31-37-7.1; S.D. Codified Laws § 37-2-33; Vt. Stat. Ann. tit. 10, § 577; Wash. Rev. Code Ann. § 19.112.100; Wis. Stat. Ann. § 168.04. The State of Rhode Island recently recovered \$15 million from oil companies to resolve claims the companies allowed MTBE to leak from underground fuel tanks. *See* Mary Serreze, *Rhode Island settles MBTE pollution lawsuit with three gasoline refiners*, Providence Business First (Apr. 11, 2022), available at <https://www.bizjournals.com/rhodeisland/news/2022/04/11/ri-settles-mbte-lawsuit.html>.

74. La. Stat. Ann. § 3:4674; Minn. Stat. Ann. § 239.791; Mo. Ann. Stat. § 414.255; Or. Rev. Stat. Ann. § 646.913; 73 Pa. Stat. Ann. § 1650.4; Wash. Rev. Code Ann. § 19.112.120.

75. Me. Rev. Stat. tit. 10, § 1457-B (to take effect only if 10 other states impose similar laws).

New York and Maryland recently joined a larger group of states in enacting bans on the use of certain flame-retardant chemicals in furniture and mattresses.<sup>76</sup> According to a health advocacy group, 16 states have adopted more than 45 policies restricting toxic flame retardants, and New York and Maryland's policies follow similar laws passed in California and Massachusetts.<sup>77</sup>

Similarly, dozens of states have restricted the amount of lead, mercury, and cadmium permissible in consumer products, and require safety labeling, like New York's law restricting permissible lead levels in glazed ceramic tableware, crystal, and china;<sup>78</sup> Maryland's recently enacted law prohibiting the sale of electric switches, electric relays, and gas valve switches that contain mercury;<sup>79</sup> and California's, Connecticut's, Illinois', Maryland's, and Minnesota's laws banning the sale of children's jewelry containing cadmium in excess of certain levels.<sup>80</sup>

Many states also regulate chemicals in cosmetics. For example, New York recently enacted a prohibition on the sale of cosmetic products and personal care products containing the likely human carcinogen 1,4-dioxane,<sup>81</sup> and California may soon follow.<sup>82</sup>

As sales restrictions, many of these laws are similar in structure to Proposition 12, and likewise could require that companies operating both within and outside the regulating jurisdiction make significant manufacturing and supply chain changes in order to continue selling their products in the jurisdiction. Thus, their fate could well be tied to that of Proposition 12, and these laws could be in danger of invalidation if the Supreme Court embraces NPPC's arguments.



### Laws and Ordinances That Survived Past Judicial Scrutiny but Could Be Newly Vulnerable

The hundreds of dormant Commerce Clause challenges that the Supreme Court and federal appellate courts have heard over the last 25 years provide another window into the kinds of laws and ordinances that could face legal challenge and invalidation, depending on how the Supreme Court decides NPPC's case. The breadth of these measures demonstrates the scope of the impact the Court's decision might have.

As California officials pointed out (in their brief unsuccessfully urging the Supreme Court not to take NPPC's case<sup>83</sup>), courts in several Circuits have upheld sales

76. N.Y. Env't Conserv. Law § 37-1001 *et. seq.*; Md. Code Ann., Health-Gen. §§ 24-306; 306.1.

77. *New York Governor Signs First-in-Nation Restrictions on Toxic Flame Retardants*, Safer Chemicals Healthy Families (Media Release) (Jan. 5, 2022), available at <https://saferchemicals.org/2022/01/05/new-york-governor-signs-first-in-nation-restrictions-on-toxic-flame-retardants/>.

78. N.Y. Pub. Health Law § 1376-a.

79. Md. Code Ann., Env't § 6-905.3.

80. Cal. Health & Safety Code § 25214.3.3; Conn. Gen. Stat. Ann. § 21a-12d; 430 Ill. Comp. Stat. Ann. 140/15; Md. Code Ann., Env't § 6-1402; Minn. Stat. Ann. § 325E.3891.

81. N.Y. Env't Conserv. Law § 37-0117; *see also Technical Fact Sheet—1,4-Dioxane*, Environmental Protection Agency (Nov. 2017), available at [https://www.epa.gov/sites/default/files/2014-03/documents/ffro\\_factsheet\\_contaminant\\_14-dioxane\\_january2014\\_final.pdf](https://www.epa.gov/sites/default/files/2014-03/documents/ffro_factsheet_contaminant_14-dioxane_january2014_final.pdf).

82. According to an article in the *National Law Journal*, California's "Department of Toxic Substances Control identified 1,4-dioxane as a Candidate Chemical under its Safer Consumer Products Regulations in 2013" and "[i]n 2019, it launched an initiative that may lead to increased pressure on manufacturers to reduce 1,4-dioxane levels in their consumer products." *New York, California, and EPA Tackle 1,4-Dioxane*, *National Law Journal* (Jan. 16, 2020), available at <https://www.natlawreview.com/article/new-york-california-and-epa-tackle-14-dioxane>.

83. *See Respondents' Brief in Opposition at 14, n. 12*, available at <https://www.supremecourt.gov/DocketPDF/21/21-468/204445/20211208115136913-National%20Pork%20Producers%20Council%20v.%20Ross%20-%20Brief%20in%20Opposition.pdf>.

restrictions similar to Proposition 12 in structure or effect on out-of-state sellers and manufacturers, including a regulation requiring electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources;<sup>84</sup> a Maine statute barring manufacturers from imposing certain surcharges on in-state sales of automobiles;<sup>85</sup> a Missouri law requiring meatpackers to disclose any price offered to sellers of livestock for slaughter unless the meatpackers purchased livestock on a grade and yield basis;<sup>86</sup> a law requiring light bulbs sold in Vermont to bear certain labels;<sup>87</sup> and a Minnesota law prohibiting the in-state sale of petroleum-based sweeping compounds.<sup>88</sup> The Seventh Circuit Court, for example, upheld an Indiana law barring the in-state sale of aborted fetal tissue, even though “much of the tissue [the plaintiff researchers sought] to use [came] from other states”;<sup>89</sup> a Chicago ordinance barring the sale of dogs bred at puppy mills, even though virtually all the puppies came from outside Chicago and even Illinois;<sup>90</sup> and a Chicago ban on the sale of spray paint, even though “[m]ost of the spray paint sold in Chicago c[ame] from outside Illinois.”<sup>91</sup>

Other sales restrictions that have survived legal challenges under the dormant Commerce Clause, despite the fact that they were alleged to have significant impacts outside the regulating state, include Connecticut’s “reconciliation requirement” for reporting nationwide, intrastate, and interstate cigarette sales by certain cigarette manufacturers as a prerequisite to selling cigarettes in the state;<sup>92</sup> a District of Columbia ordinance banning the sale, use, or possession in a motor vehicle of any device designed to detect or counteract police radar;<sup>93</sup> and a Chicago ordinance making it a criminal offense to sell phosphate detergents in the city.<sup>94</sup>

If the Supreme Court adopts the construction of the dormant Commerce Clause NPPC advances, these and many other state and local sales restrictions would be newly vulnerable. Yet the potential impacts extend far beyond such regulations. Other kinds of state laws, local ordinances, and applications of law that have survived judicial challenges despite their alleged effects on out-of-state businesses, could also be at risk of invalidation after the Supreme Court’s NPPC decision, including:<sup>95</sup>

84. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015) (affirming district court’s dismissal of dormant Commerce Clause challenge to Colo. Rev. Stat. Ann. § 40-2-124).
85. *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 44 (1st Cir. 2005) (affirming district court’s grant of summary judgment in favor of the State in challenge to Me. Rev. Stat. tit. 10, § 1176).
86. *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 821 (8th Cir. 2001) (reversing district court order striking down Mo. Ann. Stat. §§ 277.200, .203, .209, and .212).
87. *Sorrell*, 272 F.3d at 116 (vacating preliminary injunction against enforcement of Vt. Stat. Ann. tit. 10, § 6621d).
88. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 791-94 (8th Cir. 1995) (reversing grant of summary judgment to State and remanding for trial to determine constitutionality of Minn. Stat. Ann. § 325E.40).
89. *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 542-543 (7th Cir. 2019) (reversing grant of summary judgment for plaintiffs and ordering district court to enter judgment in defendants’ favor, in challenge to Ind. Code Ann. § 35-46-5-1.5).
90. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 503-04 (7th Cir. 2017) (affirming dismissal of dormant Commerce Clause challenge to Chicago, Ill., Code § 4-384-015(b)).
91. *Nat’l Paint Coatings v. City of Chicago*, 45 F.3d 1124, 1130-32 (7th Cir. 1995) (reversing grant of judgment to plaintiffs in challenge to Chicago Municipal Code § 4-132-150).
92. *Grand River Enterprises Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 127 (2d Cir. 2021) (affirming district court’s dismissal of dormant Commerce Clause challenge to Conn. Gen. Stat. Ann. § 4-28m(a)(3)), cert. denied, 142 S. Ct. 755 (2022).
93. *Electrolert Corp. v. Barry*, 737 F.2d 110, 113-14 (D.C. Cir. 1984) (affirming district court’s grant of summary judgment to the District of Columbia in dormant Commerce Clause challenge to D.C. Mun. Regs. tit. 18, § 736).
94. *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69, 81 (7th Cir. 1975) (reversing grant of summary judgment to plaintiffs in dormant Commerce Clause challenge to Chicago Ill., Code ch. 17, art. VII, s 17–73(b)). The origins and impact of the phosphate ordinance are discussed further below, at p. 14.
95. A list of laws that have survived previous dormant Commerce Clause challenges follows this report. See Appendix A (organized by subject matter); Appendix B (organized by jurisdiction). The citations in this list are to the courts’ decisions upholding the laws against challengers’ claims that they violated the dormant Commerce Clause.

- California's Low Carbon Fuel Standard and regulations, applying "to nearly all transportation fuels currently consumed in California and any fuels developed in the future," and including reporting requirements and "a declining annual cap on the average carbon intensity of California's transportation-fuel market;"<sup>96</sup>
- a State of Washington law requiring oil tankers over a certain size that do not satisfy the State's design provisions be accompanied by a tug escort when moved in Puget Sound;<sup>97</sup>
- Virginia and Arkansas statutes requiring tobacco manufacturers who did not participate in a multi-state master settlement agreement to contribute to healthcare costs escrow funds;<sup>98</sup>
- an Alameda County, California ordinance requiring prescription drug manufacturers operate and finance a program to collect, transport, and dispose of any unwanted prescription medication;<sup>99</sup>
- Michigan's State Medicaid initiative, requiring prior authorization before prescribing a drug if a drug manufacturer fails to provide the State with rebates greater than those required under the national Medicaid agreement;<sup>100</sup>
- the enforcement of Kentucky's price-gouging laws against Kentucky-based sellers selling goods to Kentucky consumers via Amazon;<sup>101</sup>
- Michigan, Indiana, Virginia, and Minnesota statutes governing corporate takeovers of business corporations chartered in those States;<sup>102</sup>
- a provision of the Kansas Uniform Consumer Credit Code authorizing regulation of short-term, "payday" loans over the Internet;<sup>103</sup>
- the application of the New Jersey Franchise Practices Act to a multistate distribution agreement;<sup>104</sup>
- a Kentucky statutory amendment shortening the presumptive period of abandonment of unclaimed traveler's checks, accelerating the issuer's remittitur of outstanding funds to the State;<sup>105</sup>
- a California labor code provision requiring a California-based employer to pay overtime to out-of-state employees;<sup>106</sup>
- the application to pilots and flight attendants whose principal place of work was in California of a California statute regulating wage statements;<sup>107</sup> and
- provisions of an Ohio statute establishing a trade screening requirement and competitive bidding guidelines for film distributors.<sup>108</sup>

96. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080 (9th Cir. 2013); see also *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019).

97. *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

98. *Star Sci. Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002); *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009).

99. *Pharm. Rsch. & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037 (9th Cir. 2014).

100. *Pharm. Rsch. & Mfrs. of Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004).

101. *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021).

102. *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201 (6th Cir. 1985); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172 (4th Cir. 1995); *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984).

103. *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008).

104. *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3d Cir. 1994).

105. *Am. Exp. Travel Related Servs. Co. v. Kentucky*, 730 F.3d 628 (6th Cir. 2013).

106. *Sullivan v. Oracle Corp.*, 662 F.3d 1265 (9th Cir. 2011).

107. *Ward v. United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021).

108. *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982).

## City and County Ordinances That Would Be In Jeopardy

As the preceding sections illustrate, municipal ordinances are just as vulnerable to legal challenge on the basis that they exceed constitutional limitations on state and local regulatory power as are state laws. Thus, the Supreme Court's decision will have implications for cities and counties nationwide.

As before, city and county ordinances that have survived dormant Commerce Clause scrutiny can provide clues about potential reverberations of the Supreme Court's decision. To take one example, Chicago's ban on the sale of phosphate detergents,<sup>109</sup> which, as noted above, survived a dormant Commerce Clause challenge,<sup>110</sup> is just one of a number of similar municipal ordinances passed in the 1970s to address the problem of increasing phosphorus loads in lakes, which was causing smelly green algae to cover shorelines and create "dead zones" in which fish stocks plummeted.<sup>111</sup> As a recent law review article summarizes, "municipalities in New York, Florida, Indiana, Michigan, Minnesota, Vermont, and Wisconsin passed ordinances banning phosphates from detergents," prompting a wave of lawsuits that resulted in many court decisions upholding "municipalities' right to pass detergent regulation to prevent water pollution."<sup>112</sup> This was followed in the 1990s by ordinances banning phosphorus in lawn and turf fertilizers. After such an ordinance in Madison, Wisconsin survived a legal challenge,<sup>113</sup> several states enacted similar measures,<sup>114</sup> and the fertilizer industry began to remove phosphorus from its flagship fertilizer products.<sup>115</sup> The article points to the potential for similar sales ordinances that could spur action on the serious problem of excess nitrogen pollution in water caused by fertilizer.<sup>116</sup> Yet the constitutionality of such measures would be uncertain if the Supreme Court endorses the version of the dormant Commerce Clause NPPC advances.



The same could be said of a whole host of municipal ordinances similar to ones that have previously survived dormant Commerce Clause challenges, including measures

- establishing a pharmaceutical company-funded "take-back" program for leftover prescription drugs;<sup>117</sup>
- prohibiting and regulating short-term vacation rentals;<sup>118</sup>

109. Chicago Ill., Code ch. 17, art. VII, s 17-73(b).

110. See *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975).

111. Andrew Shifren, *A Local Solution for a Global Problem: Technology-Forcing Municipal Ordinances to Promote Enhanced Efficiency Fertilizers*, 47 Colum. J. Envtl. L. 146, 156-57 (2022), available at <https://academiccommons.columbia.edu/doi/10.7916/r0ta-yz60/download>.

112. *Id.*

113. *Croplife Am., Inc. v. City of Madison*, 432 F.3d 732, 735 (7th Cir. 2005) (affirming grant of summary judgment to defendants on the grounds that ordinances were not preempted by state law).

114. See, e.g., 505 Ill. Comp. Stat. Ann. 80/10 § 10 (prohibiting in-state distribution of any superphosphate containing less than 18% available phosphate or any mixed fertilizer or custom blend unless the sum of the guarantees for the nitrogen, available phosphate, and soluble potash in the blend totals less than 20%).

115. Shifren, *supra* note 111, at 159-60.

116. The proposal is to make it unlawful to sell nitrogen fertilizer "unless at least 10% of the seller's revenue from within the municipality's limits was derived from the sale of [Enhanced Efficiency Fertilizers] in the prior year." *Id.* at 160-61. Enhanced Efficiency Fertilizers "is a blanket term for any fertilizer that either slows the release of nutrients...or alters the chemical conversion of nutrients into other forms that are less likely to be lost to the environment[.]" *Id.* at 151.

117. Like the Alameda County, California ordinance that survived judicial scrutiny in *Pharm. Rsch.*, 768 F.3d 1037, neighboring California counties in the San Francisco Bay Area, as well as King County, Washington, which includes Seattle and Tacoma, have passed similar ordinances. See Katharine Gammon, *U.S. Counties Requiring Drug Makers To Take Back Unwanted Medicines*, Chemical and Engineering News (Nov. 2, 2015), available at <https://cen.acs.org/articles/93/i43/US-Counties-Requiring-Drug-Makers.html>.

118. A City of Santa Monica ordinance, which prohibits vacation rentals unless the primary resident remained in the dwelling, survived dormant Commerce Clause scrutiny. *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 447-49df (9th Cir. 2019). Many cities now have similar laws. See *Short-Term Rental Laws in Major U.S. Cities (Updated 2/5/2020)*, 2nd Address, available at <https://www.2ndaddress.com/research/short-term-rental-laws/>.

- establishing a living wage or minimum wage;<sup>119</sup>
- setting zoning regulations for manufactured housing;<sup>120</sup>
- banning big-box discount superstores;<sup>121</sup>
- prohibiting the loading of crude oil onto tankers in a city's harbor;<sup>122</sup>
- prohibiting the storing and handling of coal and petroleum coke within a city;<sup>123</sup>
- limiting the sources from which pet stores can obtain certain animals for resale;<sup>124</sup> and
- banning the sale of fur products.<sup>125</sup>

The fact that a species of local ordinance or state law has not previously been subject to a *dormant Commerce Clause* challenge is no guarantee that it will not be in the future. Were the doctrine to become dramatically more local regulation-hostile, as NPPC urges to the Supreme Court, it could well provide grounds to attack numerous other municipal ordinances regarding health and safety matters of core concern to local governments—ordinances that have challenged on constitutional grounds other than the dormant Commerce Clause.

Indeed, just recently the Ninth Circuit affirmed the dismissal of a legal challenge to Los Angeles County's ban on the sale of flavored tobacco products.<sup>126</sup> Los Angeles County is far from alone; it "joined at least three states and over 300 local jurisdictions across the country" in enacting its flavored tobacco product ban.<sup>127</sup>

119. A City of Seattle ordinance, classifying franchisees affiliated with large networks as large businesses under the city's minimum-wage ordinance, survived dormant Commerce Clause scrutiny. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 405-07 (9th Cir. 2015).
120. A Georgia county's zoning regulation requiring that manufactured housing be built with 4:12 roof pitch to be sited in residential districts survived dormant Commerce Clause review. *Georgia Manufactured Hous. Ass'n, Inc. v. Spalding Cty., Ga.*, 148 F.3d 1304, 1308 (11th Cir. 1998). Similar measures in other towns and cities have also survived constitutional scrutiny, including under the dormant Commerce Clause. *See, e.g., Schanzenbach v. Town of Opal, Wyo.*, 706 F.3d 1269, 1277 (10th Cir. 2013) (upholding constitutionality of ordinance prohibiting installation of manufactured homes older than 10 years at time of permit application); *Texas Mfrs. Hous. Ass'n, Inc. v. City of La Porte*, 974 F. Supp. 602, 613-14 (S.D. Tex. 1996) (upholding constitutionality, on dormant Commerce Clause and other grounds, of city ordinance excluding manufactured homes from certain zoning classification).
121. In *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1022 (E.D. Cal. 2006), the court rejected the company's dormant Commerce Clause and other constitutional claims against a city ordinance barring "Discount Superstores."
122. In *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 298-99 (D. Me. 2018), *amended*, No. 2:15-CV-00054-JAW, 2018 WL 4901162 (D. Me. Oct. 9, 2018), the court found the City of Portland's ordinance did not regulate extraterritorially in violation of the dormant Commerce Clause. City counselors' comments on the impacts of the ordinance outside the city's borders did not alter the analysis, as the ordinance's primary purpose was to serve local ends, not to prevent oil sands extraction in other jurisdictions.
123. In *Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944, 955 (N.D. Cal. 2020), the court rejected industry challengers' allegations that the City of Richmond was regulating extraterritorially in violation of the dormant Commerce Clause, when they failed to "state facts indicating 'conflicting, legitimate legislation is already in place or [ ] the threat of such legislation is both actual and imminent.'" (quoting *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 468 (9th Cir. 2001)).
124. Such ordinances in Chicago and New York have survived dormant Commerce Clause challenges. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 503-04 (7th Cir. 2017); *New York Pet Welfare Ass'n, Inc. v. City of New York*, 850 F.3d 79, 90-91 (2d Cir. 2017). As of last year, close to 300 U.S. cities and counties had passed retail pet sales ban legislation. *Ending Retail Puppy Sales: Standing Against Puppy Mill Cruelty*, ASPCA, available at <https://www.aspca.org/improving-laws-animals/public-policy/ending-retail-puppy-sales-standing-against-puppy-mill-cruelty#:~:text=Close%20to%20300%20U.S.%20cities,rabbits%20at%20retail%20pet%20stores>.
125. San Francisco's ban on the sale of fur products survived a dormant Commerce Clause challenge in *Int'l Fur Trade Fed'n v. City & Cnty. of San Francisco*, 472 F. Supp. 3d 696, 703-04 (N.D. Cal. 2020). In the United States, Los Angeles, San Francisco, Berkeley and West Hollywood banned new fur sales, paving the way for California to become the first state to do so in 2019. *See Fur Bans*, Fur Free Alliance, available at <https://www.furfreealliance.com/fur-bans/>. Cities including Boulder, Colorado, Ann Arbor, Michigan, Hallandale Beach, Florida, and Brookline, Wellesley, Weston, and Plymouth, Massachusetts, have since passed similar legislation. *Id.*
126. *R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542, 551 (9th Cir. 2022). The tobacco sellers had alleged the county's ordinance, Los Angeles County, Cal., Code § 11.35.070(E), was unconstitutional because it conflicted with the federal Family Smoking Prevention and Tobacco Control Act, but the court disagreed.
127. *Id.*; *see also States & Localities That Have Restricted the Sale of Flavored Tobacco Products*, Campaign for Tobacco-Free Kids (Oct. 23, 2020), available at <https://perma.cc/JGX3-3VZP>.

To give another example, cities' living wage and pandemic "hero pay" ordinances have withstood constitutional challenges on grounds other than the dormant Commerce Clause,<sup>128</sup> as have municipal gun control measures.<sup>129</sup> The Ninth Circuit recently heard a constitutional challenge to Berkeley, California's municipal ban on natural gas infrastructure in new buildings,<sup>130</sup> which is one of several similar measures enacted nationwide.<sup>131</sup>

Because these and many more measures could be affected, the nation's cities and counties have just as much at stake in the outcome of NPPC's case as do the states.



### Regulations Whose Local Benefits (and Thus, Constitutionality) Could Be In Question

Because, as explained further below,<sup>132</sup> NPPC's legal claims also rely on denying and critiquing the validity, effectiveness, and "localness" of Proposition 12's animal welfare and public health benefits, the Supreme Court's decision in the case could have even broader impacts than yet described. If the Court treats as constitutionally significant NPPC's critique of Proposition 12's benefits, the Court's decision could also imperil other state laws and local ordinances whose benefits may be controversial, hard to quantify, or simply diffuse—accruing to residents both within and outside the regulating jurisdiction.

Indeed, if courts are suddenly directed by the Supreme Court's decision to skeptically interrogate the benefits of state and local policy, a wide swath of public health, environmental, and economic regulation would be imperiled: post-consumer recycled content laws, hydrofluorocarbon bans, and other environmental regulations, for example, whose climate benefits could be seen as insufficiently local.

Laws and ordinances banning products constituents find unsustainable, cruel, or ethically intolerable would be especially vulnerable to dormant Commerce Clause challenges and possible invalidation,

128. *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1157 (9th Cir. 2004) (upholding City's living wage ordinance against constitutional challenge); *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958, 965 (9th Cir. 2016) (upholding city's minimum wage ordinance against claim it was preempted by the National Labor Relations Act); *W. Growers Ass'n v. City of Coachella*, 548 F. Supp. 3d 948, 966 (C.D. Cal. 2021) (upholding constitutionality of "hero pay" ordinance mandating that agricultural and grocery workers employed by designated employers in area be paid premium pay during pandemic); *California Grocers Ass'n v. City of Long Beach*, 521 F. Supp. 3d 902, 917 (C.D. Cal. 2021) (same, as to City of Long Beach ordinance).

129. Municipal gun control measures commonly face challenges on the grounds that they are preempted by state firearms and hunting laws. However, several have withstood such challenges. *California Rifle & Pistol Assn. v. City of W. Hollywood*, 66 Cal. App. 4th 1302, 1308 (1998) (upholding ordinance banning "junk" guns); *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1116 (1997) (upholding ordinance requiring firearms dealers obtain land use permits and police permits); *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 858 (2002) (upholding county ordinance banning the sale of firearms and ammunition on county-owned property); *Nordyke v. King*, 27 Cal. 4th 875, 880 (2002) (same, as to measure banning possession of firearms and ammunition on property owned by Alameda County, California). According to the Giffords Law Center, Connecticut, Hawaii, Massachusetts, New Jersey, and New York do not have state laws expressly barring local regulation of firearms or ammunition. See *Preemption of Local Laws*, Giffords Law Center to Prevent Gun Violence, available at <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/>.

130. The California Restaurant Association alleges Berkeley's ordinance conflicts with the federal Energy Policy and Conservation Act and thus violates the Constitution's Supremacy Clause—an argument the district court rejected. See *California Rest. Ass'n v. City of Berkeley*, 547 F. Supp. 3d 878 (N.D. Cal. 2021), appeal no. 21-16278; Tom DiChristopher, *Heavy hitters pick sides in court challenge to Berkeley, Calif., gas ban*, S&P Global Commodity Insights (Apr. 7, 2022), available at <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/heavy-hitters-pick-sides-in-court-challenge-to-berkeley-calif-gas-ban-69682036>. Several states and New York City signed a brief urging the appeals court to affirm the lower court's decision throwing out the Association's challenge. See Brief of the States of California, Maryland, New Jersey, New Mexico, New York, Oregon, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, available at <https://oag.ca.gov/system/files/attachments/press-docs/CRA%20v.%20Berkeley%20-%20States%20Amicus%20Brief%20%28as%20filed%29.pdf>.

131. See *id.* In response to such bans, several states have passed legislation barring municipalities from adopting such measures. *Id.*

132. At p. 34.



including fur and other wildlife product commerce bans, prohibitions or restrictions on goods made with child labor or forced labor,<sup>133</sup> and even laws criminalizing or restricting commerce in human remains or tissues.<sup>134</sup> Even laws restricting commerce in stolen property<sup>135</sup> and regulating the provenance of looted art<sup>136</sup> could be called into question because they, too, express states' policy preference not to become marketplaces for ill-gotten—immorally or illegally procured—goods.

While there would be critical factual questions in assessing the constitutionality, under the dormant Commerce Clause, of any state law or municipal ordinance, the greatest legacy of the Supreme Court's decision in the NPPC case may well be that a broad, yet unpredictable swath of state and local lawmaking, including on matters of local concern and squarely within the states' and local governments' traditional police powers, is vulnerable to constitutional invalidation even if those laws do not displace or conflict with federal law.

*The greatest legacy of the Supreme Court's decision in the NPPC case may well be that a broad, yet unpredictable swath of state and local lawmaking...is vulnerable to constitutional invalidation.*



133. See, e.g., N.Y. Gen. Bus. Law § 69-a; 30 Ill. Comp. Stat. Ann. 584/5; 30 Ill. Comp. Stat. Ann. 583/5.

134. Indiana's statute criminalizing the acquisition, receipt, sale, and transfer of aborted fetal tissue survived a dormant Commerce Clause challenge in *Curry*, 918 F.3d at 543. Georgia, Louisiana, and Tennessee prohibit sale of human remains. Ga. Code Ann. § 16-12-160; La. Stat. Ann. § 25:952; Tenn. Code Ann. § 11-6-118. Other states prohibit the sale of human organs for transplant. See, e.g., La. Stat. Ann. § 14:101.1; Nev. Rev. Stat. Ann. § 201.460; Or. Rev. Stat. Ann. § 97.981; Tex. Penal Code Ann. § 48.02; Wis. Stat. Ann. § 146.345. And Texas prohibits the sale of human fetal tissue, Tex. Penal Code Ann. § 48.03, while California prohibits selling an ovum, zygote, embryo, or fetus for the purpose of cloning a human being. Cal. Health & Safety Code § 24185.

135. See, e.g., N.J. Stat. Ann. § 2C:20-7; Va. Code Ann. § 18.2-108.

136. New York's comprehensive deaccessioning policy restricts public museums' ability to remove and sell artwork. N.Y. Comp. Codes R. & Regs. tit. 8, § 3.27(c)(7).



## FACTUAL AND LEGAL BACKGROUND

The preceding sections detailed some of the many anticipated effects of the Supreme Court’s coming decision in the NPPC case. The following sections provide context and analysis explaining how and why the pork producers’ challenge to California’s farm animal confinement law is threatening to upend state and local regulation nationwide.

We first give a more fulsome overview of dormant Commerce Clause doctrine and then, of the United States meat and egg industries. Next, we trace the NPPC case’s trajectory to the Supreme Court, beginning with earlier, unsuccessful constitutional challenges to California’s farm animal welfare laws. In the final section of the report, we analyze NPPC’s petition to the Supreme Court, describe possible paths the Court might take in deciding the case, and detail prior warnings courts have sounded about the arguments NPPC is advancing in its challenge to Proposition 12.

### The Commerce Clause

As noted above, Article I of the United States Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]”<sup>137</sup> Indeed, as the Supreme Court recently noted, “removing state trade barriers was a principal reason for the adoption of the Constitution”<sup>138</sup>—to rein in the economic recrimination and Balkanization plaguing the states. Nevertheless, because the Constitution’s structure granted Congress only specific enumerated powers, leaving states to fill in the gaps and broadly employ their “police powers” to regulate matters pertaining the health and welfare of their citizens, early courts grappled with the question of whether

137. Art. I, Clause 3, Section 8, available at <https://constitution.congress.gov/browse/article-1/section-8/clause-3/>.

138. *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019).

and how states could exercise concurrent power, alongside Congress, to regulate economic activity that crossed state borders.

In the mid-nineteenth century, the Supreme Court indicated that the states *could* exercise a concurrent role,<sup>139</sup> and distinguished between those subjects that “imperatively deman[d] a single uniform rule, operating equally on the commerce of the United States,” and those that “deman[d] th[e] diversity, which alone can meet [] local necessities.”<sup>140</sup> Since then, federal courts hearing disputes about state and local regulation of interstate economic activity have interpreted the Constitution’s Commerce Clause as imposing a limitation on states’ and localities’ lawmaking authority—the “dormant” or “negative” Commerce Clause.

The idea of this “dormant” component of the Commerce Clause is not universally accepted, however. Some of its more prominent detractors include past and current Supreme Court Justices Antonin Scalia, Clarence Thomas, and Neil Gorsuch. As Justice Scalia put it, “The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause.”<sup>141</sup> Justice Scalia contrasted “the negative Commerce Clause adopted by the judges” with “the real Commerce Clause adopted by the People.” Concurring in a recent judgment, Justice Gorsuch similarly opined:

[O]ur dormant commerce cases suggest [federal] courts may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause [or] justified by *stare decisis*...are questions for another day.<sup>142</sup>

There has been a minority view on the federal courts, however. As the large majority of courts have found, the dormant Commerce Clause impedes state laws and local ordinances, by purpose of in effect, from “discriminating against” interstate commerce. Unless they have explicit Congressional authorization,<sup>143</sup> states and localities may not subject out-of-state goods or nonresident economic actors to unfavorable treatment, or privilege in-state goods and market players. Such “discriminatory” laws, the Supreme Court has said, are “virtually *per se* invalid.”<sup>144</sup>

By contrast, “[w]here [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed

139. The Court so held in *Gibbons v. Ogden*, 22 U.S. 1 (1824) and *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

140. *Cooley v. Bd. of Wardens of Port of Philadelphia, to Use of Soc for Relief of Distressed Pilots, Their Widows & Child.*, 53 U.S. 299, 319 (1851).

141. *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting). See also *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part) (“[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application;...and, consequently, cannot serve as a basis for striking down a state statute.”), quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

142. *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring) (citing *Epel*, 793 F.3d at 1171); *Comptroller*, 575 U.S. at 572 (Scalia, J., dissenting); *Camps Newfound*, 520 U.S. at 610–620 (Thomas, J., dissenting).

143. “It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. But because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been unmistakably clear.” *Maine v. Taylor*, 477 U.S. 131, 138–39 (1986) (internal citations and quotations omitted).

144. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994).

on such commerce is clearly excessive in relation to the putative local benefits.”<sup>145</sup> This standard, from the seminal Supreme Court case *Pike v. Bruce Church*, is known as the “*Pike* balancing” test.<sup>146</sup> Such non-discriminatory regulations that effectuate local purposes commonly survive legal challenges based on an alleged undue burden on interstate commerce under *Pike*, because courts have been reluctant to second-guess the judgment of state lawmakers legislating to further local purposes.<sup>147</sup>

The Supreme Court and lower federal courts have articulated a few variations on these principles, of particular relevance to the pork producers’ case.

First, state laws and local ordinances can offend the dormant Commerce Clause if they regulate “extraterritorially”—governing commerce that occurs wholly outside their borders.<sup>148</sup> This so-called “extraterritoriality” doctrine emerged from a trio of Supreme Court cases addressing state statutes that tied the in-state prices of goods to the price charged elsewhere. First, the Supreme Court struck down a New York statute prohibiting the sale of milk within New York if the milk was acquired from Vermont farmers at a lower price than New York farmers would have been paid for it, with Justice Cardozo explaining that “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”<sup>149</sup> The Court then applied similar reasoning to strike down a New York law requiring liquor merchants to list their prices once a month and affirm the prices they charged in New York were no higher than those charged in other states, and finally, to a Connecticut statute requiring a very similar thing of out-of-state beer shippers.<sup>150</sup>

The doctrine has largely fallen into disuse by the high court, however. In 2003, the Court declined a request by pharmaceutical manufacturers to apply its reasoning to what the manufacturers characterized as Maine’s regulation of the terms of drug sales occurring outside the state, finding that unlike in its earlier extraterritoriality cases, “Maine is not tying the price of its in-state products to out-of-state prices.”<sup>151</sup> Nevertheless, other federal courts, including the Ninth Circuit, have continued to apply the extraterritoriality doctrine in contexts beyond price control or affirmation statutes, and struck down various state regulations deemed to control transactions that occur wholly outside the state.<sup>152</sup>

145. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

146. Justice Scalia doubted whether “the scale analogy is [] appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

147. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (“We are not inclined ‘to second-guess the empirical judgments of lawmakers concerning the utility of legislation’”) (quoting *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring in judgment)).

148. *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).

149. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

150. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 583-84 (1986); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 337 (1989). In a 2015 decision, then-Judge Gorsuch questioned whether these cases were really about extraterritorial regulation at all, opining, “a careful look at the holdings in the three leading cases suggests a concern with preventing discrimination against out-of-state rivals or consumers.” *Epel*, 793 F.3d at 1173.

151. *Walsh*, 538 U.S. at 669.

152. In *Sam Francis Foundation*, for example, the court applied *Healy* to invalidate a California statute requiring art sellers who reside in California to pay the artist a five percent royalty, as it applied to art sales that take place wholly outside California. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015). Similarly, in *Daniels Sharpsmart, Inc. v. Smith*, the Ninth Circuit again followed *Healy* to find unconstitutionally extraterritorial California officials’ “attempt to reach beyond the borders of California and control transactions that occur wholly outside of the State after the material in question... has been removed from the State.” 889 F.3d 608, 615 (9th Cir. 2018). It is noteworthy, however, that some cases purporting to be about extraterritorial regulation in fact are motivated by the more traditional dormant Commerce Clause concern of economic protectionism. In *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833 (7th Cir. 2017), for example, the court deemed impermissibly extraterritorial, as applied to out-of-state vaping liquid manufacturers, Indiana’s “remarkably specific provisions” related to security procedures permit applicants had to have. Yet the “astoundingly specific provisions for the qualifications of the security firm that the manufacturer must commit to hire for at least five years raise[d]” concerns that the law’s ostensible public safety purpose was a pretext, given “that only one company in the entire United States, located not so coincidentally in Indiana, satisfied the criteria of the Indiana Act.” This made the law “look[] very much like a legislative grant of a monopoly to one favored in-state company in the security business.” *Id.*

Second, in keeping with the earliest construction of the doctrine, federal courts have found laws offend the dormant Commerce Clause when they effect inconsistent regulation of activities that are “inherently national or require a uniform system of regulation”<sup>153</sup>—most commonly, state laws regulating interstate transportation or interstate organizations like the National Collegiate Athletic Association.<sup>154</sup> Such statutes—“directed at interstate commerce and only interstate commerce”<sup>155</sup>—will fall. However, in some cases that appear to be based on such a concern, evidence or suspicion of discriminatory intent is also a factor in the courts’ decisions.<sup>156</sup> The Supreme Court “has read between the statutory lines to see whether a state...actually has a defensible interest in regulating this commerce, or whether it is, in a sense, extorting money in exchange for permitting interstate commerce within its jurisdiction.”<sup>157</sup>

Despite these variations in dormant Commerce Clause jurisprudence, it has never been the case that a state law or local ordinance offends the Constitution simply because compliance will be costly and complicated for market participants, some of whom may be located outside the regulating jurisdiction. The Supreme Court’s consideration of a Maryland law prohibiting petroleum producers and refiners from owning retail service stations in the state reflects this principle. By all accounts, the law had dramatic, negative effects on petroleum refiners operating in interstate commerce. But as the Supreme Court explained, this did not pose a constitutional problem:

[I]nterstate 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.

We cannot...accept appellants’ underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market...[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.<sup>158</sup>

153. *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012).

154. In *NCAA v. Miller*, the Ninth Circuit invalidated a Nevada statute that imposed standards for how the NCAA, an interstate organization, could run its enforcement proceedings, finding they effected a substantial burden on interstate commerce. 10 F.3d 633, 638 (9th Cir. 1993). As the court explained, “for the NCAA to accomplish its goals, the enforcement procedures must be applied even-handedly and uniformly on a national basis,” but Nevada’s statute meant that to accomplish those goals while avoiding liability, the NCAA “would have to apply Nevada’s procedures to enforcement proceedings throughout the country.” *Id.* at 638-39 (internal quotations and citations omitted).

155. *Id.* at 638.

156. For example, in *Raymond Motor Transp., Inc. v. Rice*, often cited as a matter concerning impermissible regulation of interstate transportation, the Supreme Court’s suspicion that the law’s putative local benefits were pretextual carried significant weight. 434 U.S. 429 (1978). The state “virtually defaulted in its defense of the regulations” as promoting public safety, a justification further “undercut by the maze of exemptions from the general truck-length limit” it allowed. *Id.* at 444-45. The Court took particular note of the facts that “[a]t least one of th[o]se exceptions discriminate[d] on its face in favor of Wisconsin industries and against the industries of other States,” and that “other exceptions, although neutral on their face, were enacted at the instance of, and primarily benefit, important Wisconsin industries.” *Id.* at 446-47. This sealed the truck-length regulation’s fate.

157. *Interstate Towing Ass’n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1164 (6th Cir. 1993) (upholding municipal license fees imposed on towing industry and citing *Lemke v. Farmers’ Grain Co.*, 258 U.S. 50 (1922) (invalidating North Dakota law regulating and requiring licensing of interstate traders in grain); *Robbins v. Taxing Dist. Shelby County*, 120 U.S. 489 (1887) (holding invalid a municipal tax on local agents of companies hired to solicit orders for goods as burdening out-of-state companies almost exclusively).

158. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (internal quotations and citations omitted).



## The U.S. Meat and Egg Industries

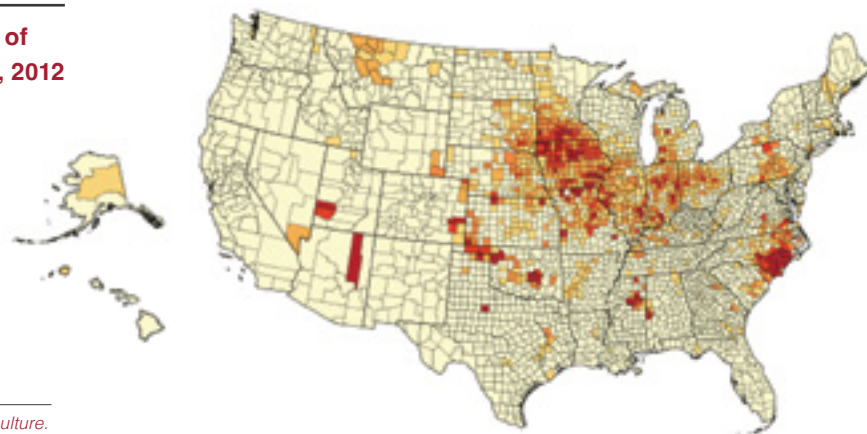
A brief overview and history of the nation’s meat and egg industries is also helpful to understanding the pork producers’ dormant Commerce Clause challenge. While the modern history of animal agriculture in the United States is beyond the scope of this report, in short, since the mid-twentieth century, farms raising animals for meat, milk, and eggs have become increasingly larger, more mechanized, and more industrialized.<sup>159</sup> During this time the animal product industries have grown steadily more consolidated, as large national and multinational corporations bought smaller competitors and supply chains became vertically integrated—meaning meat processors and sellers own and operate not only the slaughterhouses, meat brands, and subsidiaries, but also the animals, feed mills, and even transportation for feed and animals.<sup>160</sup>

In 2021, the country’s largest pork producer, Smithfield Foods, raised 930,000 sows (female breeding pigs) in the United States.<sup>161</sup> Smithfield is owned by Hong Kong-based WH Group, the world’s largest pork producer, which in 2013 purchased the U.S. company in a takeover valued at \$7.1 billion, “the largest-ever Chinese acquisition of an American company.”<sup>162</sup> In 2021 Smithfield raised more sows in the United States than did the next three largest producers combined: Kansas-based Seaboard Foods (335,000 sows), Pipestone Management (288,000), and Iowa Select Farms (242,500).<sup>163</sup> Smithfield’s 530 company-owned and 2,100 contract farms, located primarily in North Carolina, Iowa, and Missouri, produce nearly 18 million pigs annually.<sup>164</sup> Pork production is highly concentrated in a few midwestern states and North Carolina, with Iowa by far the top producer.

### Hog and Pig Sales as Percent of Agriculture Sales, by Country, 2012

U.S. = 5.7%

- percent
- < 1
- 1–4
- 5–9
- 10–19
- 20–29
- 30+



Source: USDA NASS, 2012 Census of Agriculture.

159. *Industrial Agriculture 101: What is a CAFO?* NRDC (Jan. 31, 2020), available at <https://www.nrdc.org/stories/industrial-agriculture-101#cafo>; James M. MacDonald and William D. McBride, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks*, U.S. Department of Agriculture Economic Research Service (Jan. 2009), available at <https://www.nrdc.org/stories/industrial-agriculture-101#cafo>.

160. Claire Kelloway and Sarah Miller, Open Markets Inst., *Food and Power: Addressing Monopolization in America’s Food System 4* (Mar. 2019; updated Sept. 2021), available at [https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/614a2e8bf7d510debf53f3/1632251583273/200921\\_MonopolyFoodReport\\_endnote\\_v3.pdf](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/614a2e8bf7d510debf53f3/1632251583273/200921_MonopolyFoodReport_endnote_v3.pdf). The egg industry is comparatively less consolidated than are the pork and broiler (meat) chicken industries.

161. See Appendix C, *Top U.S. Pork Powerhouses 2021 Rankings*, Successful Farming.

162. Nathan Halverson, *How China purchased a prime cut of America’s pork industry*, Reveal (Jan. 24, 2015), available at <https://revealnews.org/article/how-china-purchased-a-prime-cut-of-americas-pork-industry/>.

163. Each of the top 10 pork producers in the U.S. raised at least 143,000 sows.

164. Caroline Christen, *Top Pork Producing States: Who Is the Largest Pork Producer in the U.S.?*, Sentient Media (Jan. 29, 2021), available at <https://sentientmedia.org/top-pork-producing-states/>. According to Smithfield’s website, the company has 176 company-owned and 1,354 contract farms in North Carolina, 132 company-owned and 109 contract farms in Missouri, and 521 contract farms in Iowa. See *Operations*, Smithfield, available at <https://www.smithfieldfoods.com/about-us/Operations>.

Production is segmented to achieve economies of scale. The typical pig raised and killed for meat has traveled from the site where he was born, to another facility where he grew to about six or eight weeks, to another “finishing” facility where he spent 16-17 weeks growing to “market” weight, and finally to the slaughterhouse.<sup>165</sup> From there, the pig is slaughtered and processed into different cuts of meat shipped to wholesalers, retailers, and restaurants across the country, to be sold to consumers.<sup>166</sup>

Many formerly independent farmers have become contract growers of animals owned by and raised for large processors like Smithfield, who dictate virtually every facet of the animals’ husbandry and production.<sup>167</sup> As the Fourth Circuit Court of Appeals observed in a landmark nuisance case concerning pig waste management by Murphy Brown, a Smithfield subsidiary:

Industrial farming operators like [Murphy Brown] require their contract growers [] to comply with specific policies. The controlling industrial farmer issues detailed mandates to its growers in order to ensure consistency across their various contract operations. [Murphy Brown] imposes standard operating procedures for all of its contract growers. Specifically, [Murphy Brown] (1) directs grower management procedures; (2) mandates design and construction of operations; (3) can require the use of technological enhancements; (4) can require capital investments; (5) dictates how many of its hogs are to be placed at a given operation; and (6) controls hog waste management systems.<sup>168</sup>

The National Pork Producers Council claims that “the offspring of about 673,000 sows is required to satisfy California consumers’ demand for pork meat annually.”<sup>169</sup> Smithfield’s company-owned and -contracted farms alone thus raise 257,000 more sows than are needed to supply all of California with pork, and Smithfield has complete control over how they are raised.

## Evolving Regulation of Meat and Egg Production

For many years, conditions inside large pig barns and egg-laying hen houses were opaque to the public. But in the 1990s and early 2000s, undercover whistleblowers began to get jobs in the facilities and to release photographs and video footage they had taken inside.<sup>170</sup> The images and videos disturbed many—pregnant pigs biting the bars of and lying listlessly inside narrow metal cages called gestation crates; hens packed tightly inside a warren of filth-caked battery cages stacked floor to ceiling; baby calves tethered by their necks, alone inside small pens.<sup>171</sup>

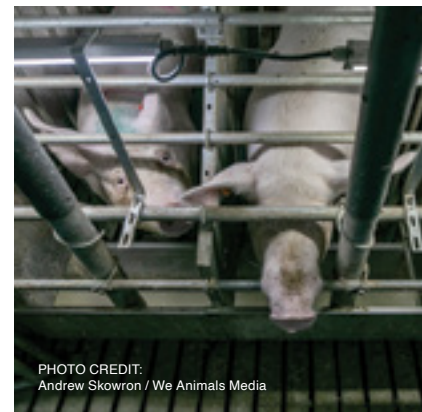


PHOTO CREDIT:  
Andrew Skowron / We Animals Media

165. *The Transformation of U.S. Livestock Agriculture*, *supra* note 159; Pet. at 9-10.

166. *Id.*

167. While some contract growers prosper, many describe the work as physically punishing and low paying. One grower interviewed by the *Chicago Tribune* “liken[ed] himself to an indentured servant, saying he earns just a living wage for grueling workdays 365 days a year.” See David Jackson and Gary Marx, *Illinois contract pig farmer: Work is low-paying, physically punishing*, *Chicago Tribune* (Aug. 8, 2016), available at <https://www.chicagotribune.com/investigations/ct-pig-farms-operators-met-20160802-story.html>.

168. *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 946 (4th Cir. 2020). The Fourth Circuit agreed it was proper for the jury to hear evidence concerning Smithfield and WH Group’s finances and executive compensation because it was relevant to whether it was feasible or practical to change its pig waste management practices to be less harmful to neighbors’ lands because, as Murphy Brown’s president testified, they would be the ones covering the costs of the contract growers’ production changes. *Id.* at 973.

169. Complaint, ¶ 20.

170. Sara Shields, Paul Shapiro, and Andrew Rowan, *A Decade of Progress toward Ending the Intensive Confinement of Farm Animals in the United States*, *Animals* 2017, 7(5), 40, available at <https://www.mdpi.com/2076-2615/7/5/40/html>; Ctr. for Const. Rts., *Ag-Gag Across America: Corporate-Backed Attacks on Activists and Whistleblowers 8-9* (2017), available at <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf>.

171. *Id.*

The investigations sparked debate over the husbandry and confinement of farm animals and prompted calls to end such intensive confinement.<sup>172</sup> Voters in Florida in 2002, Arizona in 2006, and Oregon in 2007 enacted ballot measures phasing out gestation crates for pigs and battery cage confinement for hens.<sup>173</sup> Then, in 2008, over 63 percent of the California electorate—more than 8 million Californians—voted “yes” on Proposition 2, the “Prevention of Farm Animal Cruelty Act.”<sup>174</sup> The ballot initiative required that, starting in 2015, egg-laying hens, calves raised for veal, and pregnant pigs in the state be allowed to stand up, lie down, turn around, and extend their limbs without touching their enclosure or cage-mates.<sup>175</sup> Then in 2010, the California legislature passed and Governor Schwarzenegger signed Assembly Bill No. 1437, requiring that as of January 1, 2015, eggs sold in the state had to meet Proposition 2’s standards regardless of where they were produced (the “California Egg Law”).<sup>176</sup> That meant in order to continue serving the California market, egg producers nationwide would have to provide hens enough space to meet the behavioral requirements, which the overwhelming majority, who used battery cage housing, did not.<sup>177</sup>



### Legal Challenges and the Changing Egg Industry

A cascade of unsuccessful legal challenges to Proposition 2 and the California Egg Law followed. The first sought to clarify the type and dimension of housing required for egg-laying hens.<sup>178</sup> The second challenged Proposition 2 on the grounds that it was unconstitutionally vague<sup>179</sup> and imposed excessive burdens on interstate commerce.<sup>180</sup> On the latter claim, the court found the “prevention of animal cruelty [ ] a legitimate state interest[,]” and the alleged burdens on interstate commerce “purely hypothetical and entirely speculative.”<sup>181</sup>

Undeterred, the Association of California Egg Farmers<sup>182</sup> in November 2012 filed suit contending Proposition 2 was unconstitutionally vague under the California Constitution.<sup>183</sup> When that, too, failed, in 2014 the State of Missouri sued California officials, seeking to strike down the California Egg Law on the grounds that it violated the dormant Commerce Clause and was preempted by the federal Egg

172. *Id.*

173. *Farm Animal Confinement Bans by State*, ASPCA, available at <https://www.aspc.org/improving-laws-animals/public-policy/farm-animal-confinement-bans>. Citizens have initiative or veto referendum processes in 26 states and the District of Columbia. See *States with initiative or referendum*, Ballotpedia, available at [https://ballotpedia.org/States\\_with\\_initiative\\_or\\_referendum](https://ballotpedia.org/States_with_initiative_or_referendum).

174. Codified at Cal. Health & Safety Code §§ 25990-25994. See California Proposition 2, Farm Animal Confinement Initiative (2008), Ballotpedia, available at [https://ballotpedia.org/California\\_Proposition\\_2\\_Farm\\_Animal\\_Confinement\\_Initiative\\_\(2008\)](https://ballotpedia.org/California_Proposition_2_Farm_Animal_Confinement_Initiative_(2008)).

175. *Id.*

176. See AB-1437 *Shelled eggs: sale for human consumption: compliance with animal care standards* (2009-2010), available at [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=200920100AB1437#:text=This%20bill%20would%2C%20commencing%20January,of%20these%20provisions%20a%20crime](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=200920100AB1437#:text=This%20bill%20would%2C%20commencing%20January,of%20these%20provisions%20a%20crime).

177. According to an analysis by Vox sourced from data from the USDA and the nonprofit The Humane League, in 2008 less than 5 percent of the egg market was cage-free. See Kenny Torrella, *The biggest animal welfare success of the past 6 years, in one chart*, Vox (Mar. 23, 2021), available at <https://www.vox.com/future-perfect/22331708/eggs-cages-chickens-hens-meat-poultry>.

178. See Terrence O’Keefe, *California egg farmers challenge Proposition 2 in state court*, Watt Poultry (Nov. 29, 2012), available at <https://www.wattagnet.com/articles/14404-california-egg-farmers-challenge-proposition-2-in-state-court>.

179. In violation of the Due Process Clause of the Fourteenth Amendment.

180. *Cramer v. Brown*, No. CV123130JFWJEMX, 2012 WL 13059699, at \*4 (C.D. Cal. Sept. 12, 2012). Dismissing the vagueness claim, United States District Court Judge John Walker memorably wrote that Proposition 2 “does not require the law enforcement officer to have the investigative acumen of Colombo to determine if an egg farmer is in violation of the statute.”

181. *Id.* at \*5 (citing *United States v. Stevens*, 559 U.S. 460, 469 (2010) (“[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies.”)). The egg producer challenger’s appeal also failed. *Cramer v. Harris*, 591 F. App’x 634, 635 (9th Cir. 2015).

182. The association had tried unsuccessfully to intervene in *Cramer*’s suit.

183. *California egg farmers challenge*, *supra* note 178.



Products Inspection Act.<sup>184</sup> That challenge failed when the court ruled Missouri did not have standing to challenge the law on behalf of its citizens.<sup>185</sup> Finally, in 2017 Missouri and 12 other states again attempted to sue the State of California, in part on dormant Commerce Clause grounds, this time seeking to file an original action in the U.S. Supreme Court.<sup>186</sup> This, too, was unsuccessful.<sup>187</sup>

In the meantime, the laws had gone into effect in 2015 and failed to produce the egg industry's dire predictions; instead it was the 2015 highly pathogenic avian influenza virus that caused a massive egg price spike and then, two years later, a crash.<sup>188</sup> In the years since the passage of Proposition 2 and the California Egg Law, the percentage of egg producers nationwide adopting cage-free housing slowly ticked up, as more and more states, customers, and institutions rejected battery cage-sourced eggs.<sup>189</sup> There had been early indications that the pork industry, too, might phase out gestation crates in response to the evolving regulatory landscape and customer demands. In 2007, for example, Smithfield publicly committed to phasing out the crates on all company-owned farms within 10 years.<sup>190</sup> Yet the status of this and many other corporate commitments is now uncertain.<sup>191</sup> And despite consistent claims that it was eliminating them, Smithfield has only made small reductions in the amount of time pigs spend in the crates.<sup>192</sup>

Other states, however, followed California's lead in banning the intensive confinement of farm animals and the sales of products from intensively confined animals. In 2016, over 77% of Massachusetts voters voted yes on the Massachusetts Minimum Size Requirements for Farm Animal Containment (Question 3), which prohibits the intensive confinement of breeding pigs, calves raised for veal, and egg-laying hens in the state.<sup>193</sup> Question 3 also requires that pork, veal, and eggs sold in the state comply with the law's minimum standards regardless of where the source animals are raised.<sup>194</sup> The measure's stated purpose "is to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also

184. The Attorneys General of Nebraska, Oklahoma, Alabama, and Kentucky, and the Governor of Iowa, later joined as additional plaintiffs. *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014).

185. *Id.* at 1077. The Ninth Circuit affirmed, finding the states did not articulate an interest apart from that of the states' egg farmers and thus could not bring the suit. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017).

186. *Missouri v. California*, No. 148, Original (2017), Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support available at [https://www.supremecourt.gov/DocketPDF/22/22O148/22473/20171204164825236\\_Eggs%20Final%20Filing%20PDF.pdf](https://www.supremecourt.gov/DocketPDF/22/22O148/22473/20171204164825236_Eggs%20Final%20Filing%20PDF.pdf).

187. See David Lieb, *US Supreme Court declines involvement in state egg law cases*, Associated Press (Jan. 8, 2019), available at <https://apnews.com/article/fcc9468bdd24801bb24adb2f0a04716>. Opponents of Proposition 2 and the California Egg Law took to Congress as well, where Iowa Representative Steve King introduced what became known as the "King Amendment" to the House version of the 2014 Farm Bill, entitled, "Prohibition Against Interference by State and Local Governments with Production or Manufacture of Items in Other States." See section 11312, <https://www.congress.gov/congressional-record/2013/07/11/house-section/article/H4394-1>. The Amendment prohibited states and localities from setting agricultural product standards or conditions in excess of those of any state or the federal government, for goods sold in interstate commerce. After opposition by Senate Democrats and intense public criticism, the King Amendment was ultimately stripped from the enacted version of the Farm Bill, but was revived in 2018 as the Protecting Interstate Commerce Act (PICA). PICA died in committee that year after wide-ranging opposition. See <https://www.congress.gov/bill/115th-congress/house-bill/4879/committees>.

188. Katie Little, *Egg prices breaking all-time highs on bird flu*, CNBC (Aug. 13, 2015), available at <https://www.cnbc.com/2015/08/13/egg-prices-breaking-all-time-highs-on-bird-flu.html>; Jesse Newman and Jacob Bunge, *Cheap Eggs Flood U.S. Grocery Stores*, Wall St. J. (Jul. 28, 2017), available at <https://www.wsj.com/articles/cheap-eggs-flood-u-s-grocery-stores-1501239602>.

189. *The biggest animal welfare success*, *supra* note 177; see also Scott McFetridge, *Egg producers shift as public demand for cage-free hens grows*, Associated Press (Feb. 11, 2022), available at <https://www.pbs.org/newshour/economy/egg-producers-shift-as-public-demand-for-cage-free-hens-grows>.

190. The Humane Society of the United States last year sued the company for allegedly misleading consumers about its commitment to end the use of gestation crates. See Press Release, *The Humane Society of the United States sues world's largest pork producer for misleading consumers*, The Humane Society of the United States (Oct. 18, 2021), available at <https://www.humanesociety.org/news/humane-society-united-states-sues-worlds-largest-pork-producer-misleading-consumers#:~:text=Today%2C%20the%20Humane%20Society%20of,gestation%20crates%20for%20mother%20pigs>.

191. Many of those who made public commitments backpedaled or went silent on their progress toward eliminating gestation crates from their supply chains. See World Animal Prot., *Quit Stalling* (Sept. 22, 2020), available at [https://dk16rvnu67rj.cloudfront.net/cdn/ff/3qrpu-LG-bkdjfy10lgOHLzwtFx7W1oXVjSozRdG6v8/1603304018/public/media/Quit\\_Stalling\\_book\\_Updated\\_compressed.pdf](https://dk16rvnu67rj.cloudfront.net/cdn/ff/3qrpu-LG-bkdjfy10lgOHLzwtFx7W1oXVjSozRdG6v8/1603304018/public/media/Quit_Stalling_book_Updated_compressed.pdf).

192. See *id.*

193. Massachusetts Minimum Size Requirements for Farm Animal Containment, Question 3 (2016), Ballotpedia, available at [https://ballotpedia.org/Massachusetts\\_Minimum\\_Size\\_Requirements\\_for\\_Farm\\_Animal\\_Containment\\_Question\\_3\\_\(2016\)](https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment_Question_3_(2016)).

194. *Id.*; see also Mass. Gen. Laws Ann. ch. 129 App., §§ 1-1 et seq.

threaten the health and safety of Massachusetts consumers, increase the risk of foodborne illness, and have negative fiscal impacts on the Commonwealth of Massachusetts.”<sup>195</sup> In December 2017, at the same time that states were attempting to challenge the California Egg Law, 13 states sought to file an original action in the Supreme Court against the Commonwealth of Massachusetts, too, alleging that Question 3 regulated extraterritorially in violation of the dormant Commerce Clause.<sup>196</sup> As with the action against California, the states’ suit against Massachusetts failed when the high court denied the states permission to pursue their complaint.<sup>197</sup>

### Proposition 12 and the Constitutional Challenges It Spurred

In November 2018, Californians voted by another wide margin (63 percent of voters)<sup>198</sup> to upgrade their anti-confinement law, passing Proposition 12. The law’s stated purpose is “to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California.”<sup>199</sup> Proposition 12 prohibits farm owners and operators within the state from confining covered animals “in a cruel manner,”<sup>200</sup> and prohibits business owners from knowingly selling within California certain veal meat, pork meat, or eggs from animals confined “in a cruel manner,”<sup>201</sup> which the law defines as:



- (1) Confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely.
- (2) After December 31, 2019, confining a calf raised for veal with less than 43 square feet of usable floorspace per calf.
- (3) After December 31, 2021, confining a breeding pig with less than 24 square feet of usable floorspace per pig.
- (4) After December 31, 2019, confining an egg-laying hen with less than 144 square inches of usable floorspace per hen.
- (5) After December 31, 2021, confining an egg-laying hen...in an enclosure other than a cage-free housing system.<sup>202</sup>

The law’s sales provision applies to meat and eggs sold in California regardless of their origin (where the animals are raised to produce them).

195. *Id.*

196. *Indiana v. Massachusetts*, No. 149, Original (2017), Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support available at [https://content.govdelivery.com/attachments/INAG/2017/12/11/file\\_attachments/927879/Combined%2Bfiles%2Bpdfa%2Bcompliant.pdf](https://content.govdelivery.com/attachments/INAG/2017/12/11/file_attachments/927879/Combined%2Bfiles%2Bpdfa%2Bcompliant.pdf).

197. *US Supreme Court declines involvement*, *supra* note 187.

198. California Proposition 12, Farm Animal Confinement Initiative (2018), Ballotpedia, available at [https://ballotpedia.org/California\\_Proposition\\_12,\\_Farm\\_Animal\\_Confinement\\_Initiative\\_\(2018\)](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018)).

199. *Id.*, available at [https://ballotpedia.org/California\\_Proposition\\_12,\\_Farm\\_Animal\\_Confinement\\_Initiative\\_\(2018\)#Full\\_text](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018)#Full_text).

200. Cal. Health & Safety Code § 25990(a).

201. *Id.* § 25990(b).

202. *Id.* § 25991(e).

A new wave of legal challenges ensued. First, the North American Meat Institute (NAMI)—the largest trade association representing U.S. meat packers and processors<sup>203</sup>—sued in October 2019 in the Central District of California, alleging that Proposition 12 violates the dormant Commerce Clause<sup>204</sup> by: “[1] discriminating against its members who produce pork and veal outside of California, [2] impermissibly regulating its members’ business activities beyond California’s borders, and [3] by substantially and unlawfully burdening its members’ ability to engage in interstate commerce.”<sup>205</sup> NAMI filed a preliminary motion to halt enforcement of the law, complaining of a “Hobson’s choice”—spending “tens of millions of dollars” to reconfigure housing, cutting production, abandoning the California market, or risking the law’s criminal penalties and fines.<sup>206</sup>

The court denied the motion, finding NAMI was not likely to succeed on the merits of its claims. The court first found NAMI failed to allege a discriminatory or protectionist intent or effect in Proposition 12, since the law’s in-state sales prohibition “applies equally to animals raised and slaughtered in California” as to animals raised and slaughtered elsewhere.<sup>207</sup> And following Ninth Circuit precedent, the court held that because Proposition 12 “only applies to ‘in-state conduct’—sales of meat products in California—not conduct that takes place ‘wholly outside’ California,” it did not regulate extraterritorially.<sup>208</sup> Finally, the court found NAMI’s claim of a substantial burden on interstate commerce unlikely to succeed because, the court said, the law’s “anticipated effects do not demonstrate that Proposition 12 will interfere with the flow of veal or pork products into California inasmuch as they demonstrate NAMI’s disappointment that Proposition 12 ‘precludes a preferred, more profitable method of operating in a retail market,’”<sup>209</sup> which “is not sufficient to establish a burden” on interstate commerce which would then have to be balanced, under Pike, against the law’s animal welfare and public health benefits.<sup>210</sup>

With NAMI’s effort to halt the law’s enforcement having failed, an overlapping group of pork producers—through the National Pork Producers Council and American Farm Bureau Federation—soon filed a very similar dormant Commerce Clause challenge, this time in the Southern District of California. NPPC complained that Proposition 12 unconstitutionally “interferes” with the \$26 billion-a-year pork industry.<sup>211</sup> NPPC alleged it will be “complicated” and “very difficult”<sup>212</sup> to segment pig and pork supply chains to direct Proposition 12-compliant products to California. Thus, it “remain[ed] to be seen” how many meatpackers and their pork producer suppliers would “decide to continue to serve the California market.”<sup>213</sup> NPPC alleged that Propositions 12 unlawfully “project[s] California’s required methods of production into other states and countries[,]”<sup>214</sup> and that the law’s benefits to animal welfare and public health are illusory or immaterial.

203. See <https://www.meatinstitute.org/>.

204. NAMI brought no claims other than its Commerce Clause claims.

205. *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1020 (C.D. Cal. 2019).

206. *Id.*

207. *Id.* at 1025.

208. *Id.*, quoting *Rocky Mountain*, 913 F.3d at 952.

209. *Id.*, at 1033, quoting *Optometrists II*, 682 F.3d at 1154.

210. *Id.*, at 1034 (internal quotations and citations omitted).

211. *Nat’l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1204–05 (S.D. Cal. 2020), *aff’d*, 6 F.4th 1021 (9th Cir. 2021).

212. Pet. App. 214a ¶ 348; 182a ¶ 132; available at [https://www.supremecourt.gov/DocketPDF/21/21-468/193744/20210927102744795\\_NPPC%20v%20Ross%20Petition%20for%20Cert%20Appendices%20PDFa.pdf](https://www.supremecourt.gov/DocketPDF/21/21-468/193744/20210927102744795_NPPC%20v%20Ross%20Petition%20for%20Cert%20Appendices%20PDFa.pdf).

213. *Id.* at 343a.

214. Complaint ¶ 293.

The District Court dismissed NPPC’s complaint for failing to state a constitutional claim. The court again followed Ninth Circuit precedent, that “[a] statute that applies both to California entities and out-of-state entities does not target wholly extraterritorial activity.”<sup>215</sup> NPPC’s allegations of disproportionate harm to out-of-state pork producers were immaterial because “[e]ven when a statute ‘has significant extraterritorial effects it passes Commerce Clause muster when...those effects result from the regulation of in-state conduct.’”<sup>216</sup> The court also dismissed the *Pike* claim because NPPC’s allegations failed to “establish a substantial burden on interstate commerce,” as Proposition 12’s alleged interference with the pork market “relates to the wisdom of the statute, not its burden on commerce.”<sup>217</sup>

The Ninth Circuit affirmed the Central District’s order in the *NAMI* case,<sup>218</sup> and then, in July 2021, the Southern District’s order in the *NPPC* case, too. In the latter decision, the court first considered whether NPPC stated a claim under the narrow interpretation of the extraterritoriality doctrine applied in the Supreme Court cases *Baldwin*, *Brown-Forman*, and *Healy*, in which the court struck down the price control and price affirmation statutes.<sup>219</sup> Since it was undisputed that Proposition 12 “neither dictates the price of pork products nor ties the price of pork products sold in California to out-of-state prices,”<sup>220</sup> the Ninth Circuit went on to assess whether NPPC stated a claim under the “broader understanding of the extraterritorial principle” that the Ninth Circuit had applied in cases like *Sam Francis Foundation* and *Daniel Sharpsmart*, to invalidate statutes regulating wholly out-of-state transactions.<sup>221</sup> Here, too, the answer was no.<sup>222</sup> Next, the court found that NPPC did not allege a dormant Commerce Clause claim under the theory of “state regulation of activities that are inherently national or require a uniform system of regulation,”<sup>223</sup> as NPPC failed to plausibly allege “the pork production industry is of such national concern that it is analogous to taxation or interstate travel, where uniform rules are crucial.”<sup>224</sup> Having found no substantial burden on interstate commerce, the Ninth Circuit quickly affirmed the dismissal of the NPPC’s *Pike* claim.

By this time—the summer of 2021—with Proposition 12’s effective date for pork sellers to comply with the square footage requirement only six months away, Iowa pork producers filed another lawsuit,<sup>225</sup> while some members of Congress introduced legislation to try to block Proposition 12.<sup>226</sup> But in the meantime, many large pork producers and sellers pursued contingency plans. Just as they had changed to higher-cost production methods to meet the needs of corporate customers seeking gestation crate-free pork,

215. *Nat’l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1207–08 (S.D. Cal. 2020), *aff’d*, 6 F.4th 1021 (9th Cir. 2021) (quoting *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013)).

216. *Id.* at 1207 (quoting *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015)).

217. *Id.* at 1209-10, citing *Exxon*, 437 U.S. at 128.

218. *N. Am. Meat Inst. v. Becerra*, 825 F. App’x 518, 519–20 (9th Cir. 2020). *NAMI* petitioned for Supreme Court review, which the Court summarily denied. *N. Am. Meat Inst. v. Bonta*, 141 S. Ct. 2854 (2021).

219. See *Baldwin*, 294 U.S. 511; *Brown-Forman*, 476 U.S. at 579; *Healy*, 491 U.S. 324.

220. *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1028 (9th Cir. 2021).

221. *Id.* (internal quotations omitted).

222. *Id.* at 1029.

223. *Id.* at 1031 (internal quotations omitted).

224. *Id.*

225. The Iowa Pork Producers Association—representing an overlapping cohort of pig farmers and pork sellers—filed suit in Iowa state court. That action was removed to federal court in Iowa, dismissed, refiled in California Superior Court, and removed again to the United States District Court for the Central District of California. Ultimately, that court dismissed the complaint for failure to state any constitutional claim, finding the Ninth Circuit’s *Ross* decision controlling on the Iowa producers’ Commerce Clause claims. *Iowa Pork Producers Ass’n v. Bonta*, No. 221CV09940CASAFMX, 2022 WL 613736, at \*14-15 (C.D. Cal. Feb. 28, 2022). The case is now on appeal in the Ninth Circuit. Appeal No. 22-55336 (Apr. 4, 2022).

226. Republican members of Congress from Iowa and other midwestern states introduced the Exposing Agricultural Trade Suppression (EATS) Act, which would invalidate Proposition 12 and have a further sweeping effect on a swath of state and local laws. See H.R. 4999 - Exposing Agricultural Trade Suppression Act, 117th Congress (2021-2022), available at <https://www.congress.gov/bills/117th-congress/house-bill/4999?s=1&r=5>.

consumers seeking organic meat,<sup>227</sup> and foreign pork importers like China who demand pork from pigs not fed the growth efficiency drug ractopamine (a commonly used drug in United States pork production),<sup>228</sup> some large pork producers and sellers began to signal their ability to meet the California market demand.

Pork seller Hormel Foods had in October 2020 already confirmed “it face[d] no risk of material losses from compliance with Proposition 12” and “[wa]s preparing to fully comply” by January 1, 2022.<sup>229</sup> Then, in August 2021, Tyson Foods’ CEO deemed Proposition 12’s impact on the company “not significant” and stated Tyson “can do multiple programs simultaneously, including Prop 12.”<sup>230</sup> Even one of NPPC’s former presidents and board members—and a declarant supporting NPPC’s complaint—stated in August 2021 that he could and would supply Proposition 12-compliant pork to California, and could do so without converting all of his production to be Proposition 12-compliant.<sup>231</sup> However, not all producers were so willing. Seaboard Foods, the country’s second-biggest pig producer, announced in December 2021 that it was halting sales of some pork products to California in light of Proposition 12’s square footage requirement taking effect.<sup>232</sup>

Finally, in January of this year, California grocers who had filed a separate challenge to Proposition 12 were granted a compliance extension when a California Superior Court issued an order delaying enforcement of the law’s prohibition on the sale of pork meat from animals not given 24 square feet of space, until 180 days after the California Department of Food and Agriculture (CDFA) issues its final regulations.<sup>233</sup> The California court’s order did not, however, delay the ban on the sale of pork meat derived from pigs whose mothers were confined in gestation crates, which has been in place since Proposition 12’s passage. As the CDFA stressed, the “ruling is a narrow one,” and “pork producers providing pork products to California,” would “remain subject to enforcement if they violate the square-footage requirement that went into effect on Jan. 1.”<sup>234</sup>

Thus, pork producers whose pork meat products enter the California market are now obligated to provide sows with 24 square feet of space, even if that provision of the law will not be enforced against California grocers until after the CDFA issues its regulations.

227. Roz Lehman, Iowa Organic Association, Organic-pork demand needs infrastructure, Agri-View (Feb. 4, 2021), available at [https://www.agupdate.com/agriview/news/livestock/organic-pork-demand-needs-infrastructure/article\\_bf173769-d6b1-5a17-9cac-42e6896c4146.html#:~:text=The%20global%20organic%2Dmeat%2Dproducts,for%20organic%20and%20sustainable%20foods](https://www.agupdate.com/agriview/news/livestock/organic-pork-demand-needs-infrastructure/article_bf173769-d6b1-5a17-9cac-42e6896c4146.html#:~:text=The%20global%20organic%2Dmeat%2Dproducts,for%20organic%20and%20sustainable%20foods).

228. Treena Hein, *JBS USA and Tyson stop using ractopamine*, Pig Progress (Oct. 30, 2019), available at <https://www.pigprogress.net/health-nutrition/jbs-usa-and-tyson-stop-using-ractopamine/#:~:text=Smithfield%20stopping%20ractopamine%20use%20in%202018&text=%E2%80%9CSeveral%20Smithfield%20Foods%20plants%20now,farms%20do%20not%20receive%20ractopamine>.

229. *Hormel Foods Company Information About California Proposition 12*, Hormel (Oct. 6, 2020), available at <https://www.hormelfoods.com/newsroom/in-the-news/hornews/hormel-foods-company-information-about-california-proposition-12/>.

230. Tyson Foods, *Tyson Foods Third Quarter 2021 Earnings*, 15 (Aug. 9, 2021), available at [http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/104708849/files/doc\\_financials/2021/q3/08-11-21\\_Tyson-Foods-080921.pdf](http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/104708849/files/doc_financials/2021/q3/08-11-21_Tyson-Foods-080921.pdf).

231. Greta Kaul, *Why California’s New Pork Rules Could Mean Big Changes for Minnesota Hog Farmers*, Minn. Post (Aug. 6, 2021), available at <https://www.minnpost.com/economy/2021/08/why-californias-new-pork-rules-could-mean-big-changes-for-minnesota-hog-farmers/>.

232. Tom Polansek, *U.S. pork producer to limit sales in California over new pig law*, Reuters (Dec. 17, 2021), available at <https://www.nasdaq.com/articles/u.s.-pork-producer-to-limit-sales-in-california-over-new-pig-law>.

233. *Cal. Hispanic Chambers of Commerce v. Ross*, Case No. 34-2021-80003765 (Cal. Sup. Ct. Feb. 2, 2022), available at <https://www.cdfa.ca.gov/AHFS/pdfs/2021-80003765.pdf>.

234. *Hog Futures Hit Six-Month High on California Pork Rule Delay*, Bloomberg News (Jan. 25, 2022), available at <https://www.bloomberg.com/news/articles/2022-01-25/hog-futures-hit-six-month-high-on-delay-to-california-pork-rule>.



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## ANALYSIS OF NPPC'S PETITION AND THE SUPREME COURT'S POSSIBLE PATHS

In September 2021, NPPC<sup>235</sup> filed a petition for a *writ of certiorari*, asking the Supreme Court to correct the Ninth Circuit's alleged errors in affirming the dismissal of NPPC's dormant Commerce Clause claims. The assertions in NPPC's petition mark a stark contrast from those in its December 2019 complaint. NPPC's previous allegations that it would be costly and complex for pork producers and processors to supply California with pork became a claim that it would be "**impossible**" for the industry to segment supply chains to direct Proposition 12-compliant pork to California.<sup>236</sup> Its allegations that some sow farmers would choose to change all their production to be Proposition 12-compliant rather than try to segregate, became the absolute claim that the law "will in practice require *every* sow farm to adopt its standards, completely reworking the industry and resulting in *every* U.S. pork consumer paying for California's preferred sow housing."<sup>237</sup> NPPC's claims concerning the pork industry and Proposition 12's alleged effects on it seem calculated to situate the case within the line of dormant Commerce Clause cases finding unconstitutional laws that impose "inconsistent regulation of activities that are inherently national or require a uniform system of regulation," or where "a lack of national uniformity would impede the flow of interstate goods"<sup>238</sup>—without actually citing or relying on these cases.<sup>239</sup>

NPPC first accused the Ninth Circuit of "brush[ing] aside" the Supreme Court's extraterritoriality cases, which NPPC said "hold[] that laws with significant extraterritorial effects violate our federalist scheme."<sup>240</sup>

235. Again, this Report will refer to the litigants the National Pork Producers Council and American Farm Bureau Federation collectively as "NPPC."

236. This claim is inconsistent, for example, with the allegation in NPPC's complaint that "producers who do not comply" with Proposition 12 "will need to adjust their businesses to avoid placing pork into a supply chain that does or may result in sales to California." See Complaint ¶ 102 (Pet. App. 178a).

237. See Pet. at 7, 17, 29-30 (emphasis added).

238. *Exxon*, 437 U.S. at 128.

239. NPPC finally did cite such cases in its merits brief.

240. Pet. at i, 4.

As NPPC alleged, California accounts for 13 percent of the nation's pork consumption but raises very few pigs, and thus imports 99.87 percent of its pork.<sup>241</sup> Because, NPPC said, “a pig progresses through multiple facilities outside California as it is raised, and is processed into many different cuts of meat that are sold across the country—Proposition 12 in practical effect regulates wholly out-of-state commerce.”<sup>242</sup> NPPC implored the Supreme Court to recognize the continued applicability of the principle that “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State,” which the Court stated in *Healy*.<sup>243</sup> In NPPC's view, whether a state regulation is unconstitutionally extraterritorial is assessed not by the standard the Ninth Circuit applied—whether the law governs wholly out-of-state conduct or transactions—but by a “practical effect” test under which the question is the extent of the regulation's “upstream” effects on commerce outside the regulating state, or the extent to which the alleged burdens of a state's regulation fall on out-of-state market players.<sup>244</sup>

NPPC next claimed the Ninth Circuit “failed to engage in meaningful [*Pike*] balancing” by not recognizing Proposition 12's asserted burden on interstate commerce.<sup>245</sup> After reiterating the Proposition 12's alleged burden, NPPC devotes the remainder of its argument to critiquing the “legitima[cy]” of California's justifications for the law—claiming its public health purpose is “baseless” and its animal welfare benefits, insufficiently “local,” because “nearly all the animals Proposition 12 affects are housed outside of California.”<sup>246</sup> Here and throughout the petition, NPPC quoted and leaned heavily on arguments the United States made in a brief filed in the Ninth Circuit supporting the pork group's challenge.

A bevy of states and state agriculture and trade associations also filed amicus briefs urging the Supreme Court to take up NPPC's case.<sup>247</sup> On March 28, 2022, the Court granted certiorari, agreeing to do so.

NPPC's repeated language of coercion and inevitability—that Prop 12 will “require[] pervasive changes to an integrated nationwide industry” and “necessitate[]” costly herd reductions or housing changes<sup>248</sup>—casts multibillion-dollar companies like Smithfield as powerless in the face of California's pork sales standards. This framing allows the producers to more easily characterize Proposition 12 as regulating “extraterritorially,” given California's dependence on imported pork, and as throwing a wrench in the gears of an industry that, in NPPC's telling, demands national uniformity in order to function and to avoid increased costs for every pork purchaser and consumer.<sup>249</sup>

241. *Id.* at 7.

242. *Id.* at 2.

243. *Id.* at 22 (quoting *Healy*, 491 U.S. at 336).

244. Pet. at 32.

245. *Id.* at i, 4.

246. *Id.* at 30-31.

247. See Brief of Indiana and Nineteen Other States as *Amici Curiae* in Support of Petitioners (Nov. 10, 2021), available at [https://www.supremecourt.gov/DocketPDF/21/21-468/199568/20211110130101781\\_21-468%20tsac%20Brief%20of%20Indiana%20and%20Nineteen%20Other%20States.pdf](https://www.supremecourt.gov/DocketPDF/21/21-468/199568/20211110130101781_21-468%20tsac%20Brief%20of%20Indiana%20and%20Nineteen%20Other%20States.pdf); Brief of North Carolina Chamber Legal Institute, North Carolina Pork Council, North Carolina Farm Bureau, and 11 Other State Farm Bureaus, Pork Councils, and Business Groups as *Amici Curiae* in Support of Petitioners (Nov. 18, 2021), available at [https://www.supremecourt.gov/DocketPDF/21/21-468/200400/20211118131857991\\_NPPC%20v.%20Ross%20NCCLI%20Amicus%20Final.pdf](https://www.supremecourt.gov/DocketPDF/21/21-468/200400/20211118131857991_NPPC%20v.%20Ross%20NCCLI%20Amicus%20Final.pdf); Brief of Iowa Pork Producers Association, Minnesota Pork Producers Association, Iowa Farm Bureau Federation, Minnesota Farm Bureau Federation, and Minnesota Agrigrowth Council as *Amici Curiae* in Support of Petitioners (Nov. 18, 2021), available at [https://www.supremecourt.gov/DocketPDF/21/21-468/200429/20211118142729577\\_MN\\_IA%20Farmer%20Amici%20Brief%20Final.pdf](https://www.supremecourt.gov/DocketPDF/21/21-468/200429/20211118142729577_MN_IA%20Farmer%20Amici%20Brief%20Final.pdf).

248. Pet. at 2-3 (emphasis added).

249. *Id.* at 2 (citing oft-repeated statistic that California accounts for 13 percent of the country's pork consumption but imports 99.87% of its pork).

That NPPC's petition appears to disclaim pork industry players' control over their own business decisions is curious, given the market power and control exerted by the top meat integrators (NPPC members like Smithfield).<sup>250</sup> Smithfield exerts near total control over the manner in which the almost one million sows it controls are raised.<sup>251</sup> In investor-facing materials, it touts that it “beg[an] developing a blockchain process to promote supply chain traceability for consumers,” and has a “company[] requirement that all pigs are traceable to farm of origin.”<sup>252</sup> The large pork integrators have been accused of exploiting this control, with dozens of recent antitrust lawsuits against pork producers alleging price fixing, resulting in multimillion-dollar settlements,<sup>253</sup> and calls by President Biden and members of Congress to rein in the large integrators' outsized market power and reinstate greater competition.<sup>254</sup> Yet NPPC's petition claims it is California's *Proposition 12* that imposes across-the-board compliance costs on the entire pork industry,<sup>255</sup> not pork sellers' failure to organize the supply chains they control and trace so as to direct Proposition 12-compliant products mainly or only into the California market.

### Possible Line-Drawing and Implications

NPPC claims the Supreme Court's jurisprudence “is not so rigid as to be controlled by the form by which a state erects barriers to commerce,”<sup>256</sup> yet the doctrine it urges the Court to recognize presents very thorny line-drawing questions. If whether a state unconstitutionally regulates “commerce occurring wholly outside [its] boundaries” is measured by assessing the regulation's “practical effect” on out-of-state market participants,<sup>257</sup> this could, as noted in the first section of this report, throw into doubt the constitutionality of a wide swath of state and local regulation that compels out-of-state actors to adjust their business practices or supply chains in order to continue doing business in the regulating jurisdiction. And if the Court doubts the legitimacy or

localness of Proposition 12's purposes and benefits, despite there being no suggestion that the purposes are pretextual and mask protectionism, this could impose a new, constitutionally-mandated interrogation of state and local policy legitimacy and “localness” by federal judges.

250. According to the Open Markets Institute, “By 2001, more than 8 in 10 hogs were controlled by packer conglomerates through long-term contracts with farmers or direct ownership. Since the mid-1990s, 70 percent of U.S. hog farmers have gone out of business, due primarily to a decline in small farms and a rise in large concentrated feeding operations, also known as CAFOs.” In 2018 the top four hog-processing firms controlled 70% of the market—more double what they controlled in 1976 (33%). *Food and Power*, *supra* note 160, at 4.

251. Indeed, in a filing before the California Franchise Tax Board, Smithfield stated that it “utilizes vertical integration to industrialize and control the hog production process from conception to packing. By controlling every aspect of the pork production process including genetics, fertilization, birthing, feeding, housing, slaughter and packaging, Smithfield has been able to produce high quality, consistent products with consistent genetics, which allowed Smithfield to command a premium for fresh pork, something that has historically been thought of as a commodity item. Smithfield achieved total vertical integration largely due to its use of contract farming. Control over its supply chain and production process is an essential part of Smithfield's corporate and operational strategy as it helps reduce exposure to fluctuations in commodity prices (especially considering historic volatility in hog and feed prices) [and] ensures operational efficiency.” See *Opening brief from Smithfield*, March 4, 2021 Franchise Tax Board Meeting, available at <https://www.ftb.ca.gov/about-ftb/meetings/board-meetings/2021/march-2021/smithfield-opening-brief.pdf> (internal quotations omitted). See also *Top Pork Producing States*, *supra* note 164.

252. Smithfield, *2019 Sustainability Impact Report*, 15, 102, available at [https://www.smithfieldfoods.com/getmedia/fd77514a-5d4c-4b51-abf0-8f6b83a34fd3/SMITHFIELD\\_CSR\\_Report\\_2019.pdf](https://www.smithfieldfoods.com/getmedia/fd77514a-5d4c-4b51-abf0-8f6b83a34fd3/SMITHFIELD_CSR_Report_2019.pdf).

253. Jessy Edwards, *Smithfield Foods Reaches \$42M Settlement With Restaurants In Pork Price-Fixing MDL*, Top Class Actions (Apr. 13, 2022); available at <https://topclassactions.com/lawsuit-settlements/consumer-products/food/smithfield-foods-reaches-42m-settlement-with-restaurants-in-pork-price-fixing-mdl/>; Jennifer Shike, *JBS Reaches \$20-Million Settlement in Pork Price-Fixing Case*, Farmer's Journal PORK (July 26, 2021) available at <https://www.porkbusiness.com/news/industry/jbs-reaches-20-million-settlement-pork-price-fixing-case>; Ryan McCarthy, *JBS USA finalizes settlement for another pork price-fixing lawsuit*, Meat & Poultry (Nov. 22, 2021), available at <https://www.meatpoultry.com/articles/25825-jbs-usa-finalizes-settlement-for-another-pork-price-fixing-lawsuit>.

254. Brian Deese, Sameera Fazili, and Bharat Ramamurti, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, The White House: Blog (Sept. 8, 2021), available at <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>.

255. Pet. at 13.

256. Reply Brief for Petitioners, 8-9 (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

257. *Healy*, 491 U.S. at 336.



### Expansion of the Little-Used Extraterritoriality Doctrine

As a hopeful litigant recently told the Court, “in *National Pork Producers Council*, [the Court] will expound upon the extraterritoriality doctrine for the first time in almost two decades, providing guidance that could bear directly upon” that litigant’s case, and beyond.<sup>258</sup> If the Court reverses the Ninth Circuit and finds valid NPPC’s claim that Proposition 12 effects unconstitutional extraterritorial regulation, it could do so in one of a few ways.

First, the Court could find NPPC states a claim for extraterritoriality for all the reasons NPPC gives, and rely on *Healy’s* “practical effects” test to find that Proposition 12 in “effect” controls commerce outside California’s borders. This is the broadest possible ruling the Court could give, which would mark a dramatic expansion of that lesser-used doctrine, gutting state and local police powers and placing into immediate jeopardy thousands of state and local climate and energy initiatives, consumer protection, food safety, and labeling laws, and even civil rights and labor statutes. Any local ordinance, state law, or even exercise of state power<sup>259</sup>

with allegedly costly and burdensome “upstream” effects on out-of-state market actors could be subject to invalidation as unconstitutionally extraterritorial. And because the Court has deemed extraterritorial regulation per se invalid,<sup>260</sup> this could be done with little to no consideration of the regulation’s local benefits, as courts do when assessing even-handed, non-discriminatory laws under *Pike*.

Second, the Supreme Court could find NPPC states a claim that Proposition 12 regulates extraterritorially because, as alleged in the petition, given the nature of the pork industry, the law will foist California’s regulatory decisions and compliance costs on other states that have made different policy decisions.<sup>261</sup> The Court might find these allegations raise federalism concerns of the kind the Court discussed in a 1996 decision, *BMW of North America v. Gore*.<sup>262</sup> While in a very different context (an analysis of a jury’s punitive damages award under the Due Process Clause of the Fourteenth Amendment), the Court cited *Healy* in finding that an Alabama jury’s large award of punitive damages offended principles of federalism and unconstitutionally projected Alabama’s policy decisions into other states because the award was based on testimony concerning BMW’s car sales practices *nationwide*.<sup>263</sup> The Court so found even

*This is the broadest possible ruling the Court could give, gutting state and local police powers and placing into immediate jeopardy thousands of state and local climate and energy initiatives, consumer protection, food safety, and labeling laws, and even civil rights and labor statutes.*

258. *TitleMax of Delaware, Inc., dba TitleMax, et al., Petitioners v. Richard Vague, Secretary, Pennsylvania Department of Banking and Securities*, Petition for a Writ of Certiorari, Case No. 21-1262 (docketed Mar. 17, 2022), available at [https://www.supremecourt.gov/DocketPDF/21/21-1262/218567/20220315105847327\\_TitleMax%20Petition.pdf](https://www.supremecourt.gov/DocketPDF/21/21-1262/218567/20220315105847327_TitleMax%20Petition.pdf) (“TitleMax petition”).

259. Some extraterritoriality cases concern subpoenas or the application of generally applicable state laws, in litigation, to an out-of-state company acting in the state. For example, as discussed further below, a Maryland payday lender has asked the Supreme Court to revive its claim that a Pennsylvania agency’s investigative subpoena, concerning the application of Pennsylvania usury law to loans the company made to Pennsylvanians, constitutes an extraterritorial exercise of state power because the loans originated at stores in Maryland. The lender has styled its petition a companion to NPPC’s and asked that the cases be decided together. *See id.*

260. *Int’l Dairy Foods Ass’n v. Bogggs*, 622 F.3d 628, 645 (6th Cir. 2010) (“the Supreme Court has recognized a second category of regulation that is also virtually per se invalid under the dormant Commerce Clause: a regulation that has the practical effect of controlling commerce that occurs entirely outside of the state in question”) (citing *Healy*, 491 U.S. at 336; *Baldwin*, 294 U.S. at 521).

261. *See Pet.* at 7, 17, 29-30 (emphasis added).

262. 517 U.S. 559 (1996).

263. *Id.* at 572-73. The Court said that Alabama had the authority to penalize BMW only for conduct in Alabama that harmed Alabamans, and not for conduct in states where BMW’s conduct was lawful or was penalized differently.

though the award did not require BMW or any other car maker to do anything in other states; indeed, it was a monetary award that had no effect whatsoever on conduct outside Alabama.<sup>264</sup>

If the Court were to adopt similar reasoning here, this could have just as severe, if even less predictable, consequences. It would revitalize the extraterritoriality doctrine with all the concomitant effects previously described. But it could also signal that the broadest possible variety of state action is subject to dormant Commerce Clause scrutiny and invalidity. As the Supreme Court said in *BMW*, “State power may be exercised as much by a jury’s [or judge’s] application of a state rule of law in a civil lawsuit as by a statute.”<sup>265</sup> Challenges to alleged extraterritorial “impacts” of the application of state laws in a variety of contexts—such as the investigations by the California and Massachusetts Attorneys General into Exxon’s climate- and plastics-related statements<sup>266</sup>—would surely follow.

Any of these outcomes would be a seismic change that would throw state houses, city councils, and industries nationwide into uncertainty, given that the Supreme Court has been all but ignoring the extraterritoriality doctrine for over 20 years,<sup>267</sup> despite numerous requests to weigh in on it.<sup>268</sup>

### Erasure of Local Benefits Under *Pike*

How the Court addresses NPPC’s *Pike* claim may produce yet more reverberations. If the Court finds constitutionally significant NPPC’s allegations that Proposition 12 effects a severe impact on an “inherently national,”<sup>269</sup> interconnected industry, such that the law’s burdens must be balanced against its “putative local benefits” of promoting animal welfare and protecting public health and safety, the Court might find these benefits compelling (at least in theory), and remand for the lower court to balance them against its burdens. Alternatively, the Court might find that while the public health benefit *may* be compelling, if sufficiently furthered, Proposition 12’s animal welfare benefit is insufficiently “local” because, as NPPC alleges, the law primarily protects animals outside California.<sup>270</sup>

264. Dormant Commerce Clause skeptics Justice Scalia and Justice Thomas dissented, finding “no basis for believing that Alabama has sought to control conduct elsewhere,” as “[t]he statutes at issue merely permit civil juries to treat conduct such as petitioner’s as fraud, and authorize an award of appropriate punitive damages in the event the fraud is found to be ‘gross, oppressive, or malicious.’” *Id.* at 603–04 (citing Ala. Code § 6–11–20(b)(1)). The dissent deemed the majority’s “sweeping (and largely unsupported) statements regarding the relationship of punitive awards to lawful or unlawful out-of-state conduct [] the purest dicta.” *Id.* (internal quotations and citations omitted).

265. *Id.* at 572, n. 17.

266. See, e.g., Amended Complaint, Commonwealth of Massachusetts v. Exxon Mobil Corporation, Civil Action No. 1984-CV-03333-BLS1, available at <https://www.mass.gov/doc/june-5-2020-amended-exxon-complaint/download>; Press Release, State of California Office of the Attorney General, Attorney General Bonta Announces Investigation into Fossil Fuel and Petrochemical Industries for Role in Causing Global Plastics Pollution Crisis (Apr. 28, 2022), available at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-investigation-fossil-fuel-and-petrochemical>.

267. In its 2018 *Wayfair* case, for example, concerning South Dakota’s ability to collect sales taxes from out-of-state internet retailers selling goods to South Dakotans, the Court considered and ultimately overruled two prior precedents, *Quill Corp. v. North Dakota* and *Through Heitkamp*, 504 U.S. 298 (1997) and *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, (1992), which had previously held that out-of-state sellers must have a “physical presence” in a state in order for the state to require they collect and remit sales tax from residents’ purchases. *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094–96 (2018). The Court found this “physical presence” requirement outmoded in the modern digital age. *Wayfair* had alleged South Dakota’s sales tax collection scheme constituted unconstitutional extraterritorial regulation of out-of-state sellers, and the parties vigorously disputed the burden South Dakota’s collection and remittance regime imposed on out-of-state retailers (South Dakota said “\$12 a month for 30 transactions” and *Wayfair*, “up to \$250,000”). Yet the Court’s decision did not even mention the extraterritoriality doctrine beyond a vague allusion to it as a “variation” of the Court’s dormant Commerce Clause jurisprudence. *Wayfair*, 138 S. Ct. at 2091 (2018) (citing *Brown–Forman Distillers Corp.*, 476 U.S. 573).

268. The Court has recently and repeatedly declined to take up the very extraterritoriality question NPPC’s petition presents. See, e.g., *Frosh v. Ass’n for Accessible Medicines*, 139 S. Ct. 1168, 1169 (2019); *Am. Fuel & Petrochemical Mfrs. v. O’Keeffe*, 139 S. Ct. 2043 (2019); *Sam Francis Found. v. Christies, Inc.*, 577 U.S. 1062 (2016); *Energy & Env’t Legal Inst. v. Epel*, 577 U.S. 1043 (2015); *Rocky Mountain Farmers Union v. Corey*, 573 U.S. 946 (2014); *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 574 U.S. 932 (2014); *Am. Beverage Ass’n v. Snyder*, 571 U.S. 818 (2013); *Missouri v. California*, 139 S. Ct. 859 (2019); *Indiana v. Massachusetts*, 139 S. Ct. 859 (2019).

269. *Optometrists*, 682 F.3d at 1148.

270. *Pet.* at 30–31.

Depending on how it addresses NPPC's *Pike* argument, the Court could usher in a trend of constitutional second-guessing of state and local regulatory benefits, displacing its previous admonition that "[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake."<sup>271</sup> This could represent a sea change of another sort, **giving industry challengers a green light to question the "localness" and efficacy of the benefits of a host of state and municipal regulations**, including climate change and clean energy laws whose targeted reductions in emissions may produce difficult-to-quantify and diffuse benefits, or sales restrictions that evince a state's moral objections to certain types of commerce—in dog meat and horsemeat, human organs and tissues, and goods produced through forced labor or child labor. Such a ruling would give challengers greater grounds to attack consumer finance regulations as overly paternalistic or reducing consumer choice,<sup>272</sup> undercut the utility of public health labeling regimes,<sup>273</sup> and paint the benefits of antidiscrimination laws as illusory.<sup>274</sup>

### The Possibility of Limiting NPPC to Its Facts

There is a third possible manner in which the Court may find NPPC's complaint states a claim that Proposition 12 imposes a substantial burden on interstate commerce: if the Court believes the pork industry demands national uniformity in regulation, because of the (alleged) harm of conflicting regulations.<sup>275</sup> NPPC's complaint and petition paint the industry as so inextricably interconnected, mutually dependent, and non-segregable that one state's inconsistent regulation would spell doom for the entire \$26-billion, "nutritionally important national industry."<sup>276</sup> However, relatively few recent cases have found such a substantial burden on interstate commerce from a non-discriminatory, even-handed regulation, outside the interstate transportation context.<sup>277</sup>

The Court could (attempt to) limit NPPC to its facts—to Proposition 12's particular alleged impacts on a particular industry. But that begs the question of whether the pork industry (or rather, the highly contested version of it depicted in NPPC's petition) *is*, in fact, unique. If having a complex, segmented

271. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007); see also *CTS Corp.*, 481 U.S. at 92-93; *Kassel*, 450 U.S. at 679 (Brennan, J., concurring).

272. See, e.g., Brief of Amicus Curiae American Financial Services Association in Support of Petitioners at 6-7, *TitleMax*, No. 21-1262, available at [https://www.supremecourt.gov/DocketPDF/21/21-1262/221452/20220419163116532\\_42307%20pdf%20Chilton.pdf](https://www.supremecourt.gov/DocketPDF/21/21-1262/221452/20220419163116532_42307%20pdf%20Chilton.pdf) (mocking the benefits Pennsylvania's usury law, which bars excessive loan interests rates, provides residents: "that 'protection' comes at a high price, barring Pennsylvanians from crossing State lines to borrow funds they may desperately need for urgent medical treatment, to avoid repossession of a car or to rescue a home from foreclosure.").

273. For example, in *California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022), the California Chamber of Commerce successfully challenged California's Proposition 65 cancer warning labeling regime as applied to acrylamide. The district court and Ninth Circuit credited the Chamber and expressed deep skepticism as to the California agency's labeling requirements, finding them "misleading" and "controversial." While the Chamber challenged the regulation on compelled speech, not dormant Commerce Clause grounds, one could expect similar judicial skepticism of the benefits of state public health laws, were the Court to denigrate Proposition 12's benefits in the manner NPPC requests.

274. In *S.D. Myers*, 253 F.3d at 471-72, for example, a contractor who refused to certify compliance with a San Francisco ordinance requiring City contractors provide nondiscriminatory benefits to employees with registered domestic partners challenged the ordinance on dormant Commerce Clause grounds. Myers argued, in part, that the ordinance's benefits were "illusory because the Ordinance allows contractors and vendors with the City to avoid [its] effects" by seeking to show that they are the "sole source" with which the City can contract. The Ninth Circuit dismissed this argument, because San Francisco "need not strike all evils at the same time" (citing *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717 (1966) (internal quotation omitted)). Under a more searching rubric, however, a reviewing court might well view such exemptions, and thus an anti-discrimination law's local benefits, less charitably.

275. Interestingly, the argument that the pork industry demands national uniformity in regulation does not actually appear in NPPC's complaint, and is not even fully articulated in its petition, raising questions of whether it is properly before the Supreme Court.

276. Pet. at 17.

277. And even then, as noted above, *supra* note 156, the Court has as often been motivated by a concern of pretextual regulatory purposes meant to mask discrimination against interstate commerce or favoritism for in-state actors, as by concern over inconsistent regulation of an inherently national industry. See, e.g., *Raymond Motor Transp.*, 434 U.S. 429. Moreover, NPPC describes its industry in a manner meant to evoke interstate transportation or the NCAA, but until its merits brief, did not actually cite or rely on any such cases striking down state regulation of inherently national activities.

production chain or a more-difficult-to-trace<sup>278</sup> product is not a special feature of the pork industry but a common reality for a large variety of industries and companies, it will be difficult to limit NPPC to its facts. And certainly the Court's decision would spur many litigants to attempt to "nationalize" the burdens of regulation on their industries, in the hopes of stating a valid Commerce Clause claim.

### Prior Judicial Warnings

Several Circuit Court judges and even the Supreme Court have recognized the inherent risk in expanding the extraterritoriality doctrine and "constitutionalizing" the costs and burdens of state regulation on out-of-state economic actors. Judge Wynn, in his 2018 dissent to the Fourth Circuit's decision denying *en banc* review of a decision striking down Maryland's law prohibiting unconscionable price increases for generic drugs made available for sale to Maryland consumers, wrote:

In expanding the extraterritoriality doctrine beyond the contexts in which the Supreme Court...ha[s] applied it...the majority opinion materially encroaches upon the States' reserved powers to legislate to protect the health, safety, and welfare of their citizens. By doing so, the majority opinion errantly turns the dormant Commerce Clause into a "weapon" for federal judges to second-guess efforts by state legislatures to protect the health and welfare of their citizens, even when such efforts do not implicate the two concerns underlying the Supreme Court's "[m]odern" dormant Commerce Clause jurisprudence: state regulations that "discriminate against interstate commerce" or "impose undue burdens on interstate commerce[.]"<sup>279</sup>



In 2015, when then-Judge Gorsuch was confronted with the exact argument NPPC here makes—that the *Healy* line of cases requires courts to invalidate "any state regulation with the practical effect of controlling conduct beyond the boundaries of the State"<sup>280</sup>—he wrote it would "risk serious problems of overinclusion. After all, if any state regulation that 'control[s]...conduct' out of state is per se unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels?"<sup>281</sup> Judge Gorsuch was troubled that the challenger "offer[ed] no limiting principle that might prevent that possibility or others like it," and declined the "audacious invitation" to embark on such a "novel lawmaking project."<sup>282</sup>

278. Again, NPPC's allegation that pork products cannot be traced back to the facilities in which the animals are raised is directly contradicted by its largest member's (Smithfield's) public statements, including to investors. See 2019 Sustainability Impact Report, *supra* note 252.

279. *Ass'n for Accessible Medicines v. Frosh*, 742 F. App'x 720, 721 (4th Cir. 2018) (Wynn, J., dissenting) (internal citations omitted).

280. *Epel*, 793 F.3d at 1174 (internal citation omitted).

281. *Id.* at 175.

282. *Id.*

Finally, in rejecting waste haulers' dormant Commerce Clause challenge to a non-discriminatory law, the Supreme Court noted the "common thread" to the haulers' arguments:

They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. *See Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.<sup>283</sup>

It remains to be seen whether today's Court will heed its admonitions of yesterday, and those of Justice Gorsuch, in considering NPPC's dormant Commerce Clause claims.



283. *United Haulers Ass'n*, 550 U.S. at 347 (2007).



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## CONCLUSION

The legal challenge to California's Proposition 12 the Supreme Court is set to hear next term portends broad and uncertain impacts. How the Court rules could well have reverberations for virtually any issue, law, ordinance, jurisdiction, constituency, and corner of the economy. The Supreme Court's endorsement of the pork producers' construction of the dormant Commerce Clause would suddenly "constitutionalize" routine regulatory burdens, making a state law's constitutionality depend on the size and power of an affected industry—a sort of "too big to regulate" legal standard. Such a rubric would sap state and local governments' ability to protect their citizens and further policy goals tailored to their local needs. That the Court decided to take up NPPC's challenge at all puts us on notice.

## APPENDIX A

*Laws, ordinances, and applications of law that survived dormant Commerce Clause challenges, organized by subject matter*

### Energy, Agriculture, and Environment

#### Climate and Energy

- A Colorado statute requiring that 20 percent of electricity sold to Colorado consumers come from renewable sources.<sup>284</sup>
- A Maryland statute providing that producers or refiners of petroleum products could not operate any retail service stations within Maryland and requiring that all temporary price reductions be extended uniformly to all service stations supplied.<sup>285</sup>
- A Minnesota statute granting incumbent electric utilities a right of first refusal to build and own electric transmission lines that connected to their existing facilities.<sup>286</sup>
- California’s Low Carbon Fuel Standard and regulations, applying “to nearly all transportation fuels currently consumed in California and any fuels developed in the future,” and including reporting requirements and “a declining annual cap on the average carbon intensity of California’s transportation-fuel market.”<sup>287</sup>
- Ohio’s exemption of state-regulated natural gas utilities (known as “local distribution companies”) from sales and use taxes otherwise imposed on sellers of natural gas.<sup>288</sup>
- A Kansas regulation providing that producers’ entitlements to assigned quantities of gas would permanently be canceled if production were too long delayed.<sup>289</sup>
- Connecticut’s renewable portfolio standard (RPS) program requiring the state’s utilities to either produce renewable energy themselves or buy renewable energy credits from other renewable energy producers located within the region.<sup>290</sup>
- Kentucky’s regulatory scheme allowing the state Public Utility Commission to determine the cost reasonableness of an interstate utility’s purchase of interstate supplied natural gas, in determining whether to grant a utility a cost tariff for gas supplied to its citizens.<sup>291</sup>
- A Missouri statute requiring a natural gas utility to obtain regulatory approval before purchasing stock of other utility companies.<sup>292</sup>
- An Oregon program regulating the production and sale of transportation fuels based on greenhouse gas emissions.<sup>293</sup>
- Vessel fuel use regulations adopted by the California Air Resources Board requiring vessel operators to use cleaner fuels on vessels operating within 24 nautical miles of the California coast.<sup>294</sup>

284. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015).

285. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

286. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020), cert. denied, 141 S. Ct. 1510 (2021).

287. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080 (9th Cir. 2013); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019).

288. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

289. *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493 (1989).

290. *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017).

291. *Kentucky W. Virginia Gas Co. v. Pennsylvania Pub. Util. Comm’n*, 837 F.2d 600 (3d Cir. 1988).

292. *S. Union Co. v. Missouri Pub. Serv. Comm’n*, 289 F.3d 503 (8th Cir. 2002).

293. *Am. Fuel & Petrochemical Manufacturers v. O’Keeffe*, 903 F.3d 903 (9th Cir. 2018).

294. *Pac. Merch. Shipping Ass’n v. Goldstene*, 639 F.3d 1154 (9th Cir. 2011).

## Waste Disposal

- Connecticut’s E-Waste Law, which imposed the cost of an electronics recycling program on electronics manufacturers.<sup>295</sup>
- A county’s flow control ordinances that benefited the refuse authority’s public waste disposal site.<sup>296</sup>
- A county’s flow control ordinance, which prohibited disposal of waste generated in the county at any site other than a designated publicly owned landfill.<sup>297</sup>
- The City of Baltimore’s zoning ordinance which limited the operator of a medical waste facility to medical waste generated within the city.<sup>298</sup>
- Washington State’s regulatory scheme requiring a certificate of public convenience and necessity in order to collect and transport solid waste.<sup>299</sup>
- Provision of Delaware’s coastal zone statute banning product transfer facilities in Delaware’s coastal zone.<sup>300</sup>

## Wildlife

- Washington Department of Wildlife regulations prohibiting the importation, possession, propagation, transfer, or release of listed “deleterious exotic wildlife.”<sup>301</sup>
- Amendments to New York Environmental Conservation Law to prohibit trawlers from taking, landing, or possessing lobsters in Long Island Sound.<sup>302</sup>
- San Francisco’s ban on the sale of fur products.<sup>303</sup>
- California’s prohibition on the importation, possession, and transportation of mountain lions in the state of California.<sup>304</sup>
- California’s Shark Fin Law, making it unlawful to possess, sell, offer for sale, trade, or distribute a shark fin.<sup>305</sup>
- A California law banning sale of products that are the result of force-feeding birds to enlarge their livers beyond their normal size.<sup>306</sup>
- A Michigan statute combatting nuisance aquatic nuisance by requiring permitting for oceangoing vessels operating in the state’s waters.<sup>307</sup>

295. *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018).

296. *Lebanon Farms Disposal, Inc. v. Cty. of Lebanon*, 538 F.3d 241 (3d Cir. 2008).

297. *Sandlands C & D LLC v. Cty. of Horry*, 737 F.3d 45 (4th Cir. 2013).

298. *Med. Waste Assocs. Ltd. P’ship v. Mayor & City Council of Baltimore*, 966 F.2d 148 (4th Cir. 1992), as amended (July 17, 1992).

299. *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995).

300. *Norfolk S. Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987).

301. *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994).

302. *New York State Trawlers Ass’n v. Jorling*, 16 F.3d 1303 (2d Cir. 1994).

303. *Int’l Fur Trade Fed’n v. City & Cty. of San Francisco*, 472 F. Supp. 3d 696 (N.D. Cal. 2020).

304. *Safari Club Int’l v. Becerra*, 702 F. App’x 607 (9th Cir. 2017).

305. *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136 (9th Cir. 2015).

306. *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 729 F.3d 937 (9th Cir. 2013).

307. *Fednav, Ltd. v. Chester*, 547 F.3d 607 (6th Cir. 2008).



## Health, Pharmaceuticals, and Drugs

- California statutes and regulations prohibiting licensed opticians and optical companies from offering prescription eyewear at the same location in which eye examinations were provided and from advertising that eyewear and eye examinations were available in the same location.<sup>308</sup>
- Maine’s prescription drug rebate program.<sup>309</sup>
- New York’s Public Health Law prohibiting cigarette sellers and common and contract carriers from shipping and transporting cigarettes directly to New York consumers.<sup>310</sup>
- Virginia’s requirement to obtain a certificate of need (CON) to establish or expand medical facilities and services.<sup>311</sup>
- Washington department of health regulations requiring that elective percutaneous coronary interventions (PCI) be performed only at hospitals having a minimum annual volume of 300 procedures.<sup>312</sup>
- A Utah law prohibiting contact lens manufacturers from enforcing their Uniform Pricing Policies against retailers in Utah.<sup>313</sup>
- Virginia and Arkansas statutes requiring tobacco manufacturers who did not participate in a multi-state master settlement agreement to contribute to the healthcare costs escrow fund.<sup>314</sup>
- Oklahoma’s allocable share amendment, which sets the amount of escrow funds refunded annually to tobacco manufacturers that did not participate in states’ master settlement agreement with other tobacco manufacturers.<sup>315</sup>
- New York statutes conditioning tax stamp issuance on a cigarette manufacturer either being a participant in the multistate tort suit settlement agreement or making escrow payments required of nonparticipants.<sup>316</sup>
- A Tennessee statute prohibiting optometrists from practicing in, or in conjunction with, any retail store.<sup>317</sup>
- An Ohio statute which required the registration of a nonresident as a wholesale pharmaceutical distributor where the person possesses a reciprocal drug registration certificate or license issued by another state with comparable qualifications to Ohio’s.<sup>318</sup>
- A county ordinance requiring prescription drug manufacturers to operate and finance a program to collect, transport, and dispose of any unwanted prescription medication.<sup>319</sup>
- Connecticut’s “reconciliation requirement” for reporting nationwide, intrastate, and interstate cigarette sales by certain cigarette manufacturers as a prerequisite to selling cigarettes in the state.<sup>320</sup>

308. *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144 (9th Cir. 2012).

309. *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003).

310. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

311. *Colon Health Centers of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016).

312. *Yakima Valley Mem’l Hosp. v. Washington State Dep’t of Health*, 731 F.3d 843 (9th Cir. 2013).

313. *Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App’x 736, 738 (10th Cir. 2016).

314. *Star Sci. Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002); *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009).

315. *KT & G Corp v. Att’y Gen. of State of Okla.*, 535 F.3d 1114 (10th Cir. 2008).

316. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

317. *LensCrafters, Inc. v. Robinson*, 403 F.3d 798 (6th Cir. 2005).

318. *Ferndale Lab’ys, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996).

319. *Pharm. Rsch. & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037 (9th Cir. 2014).

320. *Grand River Enterprises Six Nations, Ltd. v. Boughton*, 988 F.3d 114 (2d Cir. 2021), cert. denied, 142 S. Ct. 755 (2022).

- New York’s Generic Drug Act requiring, subject to certain conditions, pharmacists dispense cheaper generic drugs in lieu of trade name drugs in filling doctors’ prescriptions.<sup>321</sup>
- A provision of Wisconsin’s Unfair Sales Act prohibiting licensed tobacco wholesalers, but not other wholesalers, from deducting trade discounts when calculating their “cost to wholesaler” under the Act.<sup>322</sup>
- Michigan’s State Medicaid initiative, requiring prior authorization before prescribing a drug if a drug manufacturer fails to provide the state with rebates greater than those required under the national Medicaid agreement.<sup>323</sup>

### Civil Rights, Justice, and Policing

- A San Francisco ordinance requiring city contractors to provide nondiscriminatory benefits to employees with registered domestic partners.<sup>324</sup>
- Interpretation of California’s Disabled Persons Act requiring television networks to caption videos on their websites.<sup>325</sup>
- A California Labor Code provision requiring a California-based employer to pay overtime to out-of-state employees.<sup>326</sup>
- A District of Columbia ordinance banning the sale, use, or possession in a motor vehicle of any device designed to detect or counteract police radar.<sup>327</sup>

### Agriculture, Food, and Alcohol

- A Texas law prohibiting the processing, sale, or transfer of horse meat for human consumption.<sup>328</sup>
- An Illinois statute making it unlawful to slaughter horses for human consumption, or to import or export horse meat for human consumption.<sup>329</sup>
- An Ohio Department of Agriculture regulation designed to curb allegedly misleading labeling of dairy products with regard to nonuse of artificial hormones, antibiotics, or pesticides.<sup>330</sup>
- Pennsylvania’s enforcement of minimum wholesale and retail milk prices pursuant to Pennsylvania Milk Marketing Law (PMML).<sup>331</sup>
- Maine’s statutory scheme allowing imposition of minimum prices upon milk dealers already required to pay minimum prices under federal Agricultural Marketing Agreement Act (AMAA).<sup>332</sup>
- A Texas statute that banned all public corporations from holding a package store permit, which allowed retail sale of liquor in Texas.<sup>333</sup>

321. *Pharm. Soc. of State of New York, Inc. v. Lefkowitz*, 586 F.2d 953 (2d Cir. 1978).

322. *Eby-Brown Co., LLC v. Wisconsin Dep’t of Agric.*, 295 F.3d 749 (7th Cir. 2002), *as amended on denial of reh’g* (Aug. 12, 2002).

323. *Pharm. Rsch. & Mfrs. Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004).

324. *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461 (9th Cir. 2001).

325. *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014).

326. *Sullivan v. Oracle Corp.*, 662 F.3d 1265 (9th Cir. 2011).

327. *Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C. Cir. 1984).

328. *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326 (5th Cir. 2007).

329. *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

330. *Int’l Dairy Foods Ass’n v. Boggis*, 622 F.3d 628 (6th Cir. 2010).

331. *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd.*, 462 F.3d 249 (3d Cir. 2006).

332. *Grant’s Dairy–Maine, LLC v. Comm’r of Maine Dep’t of Agric., Food & Rural Res.*, 232 F.3d 8 (1st Cir. 2000).

333. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm’n*, 945 F.3d 206 (5th Cir. 2019).

- An Indiana law that prevented retailers from shipping wine to their customers via a motor carrier.<sup>334</sup>
- Maine statutes allowing small wineries to bypass wholesalers and sell directly to consumers in face-to-face transactions but prohibiting direct shipping from a winery to consumers.<sup>335</sup>
- Rhode Island statutes prohibiting liquor franchises and franchise-type business activities by holders of liquor licenses.<sup>336</sup>
- A Wisconsin butter-grading law requiring butter sold in the state to be graded by either a Wisconsin-licensed butter grader or by the United States Department of Agriculture.<sup>337</sup>
- A Minnesota statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons.<sup>338</sup>
- Tennessee’s statutory ban on the direct shipment of alcoholic beverages, including wine, to consumers.<sup>339</sup>
- A Missouri law requiring meatpackers to disclose any price offered to sellers of livestock for slaughter unless the meatpackers purchased livestock on a grade and yield basis.<sup>340</sup>

### Transportation, Automotive, Airline, and Consumer Product Safety

- A Maine statutory amendment prohibiting automobile manufacturers, already statutorily required to reimburse dealers at retail-repair rates for warranty repairs, from “otherwise recover[ing]” their costs of reimbursement (e.g., through state-specific wholesale vehicle surcharges).<sup>341</sup>
- A Vermont statute imposing labeling requirements upon mercury-containing lamps.<sup>342</sup>
- California Air Resources Board (CARB) regulations setting fleet-average greenhouse gas emissions standards for new motor vehicles beginning in Model Year (MY) 2009.<sup>343</sup>
- A City of Long Beach ordinance restricting municipal airport noise.<sup>344</sup>
- A Chicago ordinance prohibiting the sale of spray paint and jumbo indelible markers within city limits.<sup>345</sup>
- A Town of East Hampton law requiring ferry operators to obtain a special permit before using a ferry terminal within the Town and restricting the types of ferries that may use local terminals.<sup>346</sup>
- Massachusetts Turnpike Authority (MTA) toll discount program offered to subscribers of MTA’s electronic toll payment system, but not to users of a comparable system offered in other states.<sup>347</sup>
- A Virginia statute preventing a motor vehicle manufacturer or distributor from granting an additional franchise for a particular line-make of vehicle in a trade area already served by one or more dealers carrying the same line if it is determined that the market will not support all of the dealerships.<sup>348</sup>

334. *sLebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455 (7th Cir. 2012).

335. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007).

336. *Wine And Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007).

337. *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1050–51 (7th Cir. 2018).

338. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

339. *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008).

340. *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814 (8th Cir. 2001).

341. *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30 (1st Cir. 2005).

342. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).

343. *Chamber of Com. of U.S. v. E.P.A.*, 642 F.3d 192, 196–97 (D.C. Cir. 2011).

344. *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991), *as amended on denial of reh’g* (Jan. 9, 1992).

345. *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995).

346. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 42 (2d Cir. 2007).

347. *Yerger v. Massachusetts Tpk. Auth.*, 395 F. App’x 878 (3d Cir. 2010).

348. *Am. Motors Sales Corp. v. Div. of Motor Vehicles of Com. of Va.*, 592 F.2d 219 (4th Cir. 1979).

- A Texas statute restricting the right of auto insurers to own and operate auto body shops in Texas.<sup>349</sup>
- A Texas statute prohibiting automobile manufacturers from acting as dealers in Texas.<sup>350</sup>
- California’s Passenger Car Rental Industry Tourism Assessment Program, requiring that rental car companies pay an assessment for each rental car transaction that commences at an airport or hotel location.<sup>351</sup>
- A State of Washington law requiring oil tankers over a certain size that do not satisfy the state’s design provisions be accompanied by a tug escort when moved in Puget Sound.<sup>352</sup>
- New York City Fire Department regulations prohibiting the transportation of hazardous gases by tank truck within the city except when no practical alternative route exists, and establishing a hazardous gas routing requirement for authorized transportation of gases.<sup>353</sup>
- A City of Cincinnati ordinance requiring the licensing of all trucks that tow vehicles from locations within the city and imposing certain safety requirements for tow trucks.<sup>354</sup>
- Municipal ordinances authorizing the inspection of meat delivery vehicles.<sup>355</sup>
- A Chicago, Illinois ordinance making it a criminal offense to sell phosphate detergents in the city.<sup>356</sup>

## Corporations, Finance, Law, and Real Estate

- Indiana, Michigan, Minnesota, and Virginia statutes governing corporate takeovers of business corporations chartered in the states.<sup>357</sup>
- A provision of the Kansas Uniform Consumer Credit Code (UCCC) that authorized regulation of short-term, “payday” loans over the Internet.<sup>358</sup>
- A City of Santa Monica ordinance prohibiting vacation rentals unless the primary resident remains in the dwelling.<sup>359</sup>
- A Utah statute requiring all attorneys acting as trustees of real property trust deeds in Utah to “maintain a place” within the state.<sup>360</sup>
- Connecticut statutes providing that any subsidiary of a foreign bank must register with the Commissioner of Banking prior to engaging in any “banking business.”<sup>361</sup>
- The application of Pennsylvania usury law to out-of-state companies via an investigative subpoena issued by the Pennsylvania Department of Banking and Securities.<sup>362</sup>

349. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007).

350. *Ford Motor Co. v. Texas Dep’t of Transp.*, 264 F.3d 493 (5th Cir. 2001).

351. *In re Tourism Assessment Fee Litig.*, 391 F. App’x 643 (9th Cir. 2010).

352. *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

353. *Nat’l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982).

354. *Interstate Towing Ass’n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154 (6th Cir. 1993).

355. *Chicago-Midwest Meat Ass’n v. City of Evanston*, 589 F.2d 278 (7th Cir. 1978).

356. *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975).

357. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 204 (6th Cir. 1985); *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172 (4th Cir. 1995).

358. *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008).

359. *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019).

360. *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009).

361. *Sears, Roebuck & Co. v. Brown*, 806 F.2d 399 (2d Cir. 1986).

362. *TitleMax of Delaware, Inc. v. Weissmann*, 24 F.4th 230 (3d Cir. 2022).

- An amendment to New Jersey’s unclaimed property statute retroactively reducing the presumptive abandonment period for travelers checks from 15 to 3 years.<sup>363</sup>
- The New Jersey Bureau of Securities’ application of the New Jersey Uniform Securities Law to prevent the sale of securities from New Jersey to buyers in other states where purchase of the securities was authorized by state regulators.<sup>364</sup>
- New Jersey rules of professional conduct requiring attorneys to maintain a bona fide office in New Jersey, regardless of their domicile, and requiring attendance at continuing legal education skills and methods courses.<sup>365</sup>
- Application of the New Jersey Franchise Practices Act to a multistate distribution agreement.<sup>366</sup>
- A Pennsylvania statute prohibiting companies which sell insurance in the state from having any affiliation with savings and loans institutions.<sup>367</sup>
- A Virginia rule allowing admission to the state’s bar without examination only for out-of-state attorneys who intend to practice full time in Virginia.<sup>369</sup>
- An Illinois requirement that nonresident attorneys pass the state bar exam, while new residents who have practiced law continuously for five of the last seven years in the state in which they were licensed can gain admission on motion alone.<sup>369</sup>
- An Arizona Supreme Court rule allowing admission without examination for licensed attorneys from states with reciprocal bar admission rules, but generally requiring licensed attorneys from nonreciprocal states to take the uniform bar exam.<sup>370</sup>
- A Maryland statute prohibiting any public service company from acquiring any part of capital stock of any public service company of the same class without prior authorization by the Maryland Public Service Commission.<sup>371</sup>
- The enforcement of Kentucky’s price-gouging laws against Kentucky-based sellers involved in Amazon sales to Kentucky consumers.<sup>372</sup>
- An Ohio statute that tolled the statute of limitations while a defendant was out of state.<sup>373</sup>
- The application of many different state and local minimum wage laws, resulting from flight attendants’ state and local minimum wage claims, to an airline.<sup>374</sup>
- The application of a California statute regulating wage statements provided to pilots and flight attendants whose principal place of work was in California.<sup>375</sup>
- A Florida licensing statute for architecture and interior design.<sup>376</sup>

363. *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012).

364. *A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 781 (3d Cir. 1999).

365. *Tolchin v. Supreme Ct. of the State of N.J.*, 111 F.3d 1099 (3d Cir. 1997).

366. *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3d Cir. 1994).

367. *Ford Motor Co. v. Ins. Com’r of Com. of Pa.*, 874 F.2d 926 (3d Cir. 1989).

368. *Goldfarb v. Supreme Ct. of Virginia*, 766 F.2d 859 (4th Cir. 1985).

369. *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985).

370. *Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Berch*, 773 F.3d 1037 (9th Cir. 2014).

371. *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985).

372. *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021).

373. *Garber v. Menendez*, 888 F.3d 839 (6th Cir. 2018).

374. *Hirst v. Skywest, Inc.*, 910 F.3d 961 (7th Cir. 2018).

375. *Ward v. United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021).

376. *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011).

- A New York law entitling resident shareholders to a shareholder list and compilation of a “NOBO” list of non-objecting beneficial owners of shares of an out-of-state corporation.<sup>377</sup>
- A Maryland law barring corporate ownership of funeral establishments and requiring licensure of individual owners.<sup>378</sup>
- A Kentucky statutory amendment shortening the presumptive period of abandonment of unclaimed traveler’s checks, thereby accelerating the date at which an issuer is required to remit outstanding funds to the state.<sup>379</sup>
- A City of Seattle ordinance classifying franchisees affiliated with large networks as large businesses under the city’s minimum-wage ordinance, thereby subjecting them to a steeper schedule of incremental wage increases over the next five years.<sup>380</sup>
- A Nevada statute under which ATM networks could not prohibit a Nevada bank from charging transaction fees.<sup>381</sup>
- A Connecticut law prohibiting the sale of gift cards with inactivity fees and expiration dates.<sup>382</sup>

## Miscellaneous

- A City of Chicago “puppy mill” ordinance limiting sources from which pet stores could obtain certain animals for resale.<sup>383</sup>
- A City of New York ordinance requiring pet shops to sell only animals acquired from breeders holding Class A licenses.<sup>384</sup>
- New York’s so-called “scaffold laws,” requiring “proper protection” and 241(6) (requiring “adequate protection”) for workers.<sup>385</sup>
- The Pennsylvania Feature Motion Picture Fair Business Practice Law, setting conditions on film licensing.<sup>386</sup>
- Provisions of an Ohio statute setting forth a trade screening requirement and competitive bidding guidelines for film distributors.<sup>387</sup>
- A voter-approved amendment to the Michigan Constitution requiring voter approval of new forms of gambling but exempting certain casinos and Indian tribal gaming.<sup>388</sup>
- An Indiana statute criminalizing the acquisition, receipt, sale, and transfer of aborted fetal tissue.<sup>389</sup>
- Licensing provisions of the Idaho Outfitters and Guides Act.<sup>390</sup>
- A county zoning regulation requiring that manufactured housing be built with 4:12 roof pitch to qualify for placement in most residential districts.<sup>391</sup>

377. *Sadler v. NCR Corp.*, 928 F.2d 48 (2d Cir. 1991).

378. *Brown v. Hovatter*, 561 F.3d 357 (4th Cir. 2009).

379. *Am. Exp. Travel Related Servs. Co. v. Kentucky*, 730 F.3d 628 (6th Cir. 2013).

380. *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).

381. *Valley Bank of Nevada v. Plus Sys., Inc.*, 914 F.2d 1186 (9th Cir. 1990).

382. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007).

383. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495 (7th Cir. 2017).

384. *New York Pet Welfare Ass’n, Inc. v. City of New York*, 850 F.3d 79 (2d Cir. 2017).

385. *Businesses for a Better New York v. Angello*, 341 F. App’x 701, 703 (2d Cir. 2009).

386. *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369 (3d Cir. 1986).

387. *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982).

388. *Northville Downs v. Granholm*, 622 F.3d 579, 583–84 (6th Cir. 2010).

389. *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537 (7th Cir. 2019).

390. *Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250 (9th Cir. 1983).

391. *Georgia Manufactured Hous. Ass’n, Inc. v. Spalding Cty., Ga.*, 148 F.3d 1304 (11th Cir. 1998).

## APPENDIX B

*Regulations, laws, and applications of law that survived dormant Commerce Clause challenges and/or could be vulnerable to invalidation,<sup>392</sup> organized by jurisdiction.*

### Alabama

- Prohibits the sale of infant formula after a specified window of time from production, to protect infants from foodborne illness<sup>393</sup>
- Protects flocks of birds from avian flu<sup>394</sup>
- Regulates the importation of garbage-fed swine to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>395</sup>

### Alaska

- Prohibits the importing, releasing, or exporting of live game without a permit<sup>396</sup>
- Protects native wildlife by requiring that plastic rings connecting beverage containers and other products be degradable<sup>397</sup>
- Protects flocks of birds from avian flu<sup>398</sup>

### Arizona

- Allows admission without examination for licensed attorneys from states with reciprocal bar admission rules; requires licensed attorneys from nonreciprocal states to take the uniform bar exam<sup>399</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>400</sup>

### Arkansas

- Requires tobacco manufacturers who did not participate in a multistate master settlement agreement to contribute to a healthcare costs escrow fund<sup>401</sup>
- Protects flocks of birds from avian flu<sup>402</sup>

### California

- Prohibits the sale of an ovum, zygote, embryo, or fetus for the purpose of cloning a human being<sup>403</sup>
- Sets low-carbon fuel standards and reporting requirements<sup>404</sup>

392. Laws listed in this appendix are purely illustrative and represent only a handful of examples of the laws and applications of law that could be vulnerable to invalidation depending on the outcome of the case.

393. Ala. Code § 20-1-27.

394. Ala. Admin. Code r. 80-3-6-.35; 80-3-18-.02 et seq.

395. Ala. Code § 2-15-211.

396. Alaska Admin. Code tit. 5, § 92.029.

397. Alaska Stat. Ann. § 46.06.090.

398. Alaska Admin. Code tit. 18, § 36.215.

399. Cited in *Nat'l Ass'n for the Advancement of Multijurisdiction Prac. v. Berch*, 773 F.3d 1037 (9th Cir. 2014).

400. Ariz. Rev. Stat. Ann. § 3-3491(E).

401. Cited in *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009).

402. Ark. Admin. Code § 125.00.11; Ark. Admin. Code § 125.00.15 et seq.

403. Cal. Health & Safety Code § 24185.

404. Cited in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019).

- Sets vessel fuel use regulations including requiring vessel operators to use cleaner fuels on vessels operating within 24 nautical miles of the California coast<sup>405</sup>
- Prohibits the importation, possession, and transportation of mountain lions<sup>406</sup>
- Prohibits the possession, sale, trade, or distribution of shark fins<sup>407</sup>
- Bans the sale of products that are the result of force-feeding birds to enlarge their livers beyond their normal size<sup>408</sup>
- Prohibits licensed opticians and optical companies from offering prescription eyewear at the same location as eye examinations and from advertising that eyewear and eye examinations are available in the same location<sup>409</sup>
- Requires television networks to caption videos on their websites<sup>410</sup>
- Requires a California-based employer to pay overtime to out-of-state employees<sup>411</sup>
- Sets fleet-average greenhouse gas emissions standards for new motor vehicles beginning in Model Year 2009<sup>412</sup>
- Requires that rental car companies pay an assessment for each rental car transaction that commences at an airport or hotel location<sup>413</sup>
- Regulates wage statements provided to pilots and flight attendants whose principal place of work is California<sup>414</sup>
- Sets greenhouse gas performance standard for electric power sold in California<sup>415</sup>
- Sets energy efficiency standards<sup>416</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>417</sup>
- Prohibits the sale of food or candy in wrappers containing lead<sup>418</sup>
- Establishes cap for greenhouse gas emissions<sup>419</sup>
- Prohibits the sale of infant formula after a specified window of time from production, to protect infants from foodborne illness<sup>420</sup>
- Ensures that pet food is free from contaminants<sup>421</sup>
- Protects flocks of birds from avian flu<sup>422</sup>

405. Cited in *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154 (9th Cir. 2011).

406. Cited in *Safari Club Int'l v. Becerra*, 702 F. App'x 607 (9th Cir. 2017).

407. Cited in *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136 (9th Cir. 2015).

408. Cited in *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013).

409. Cited in *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144 (9th Cir. 2012).

410. Cited in *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014).

411. Cited in *Sullivan v. Oracle Corp.*, 662 F.3d 1265 (9th Cir. 2011).

412. Cited in *Chamber of Com. of U.S. v. E.P.A.*, 642 F.3d 192, 196–97 (D.C. Cir. 2011).

413. Cited in *In re Tourism Assessment Fee Litig.*, 391 F. App'x 643 (9th Cir. 2010).

414. Cited in *Ward v. United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021).

415. Cal. Pub. Util. Code §§ 8340-41.

416. 20 Cal. C. Reg. §§ 1601-1609.

417. Cal. Health & Safety Code § 43013.3.

418. *Id.* § 110552.

419. 17 Cal. Code Reg. §§ 95801-96022.

420. Cal. Health & Safety Code § 114094.5.

421. Cal. Code Regs. tit. 17, §§ 19030; 19035.

422. *Id.* tit. 3, § 821.1.



- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>423</sup>
- Prohibits the sale of products containing hydrofluorocarbons (HFCs)<sup>424</sup>

## Colorado

- Requires that 20% of electricity sold to Colorado consumers come from renewable sources<sup>425</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>426</sup>
- Prohibits the importation of wildlife<sup>427</sup>

## Connecticut

- Requires the state's utilities to produce renewable energy or buy renewable energy credits from other renewable energy producers located within the region<sup>428</sup>
- Imposes the cost of an electronics recycling program on electronics manufacturers<sup>429</sup>
- Requires specific reporting by certain cigarette manufacturers as a prerequisite to selling cigarettes in the state<sup>430</sup>
- Requires any subsidiary of a foreign bank to register with the Commissioner of Banking prior to engaging in banking business<sup>431</sup>
- Prohibits the sale of gift cards with inactivity fees and expiration dates<sup>432</sup>
- Requires that 44% of all electricity sold in the state be from renewable energy sources by 2030<sup>433</sup>
- Sets renewable energy standards<sup>434</sup>
- Sets energy efficiency standards<sup>435</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>436</sup>
- Prohibits the importation of live fish, wild birds, mammals, reptiles, and invertebrates without a permit<sup>437</sup>
- Prohibits the sale of baby or toddler food stored in a container that contains intentionally added bisphenol-A ("BPA")<sup>438</sup>
- Protects flocks of birds from avian flu<sup>439</sup>

423. *Id.* tit. 3 § 1180.13.

424. Cal. Health & Safety Code § 39734.

425. Cited in *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015).

426. Colo. Rev. Stat. Ann. § 25-7-139.

427. *Id.* § 33-6-114.

428. Cited in *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017).

429. Cited in *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018).

430. Cited in *Grand River Enterprises Six Nations, Ltd. v. Boughton*, 988 F.3d 114 (2d Cir. 2021).

431. Cited in *Sears, Roebuck & Co. v. Brown*, 806 F.2d 399 (2d Cir. 1986).

432. Cited in *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007).

433. Conn. Gen. Stat. § 16-245a et seq.

434. *Id.* § 16a-3n.

435. *Id.* § 16a-48.

436. *Id.* § 22a-450a.

437. *Id.* § 26-55.

438. *Id.* § 21a-12b.

439. Conn. Agencies Regs. § 22-324-1.

## Delaware

- Bans product transfer facilities in Delaware’s coastal zone<sup>440</sup>
- Requires that 25% of electricity sold in-state to be from renewables by 2025, 28% by 2030, and 40% by 2035<sup>441</sup>
- Protects flocks of birds from avian flu<sup>442</sup>

## District of Columbia

- Bans the sale, use, or possession in a motor vehicle of any device designed to detect or counteract police radar<sup>443</sup>
- Requires 20% renewable energy by 2020, 100% by 2032; 2.5% solar by 2023, 5% by 2032, and 10% by 2041<sup>444</sup>
- Sets energy efficiency standards for lighting, food-holding cabinets and bottled-water dispensers<sup>445</sup>

## Florida

- Requires licensure for architects and interior designers<sup>446</sup>
- Establishes requirements for permits for drilling or exploring and extracting through well holes or by other means<sup>447</sup>
- Establishes natural gas storage facility permit application to inject gas into and recover gas from a natural gas storage reservoir<sup>448</sup>
- Protects flocks of birds from avian flu<sup>449</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>450</sup>

## Georgia

- Establishes energy efficiency standards for faucets, toilets, showerheads, and other appliances<sup>451</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>452</sup>
- Prohibits the sale of infant formula after a specified window of time from production, to protect infants from foodborne illness<sup>453</sup>
- Prohibits the sale of human remains<sup>454</sup>
- Ensures that pet food is free from contaminants and pet food additives are not harmful<sup>455</sup>

440. Cited in *Norfolk S. Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987).

441. Del. Code Ann. 26 § 354.

442. 3 Del. Admin. Code 901-2.0; 904-15.0 et seq.

443. Cited in *Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C. Cir. 1984).

444. D.C. Code § 34-1432.

445. *Id.* §§ 8-1771.01 et seq.

446. Cited in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011).

447. Fla. Stat. Ann. § 377.242.

448. *Id.* § 377.2407.

449. Fla. Admin. Code Ann. rr. 5C-3.001, 5C-16.001 et seq.

450. *Id.* r. 5C-23.003.

451. Ga. Code Ann. § 8-2-3.

452. *Id.* § 12-9-70.

453. Ga. Comp. R. & Regs. 40-7-1-13(3)(e).

454. Ga. Code Ann. § 16-12-160.

455. Ga. Comp. R. & Regs. 4058.06; 4058.02.

- Protect flocks of birds from avian flu<sup>456</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>457</sup>

## Hawaii

- Prohibits importation of invasive species, soil, and plants<sup>458</sup>
- Protects native wildlife by requiring that the plastic rings connecting beverage containers and other products be degradable<sup>459</sup>
- Protects flocks of birds from avian flu<sup>460</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>461</sup>

## Idaho

- Imposes licensing requirements for commercial raft outfitters and guides on the Snake River<sup>462</sup>
- Protects flocks of birds from avian flu<sup>463</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>464</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>465</sup>

## Illinois

- Prohibits horse slaughter for human consumption, or the import or export of horse meat for human consumption<sup>466</sup>
- Requires that nonresident attorneys pass the state bar exam, while allowing new residents who practiced law continuously for five of the last seven years in the state in which they are licensed to gain admission on motion alone<sup>467</sup>
- Requires that 25% of electricity sold in-state be from renewables by 2025-2026<sup>468</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline (requires product be labeled as containing MBTE)<sup>469</sup>
- Prohibits the sale of food or candy in wrappers containing lead<sup>470</sup>

456. *Id.* 40-13-1-.03 et seq.

457. *Id.* 40-13-2-.08.

458. Haw. Rev. Stat. Ann. § 150A-6.

459. *Id.* § 339-22.

460. Haw. Code R. § 4-28-8.

461. Haw. Code R. 4-17-16.

462. Cited in *Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250 (9th Cir. 1983).

463. Idaho Admin. Code r. 02.04.03.302.

464. *Id.* 02.04.21.400.

465. *Id.* 02.04.17.040.

466. Cited in *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

467. Cited in *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985).

468. Ill. Rev. Stat. ch. 220 § 5/8-103; 20 § 3855/1-75; 220 § 5/16-111.5.

469. 415 Ill. Comp. Stat. Ann. 122/15.

470. Ill. Rev. Stat. ch. 410 45/4.

- Bans the sale of children’s jewelry containing cadmium in excess of 75 parts per million<sup>471</sup>
- Restricts goods made with child labor or forced labor<sup>472</sup>
- Ensures that pet food is free from contaminants<sup>473</sup>
- Protect flocks of birds from avian flu<sup>474</sup>
- Regulates the phosphate content of fertilizer<sup>475</sup>

## Indiana

- Prohibits retailers from shipping wine to their customers via a motor carrier<sup>476</sup>
- Governs corporate takeovers of business corporations chartered in the state<sup>477</sup>
- Criminalizes the acquisition, receipt, sale, and transfer of aborted fetal tissue<sup>478</sup>
- Prohibits the sale of any lead-containing packaging that might be ingested by children<sup>479</sup>
- Regulates suitable location for drilling oil and gas and gas wells to guard against waste and endangerment<sup>480</sup>
- Protects flocks of birds from avian flu<sup>481</sup>

## Iowa

- Ensures that pet food is free from contaminants<sup>482</sup>
- Protects flocks of birds from avian flu<sup>483</sup>

## Kansas

- Curtails producers’ entitlements to assigned quantities of natural gas<sup>484</sup>
- Authorizes short-term “payday” loans over the internet<sup>485</sup>
- Sets requirements for marketing and labeling of eggs<sup>486</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>487</sup>
- Protect flocks of birds from avian flu<sup>488</sup>

471. 430 Ill. Comp. Stat. Ann. 140/15.

472. 30 Ill. Comp. Stat. Ann. 584/5; 30 Ill. Comp. Stat. Ann. 583/5.

473. Ill. Admin. Code tit. 8, § 200.130.

474. *Id.* 8, §§ 85.10, 85.125.

475. 505 Ill. Comp. Stat. Ann. 80/10 § 10.

476. Cited in *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455 (7th Cir. 2012).

477. Cited in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

478. Cited in *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537 (7th Cir. 2019).

479. Ind. Code Ann. § 16-41-39.4-7.

480. *Id.* § 14-37-7-3.5.

481. 345 Ind. Admin. Code 1-6-2; 4-4-4.

482. Iowa Admin. Code r. 2142.2(198).

483. *Id.* 21-64.185(163).

484. Cited in *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493 (1989).

485. Cited in *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008).

486. Kan. Admin. Regs. 4-11-3.

487. Kan. Stat. Ann. § 55-527.

488. Kan. Admin. Regs. § 9-27-1.

## Kentucky

- Regulates cost reasonableness of interstate utility's purchase of natural gas, and whether to grant a utility a cost tariff for gas supplied to its citizens<sup>489</sup>
- Prohibits price gouging by retailers<sup>490</sup>
- Shortens the presumptive period of abandonment of unclaimed traveler's checks<sup>491</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>492</sup>
- Establishes labeling requirements for eggs<sup>493</sup>
- Regulates the conditions under which oil and gas permits may be issued and exceptions thereto<sup>494</sup>
- Protects flocks of birds from avian flu<sup>495</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>496</sup>

## Louisiana

- Prohibits the sale of human remains<sup>497</sup>
- Prohibits the sale of human organs for transplant<sup>498</sup>
- Ensures that pet food is free from contaminants<sup>499</sup>
- Protects flocks of birds from avian flu<sup>500</sup>
- Requires gas sold in state to include a certain percentage of ethanol<sup>501</sup>

## Maine

- Operates a prescription drug rebate program<sup>502</sup>
- Allows for imposition of minimum prices upon milk dealers already required to pay minimum prices under federal Agricultural Marketing Agreement Act (AMAA)<sup>503</sup>
- Allows small wineries to sell to consumers in a face-to-face transaction but prohibits direct shipping from a winery to consumers<sup>504</sup>
- Prohibits automobile manufacturers, statutorily required to reimburse dealers at retail-repair rates for warranty repairs, from recovering their costs of reimbursement, including through state-specific wholesale vehicle surcharges<sup>505</sup>

489. Cited in *Kentucky W. Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988).

490. Cited in *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021).

491. Cited in *Am. Exp. Travel Related Servs. Co. v. Kentucky*, 730 F.3d 628 (6th Cir. 2013).

492. Ky. Rev. Stat. Ann. § 363.9053.

493. *Id.* § 260.630.

494. *Id.* § 353.610.

495. Ky. Admin. Regs. 20:040; 20:250.

496. 302 Ky. Admin. Regs. 22:080.

497. La. Stat. Ann. § 25:952.

498. *Id.* § 14:101.1.

499. 7 La. Admin. Code Pt XVII, 135.

500. *Id.* Pt XXI, 105.

501. La. Stat. Ann. § 3:4674.

502. Cited in *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003).

503. Cited in *Grant's Dairy—Maine, LLC v. Comm'r of Maine Dep't of Agric., Food & Rural Res.*, 232 F.3d 8 (1st Cir. 2000).

504. Cited in *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007).

505. Cited in *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30 (1st Cir. 2005).

- Establishes that by 2030, 80% of retail sales of electricity in the state will come from renewable resources; sets a target of 100% renewable by 2050<sup>506</sup>
- Establishes compliance standards for disposal and recycling of electronic goods<sup>507</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>508</sup>
- Protects flocks of birds from avian flu<sup>509</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>510</sup>
- Prohibits the sale of products containing hydrofluorocarbons (HFCs)<sup>511</sup>
- Bans the sale of ethanol-containing fuel (to take effect only if 10 other states impose similar laws)<sup>512</sup>

## Maryland

- Prohibits petroleum product producers and refiners from operating retail service stations in the state<sup>513</sup>
- Prohibits public service companies from acquiring capital stock of any public service company of the same class without prior authorization by the Maryland Public Service Commission<sup>514</sup>
- Bars corporate ownership of funeral establishments and requires licensure of individual owners<sup>515</sup>
- Establishes that 30.1% of electricity must be from renewable sources in 2022; 50% in 2030<sup>516</sup>
- Establishes energy efficiency standards for ceiling fans, washers, bottled water dispensers, and food-holding cabinets<sup>517</sup>
- Prohibits the sale of all childcare articles that contain intentionally added bisphenol-A (BPA)<sup>518</sup>
- Establishes labeling requirements for eggs<sup>519</sup>
- Bans the use of certain flame-retardant chemicals in furniture and mattresses<sup>520</sup>
- Prohibits the sale of electric switches, electric relays, and gas valve switches that contain mercury<sup>521</sup>
- Protects animal health and food safety by prohibiting the sale of commercial poultry feed containing arsenic<sup>522</sup>

506. Me. Rev. Stat. Ann. tit. 35-A § 3210.

507. *Id.* tit. 38 § 1610.

508. *Id.* tit. 38, § 585-l.

509. Code Me. R. tit. 01-001 Ch. 206, §§ 4-5.

510. *Id.*

511. Me. Rev. Stat. tit. 38, § 1613.

512. *Id.* tit. 10, § 1457-B.

513. Cited in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

514. Cited in *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985).

515. Cited in *Brown v. Hovatter*, 561 F.3d 357 (4th Cir. 2009).

516. Md. Code Ann., Pub. Util. § 7-701 *et. seq.*

517. Md. Gov. Code § 9-2006.

518. Md. Code Ann., Health-Gen. § 24-304.

519. Md. Code Ann., Agric. § 4-303.

520. Md. Code Ann., Health-Gen. §§ 24-306; 306.1.

521. Md. Code Ann., Env't § 6-905.3.

522. Md. Code Ann., Agric. § 6-107.3.

## Massachusetts

- Establishes a toll discount program offered to subscribers of Massachusetts Turnpike Authority's electronic toll payment system<sup>523</sup>
- Requires retail electricity suppliers to provide customers a minimum percentage of kilowatt-hours sales from Class I renewable energy generating sources (35% renewable by 2030 and an additional 1% each year after) and Class II sources (6.7% renewable by 2020)<sup>524</sup>
- Ensures that pet food is free from contaminants<sup>525</sup>

## Michigan

- Requires permitting for oceangoing vessels operating in the state's waters, to combat nuisance aquatic species<sup>526</sup>
- Requires prior authorization before prescribing a drug if a drug manufacturer fails to provide the state with rebates greater than those required under the national Medicaid agreement<sup>527</sup>
- Requires voter approval of new forms of gambling, while exempting certain casinos and Indian tribal gaming<sup>528</sup>
- Requires that 15% of electricity come from renewable sources by 2021<sup>529</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>530</sup>
- Prohibits the transport, sale, import, and export of fish, plants, and wildlife on state lists<sup>531</sup>
- Ensures that pet food is free from contaminants<sup>532</sup>
- Requires that restaurant grease and animal carcasses be transported in a leakproof container<sup>533</sup>
- Governs corporate takeovers of business corporations chartered in the state<sup>534</sup>

## Minnesota

- Grants incumbent electric utilities a right of first refusal to build and own electric transmission lines that connect to their existing facilities<sup>535</sup>
- Bans the retail sale of milk in plastic nonreturnable, nonrefillable containers<sup>536</sup>
- Governs corporate takeovers of business corporations<sup>537</sup>
- Prohibits the in-state sale of petroleum-based sweeping compounds<sup>538</sup>

523. Cited in *Yerger v. Massachusetts Tpk. Auth.*, 395 F. App'x 878 (3d Cir. 2010).

524. Mass. Gen. Laws Ann. ch. 25A §11F.

525. 330 Mass. Code Regs. 13.03; 13.06.

526. Cited in *Fednav, Ltd. v. Chester*, 547 F.3d 607 (6th Cir. 2008).

527. Cited in *Pharm. Rsch. & Mfrs. Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004).

528. Cited in *Northville Downs v. Granholm*, 622 F.3d 579, 583–84 (6th Cir. 2010).

529. Mich. Comp. Laws Ann. §§ 460.1001 et seq.

530. *Id.* § 290.643(5).

531. *Id.* § 324.36505.

532. Mich. Admin. Code R 285.635.13.

533. *Id.* 287.653.

534. Cited in *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201 (6th Cir. 1985).

535. Cited in *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020).

536. Cited in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

537. Cited in *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984).

538. Cited in *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 791, 794 (8th Cir. 1995).

- Sets renewable energy standards<sup>539</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>540</sup>
- Prohibits the sale of baby or toddler food stored in a container that contains intentionally added bisphenol-A (BPA)<sup>541</sup>
- Protects flocks of birds from avian flu<sup>542</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>543</sup>
- Requires gas sold in state to include a certain percentage of ethanol<sup>544</sup>

## Mississippi

- Protects flocks of birds from avian flu<sup>545</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>546</sup>

## Missouri

- Requires meatpackers to disclose any price offered to sellers of livestock for slaughter unless the meatpackers purchased livestock on a grade and yield basis<sup>547</sup>
- Sets renewable energy standards<sup>548</sup>
- Requires a natural gas utility to obtain regulatory approval before purchasing stock of other utility companies<sup>549</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>550</sup>
- Ensures that pet food is free from contaminants<sup>551</sup>
- Prohibits feeding untreated garbage to swine<sup>552</sup>
- Protects flocks of birds from avian flu<sup>553</sup>
- Requires gas sold in state to include a certain percentage of ethanol<sup>554</sup>

539. Minn. Stat. Ann. §§ 216B.1691; 216B.2401.

540. *Id.* § 239.761, subd. 6.

541. *Id.* § 325F.174.

542. Minn. R. 1721.0360.

543. Minn. Stat. Ann. § 35.82.

544. *Id.* § 239.791.

545. 2 Code Miss. R. Pt. 101, Subpt. 2, Ch. 12, sec. 112.02.

546. Miss. Code. Ann. § 69-11-5.

547. Cited in *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814 (8th Cir. 2001).

548. Mo. Rev. Stat. § 393.1030 (15% of electric sales in state must be from renewable sources each year).

549. Cited in *S. Union Co. v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503 (8th Cir. 2002).

550. Mo. Ann. Stat. § 414.043.

551. Mo. Code Regs. Ann. tit. 2, § 70-31.070.

552. *Id.* § 30-4.010.

553. *Id.* § 30-2.010.

554. Mo. Ann. Stat. § 414.255.



## Montana

- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>555</sup>
- Protects flocks of birds from avian flu<sup>556</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>557</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>558</sup>

## Nebraska

- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>559</sup>
- Protects flocks of birds from avian flu<sup>560</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>561</sup>

## Nevada

- Bars ATM networks from prohibiting a Nevada bank from charging transaction fees<sup>562</sup>
- Sets energy efficiency standards<sup>563</sup>
- Sets renewable energy standards<sup>564</sup>
- Prohibits the sale of human organs for transplant<sup>565</sup>
- Protects flocks of birds from avian flu<sup>566</sup>

## New Hampshire

- Sets renewable energy standards<sup>567</sup>
- Sets energy efficiency standards<sup>568</sup>
- Authorizes commissioner to promote regional or federal efforts to reduce the contamination threat posed by methyl tert-butyl ether (MTBE) in gasoline<sup>569</sup>
- Protects flocks of birds from avian flu<sup>570</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>571</sup>

555. Mont. Code Ann. § 82-15-102.

556. Mont. Admin. R. 32.3.104.

557. *Id.* 32.3.219169.

558. Mont. Code Ann. §§ 81-2-501 *et. seq.*

559. Neb. Rev. Stat. Ann. § 66-1227.

560. 23 Neb. Admin. Code Ch. 1, § 004.

561. 23 Neb. Admin. Code Ch. 10, § 005.

562. Cited in *Valley Bank of Nevada v. Plus Sys., Inc.*, 914 F.2d 1186 (9th Cir. 1990).

563. Nev. Rev. Stat. Ann. § 701.768.

564. *Id.* § 704.7821 (currently, 29% of electricity from renewable sources; 2024-2026, at least 32%; 2027-2029, at least 42%; by 2030, at least 50%).

565. *Id.* § 201.460.

566. Nev. Admin. Code § 441A.085.

567. N.H. Rev. Stat. Ann. § 362-F (by 2025, 25.2% made up of threshold proportions of thermal, new solar, existing biomass/methane, and existing small hydroelectric).

568. *Id.* § 339-G:3 (bottled water dispensers and food-holding cabinets).

569. *Id.* § 485:16-d.

570. N.H. Code Admin. R. Agric. 2114.01.

571. *Id.* 2110.01.

## New Jersey

- Retroactively reduces the presumptive abandonment period for travelers checks from 15 to three years<sup>572</sup>
- Prevents the sale of securities from New Jersey to buyers in other states where purchase of the securities may be authorized by state regulators<sup>573</sup>
- Requires attorneys to maintain a bona fide office in New Jersey, regardless of their domicile, and requires attendance at continuing legal education courses<sup>574</sup>
- Applies the New Jersey Franchise Practices Act to a multistate distribution agreement<sup>575</sup>
- Sets renewable energy standards<sup>576</sup>
- Requires egg labeling<sup>577</sup>
- Prohibits the sale of infant formula after a specified window of time from production, to protect infants from foodborne illness<sup>578</sup>
- Imposes cost of recycling program on electronics manufacturers<sup>579</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>580</sup>
- Restricts commerce in stolen property<sup>581</sup>
- Protects flocks of birds from avian flu<sup>582</sup>
- Sets standards for post-consumer recycled content in plastic bags, trash bags, and beverage containers<sup>583</sup>
- Prohibits the sale of products containing hydrofluorocarbons (HFCs)<sup>584</sup>

## New Mexico

- Sets renewable energy standards<sup>585</sup>
- Grants the energy commission the ability to direct public utilities to evaluate and implement cost-effective programs that reduce energy demand and consumption<sup>586</sup>
- Protects flocks of birds from avian flu<sup>587</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>588</sup>

572. Cited in *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012).

573. Cited in *A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780 (3d Cir. 1999).

574. Cited in *Tolchin v. Supreme Ct. of the State of N.J.*, 111 F.3d 1099 (3d Cir. 1997).

575. Cited in *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3d Cir. 1994).

576. N.J. Stat. Ann. § 48:3-87 (21% of kilowatt hours sold from Class I renewable energy sources by 2020; 35% by 2025; 50% by 2030).

577. *Id.* § 24:11-5.

578. *Id.* § 56:8-2.27.

579. N.J. Admin. Code § 7:26A-13.9.

580. N.J. Stat. Ann. § 26:2C-8.22.

581. *Id.* § 2C:20-7.

582. N.J. Admin. Code §§ 2:3–1.1; 2:3–7.1 et seq.; 2:5–4.1.

583. N.J. Stat. Ann. §§ 13:1E-99.138 et seq.

584. *Id.* § 26:2C-61.

585. N.M. Stat. Ann. §§ 62-16-4; 62-15-1 et seq. (40% renewables by 2025; 80% renewables by 2040).

586. *Id.* § 62-17-5.

587. N.M. Admin. Code 21.30.4.9.

588. *Id.* 21.32.4.14.

## New York

- Conditions tax stamp issuance on a cigarette manufacturer either being a participant in the multistate tort suit settlement agreement or making escrow payments required of nonparticipants<sup>589</sup>
- Prohibits trawlers from taking, landing, or possessing lobsters in Long Island Sound<sup>590</sup>
- Prohibits cigarette sellers and common and contract carriers from shipping and transporting cigarettes directly to New York consumers<sup>591</sup>
- Requires, subject to certain conditions, pharmacists to dispense cheaper generic drugs in lieu of trade-name drugs in filling doctors' prescriptions<sup>592</sup>
- Entitles resident shareholders to a shareholder list and compilation of a "NOBO" list of non-objecting beneficial owners of shares of an out-of-state corporation<sup>593</sup>
- Requires scaffolding for construction workers<sup>594</sup>
- Sets energy efficiency standards<sup>595</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>596</sup>
- Bans the use of certain flame-retardant chemicals in furniture and mattresses<sup>597</sup>
- Restricts permissible lead levels in glazed ceramic tableware, crystal, and china<sup>598</sup>
- Prohibits the sale of cosmetic products and personal care products containing the likely human carcinogen 1,4-dioxane<sup>599</sup>
- Prohibits the in-state sale of goods made with child labor<sup>600</sup>
- Restricts public museums' ability to remove artwork and sell it<sup>601</sup>
- Ensures that pet food is free from contaminants<sup>603</sup>
- Protects flocks of birds from avian flu<sup>603</sup>
- Restricts the sale of pavement products containing coal tar<sup>604</sup>

## North Carolina

- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>605</sup>
- Sets renewable energy standards<sup>606</sup>

589. Cited in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

590. Cited in *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303 (2d Cir. 1994).

591. Cited in *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

592. Cited in *Pharm. Soc. of State of New York, Inc. v. Lefkowitz*, 586 F.2d 953 (2d Cir. 1978).

593. Cited in *Sadler v. NCR Corp.*, 928 F.2d 48 (2d Cir. 1991).

594. Cited in *Businesses for a Better New York v. Angello*, 341 F. App'x 701 (2d Cir. 2009).

595. N.Y. Energy Law § 16-102 *et. seq.*

596. N.Y. Agric. & Mkts. Law § 192-g.

597. N.Y. Env't Conserv. Law §§ 37-1001 *et. seq.*

598. N.Y. Pub. Health Law § 1376-a.

599. N.Y. Env't Conserv. Law § 37-0117.

600. N.Y. Gen. Bus. Law § 69-a.

601. N.Y. Comp. Codes R. & Regs. tit. 8, § 3.27(c)(7).

602. *Id.* tit. 1, § 257.17.

603. N.Y. Comp. Codes R. & Regs. tit. 1, §§ 45.1; 45.5.

604. N.Y. Env't Conserv. Law § 37-0119.

605. N.C. Gen. Stat. Ann. § 119-26.3.

606. *Id.* § 62-133.8 (12.5% renewable).

- Requires egg labeling<sup>607</sup>
- Ensures that pet food is free from contaminants<sup>608</sup>
- Protects flocks of birds from avian flu<sup>609</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>610</sup>

## North Dakota

- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>611</sup>
- Protects flocks of birds from avian flu<sup>612</sup>

## Ohio

- Exempts state-regulated natural gas utilities (known as “local distribution companies”) from sales and use taxes otherwise imposed on sellers of natural gas<sup>613</sup>
- Requires the registration of a nonresident as a wholesale pharmaceutical distributor where the person possesses a reciprocal drug registration certificate or license issued by another state with comparable qualifications to Ohio’s<sup>614</sup>
- Attempts to curb allegedly misleading labeling of dairy products with regard to nonuse of artificial hormone, antibiotics, or pesticides<sup>615</sup>
- Sets forth a trade screening requirement and competitive bidding guidelines for film distributors<sup>616</sup>
- Sets renewable energy standards<sup>617</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>618</sup>
- Requires egg labeling<sup>619</sup>
- Prohibits the sale of infant formula after a specified window of time from production, to protect infants from foodborne illness<sup>620</sup>
- Ensures that pet food is free from contaminants<sup>621</sup>
- Protects flocks of birds from avian flu<sup>622</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>623</sup>

607. *Id.* § 106-245.13 *et seq.*

608. 2 N.C. Admin. Code 9D.0102.

609. 2 N.C. Admin. Code 52B.0603; 52C.0603.

610. 2 N.C. Admin. Code 52B.0207.

611. N.D. Cent. Code Ann. § 23.1-13-05.

612. N.D. Admin. Code 48.1-09-03-01; 48.1-10-01-01.

613. Cited in *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

614. Cited in *Ferndale Lab'ys, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996).

615. Cited in *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010).

616. Cited in *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982).

617. Ohio Rev. Code Ann. § 4928.64 (8.5% renewable by 2026).

618. *Id.* § 3704.12.

619. *Id.* § 925.021.

620. *Id.* § 3715.521.

621. Ohio Admin. Code 901:5719.

622. *Id.* 901:1-21-02.

623. Ohio Rev. Code Ann. § 942.05.

## Oklahoma

- Caps escrow funds refunded annually to tobacco manufacturers that did not participate in states' master settlement agreement with other tobacco manufacturers<sup>624</sup>
- Sets renewable energy standards<sup>625</sup>
- Sets conditions on well spacing and drilling units for oil and gas<sup>626</sup>
- Protects flocks of birds from avian flu<sup>627</sup>

## Oregon

- Regulates the production and sale of transportation fuels based on greenhouse gas emissions<sup>628</sup>
- Sets renewable energy standards<sup>629</sup>
- Sets energy efficiency standards<sup>630</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>631</sup>
- Requires retail electricity providers to reduce carbon dioxide emissions by 80% by 2030; 90% by 2035; and 100% by 2040<sup>632</sup>
- Prohibits the sale of human organs for transplant<sup>633</sup>
- Protects flocks of birds from avian flu<sup>634</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>635</sup>
- Prohibits the sale of containers that contain less than a specific amount of post-consumer recycled content<sup>636</sup>
- Requires gas sold in state to include a certain percentage of ethanol<sup>637</sup>

## Pennsylvania

- Enforces minimum wholesale and retail milk prices pursuant to Pennsylvania Milk Marketing Law<sup>638</sup>
- Applies usury law to out-of-state companies doing business in Pennsylvania with Pennsylvanians<sup>639</sup>
- Prohibits companies that sell insurance in the state from having any affiliation with savings and loans institutions<sup>640</sup>

624. Cited in *KT & G Corp v. Att'y Gen. of State of Okla.*, 535 F.3d 1114 (10th Cir. 2008).

625. Okla. Stat. Ann. tit. 17, § 801.4 (target for 15% of all installed electricity generation be from renewable sources by 2015).

626. *Id.* tit. 52, § 87.1.

627. Okla. Admin. Code § 35:15-11-41.

628. Cited in *Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018).

629. Or. Rev. Stat. Ann. § 469A.052.

630. *Id.* § 469.233.

631. *Id.* § 646.910.

632. *Id.* § 469A.410.

633. *Id.* § 97.981.

634. Org. Admin. R. 603-011-0375; 333-018-0015; 603-011-0212.

635. Or. Rev. Stat. Ann. § 600.095.

636. *Id.* §§ 459A.550 (glass containers manufactured must contain at least 50% recycled glass); 459A.655 (similar requirement for rigid plastic containers sold in state).

637. *Id.* § 646.913.

638. Cited in *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd.*, 462 F.3d 249 (3d Cir. 2006).

639. Cited in *TitleMax of Delaware, Inc. v. Weissmann*, 24 F.4th 230 (3d Cir. 2022).

640. Cited in *Ford Motor Co. v. Ins. Com'r of Com. of Pa.*, 874 F.2d 926 (3d Cir. 1989).

- Sets conditions on film licensing<sup>641</sup>
- Sets renewable energy standards<sup>642</sup>
- Requires egg labeling<sup>643</sup>
- Protects flocks of birds from avian flu<sup>644</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>645</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>646</sup>
- Requires gas sold in state to include a certain percentage of ethanol<sup>647</sup>

## Rhode Island

- Prohibits liquor franchises and franchise-type business activities by holders of liquor licenses<sup>648</sup>
- Sets renewable energy standards<sup>649</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>650</sup>
- Protects flocks of birds from avian flu<sup>651</sup>

## South Carolina

- Requires electronics recycling<sup>652</sup>
- Protects flocks of birds from avian flu<sup>653</sup>

## South Dakota

- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>654</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>655</sup>

## Tennessee

- Prohibits optometrists from practicing in, or in conjunction with, any retail store<sup>656</sup>
- Bans the direct shipment of alcoholic beverages, including wine, to consumers<sup>657</sup>

641. Cited in *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369 (3d Cir. 1986).

642. 73 Pa. Stat. Ann. § 1648.3 (requiring electric energy sold to retail electric customers be generated from alternative energy sources and in the percentage specified).

643. 7 Pa. Code § 88.5.

644. *Id.* § 3.113.

645. *Id.* § 3.133.

646. 3 Pa. Stat. and Cons. Stat. Ann. § 2352.

647. 73 Pa. Stat. Ann. § 1650.4.

648. Cited in *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007).

649. 39 R.I. Gen. Laws Ann. §§ 39-26.6-1 et seq. (14.5% renewable sources by 2019, with increases of 1.5% each year until 38.5% by 2035).

650. 31 R.I. Gen. Laws Ann. § 31-37-7.1.

651. R.I. Code R. §§ 25-3-27:1.14; 25-15-100, App. IV.

652. S.C. Code Ann. § 48-60-55.

653. S.C. Code Ann. Regs 27-1011, 27-1014.

654. S.D. Codified Laws § 37-2-33.

655. S.D. Admin. R. 12:68:09:05.

656. Cited in *LensCrafters, Inc. v. Robinson*, 403 F.3d 798 (6th Cir. 2005).

657. Cited in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008).

- Prohibits the sale of human remains<sup>658</sup>
- Ensures that pet food is free from contaminants<sup>659</sup>
- Protects flocks of birds from avian flu<sup>660</sup>

## Texas

- Prohibits the processing, sale, or transfer of horse meat for human consumption<sup>661</sup>
- Bans all public corporations from holding a package store permit allowing the retail sale of liquor in Texas<sup>662</sup>
- Restricts the right of auto insurers to own and operate auto body shops in Texas<sup>663</sup>
- Prohibits automobile manufacturers from acting as dealers in Texas<sup>664</sup>
- Requires egg labeling<sup>665</sup>
- Prohibits the sale of human organs for transplant<sup>666</sup>
- Prohibits the sale of human fetal tissue<sup>667</sup>
- Ensures that pet food is free from contaminants<sup>668</sup>
- Protects flocks of birds from avian flu<sup>669</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>670</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>671</sup>

## Utah

- Prohibits contact lens manufacturers from enforcing their Uniform Pricing Policies against retailers in Utah<sup>672</sup>
- Requires all attorneys acting as trustees of real property trust deeds in Utah to maintain a place within state<sup>673</sup>
- Protects flocks of birds from avian flu<sup>674</sup>

658. Tenn. Code Ann. § 11-6-118.

659. Tenn. Comp. R. & Regs. 0080-05-05-18.

660. Tenn. Comp. R. & Regs. 0080-02-01-.10; 0080-02-16-.02.

661. Cited in *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326 (5th Cir. 2007).

662. Cited in *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 945 F.3d 206 (5th Cir. 2019).

663. Cited in *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007).

664. Cited in *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001).

665. Tex. Agric. Code Ann. § 132.044.

666. Tex. Penal Code Ann. § 48.02.

667. Tex. Penal Code Ann. § 48.03.

668. 4 Tex. Admin. Code § 63.2.

669. *Id.* §§ 51.15; 54.9.

670. *Id.* § 51.14.

671. Tex. Health & Safety Code Ann. § 144.023.

672. Cited in *Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App'x 736 (10th Cir. 2016).

673. Cited in *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009).

674. Utah Admin. Code r. R58-6-4.

- Requires egg labeling<sup>675</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>676</sup>

## Vermont

- Sets renewable energy standards<sup>677</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>678</sup>
- Prohibits the sale of packaging containing heavy metals<sup>679</sup>
- Ensures that pet food is free from contaminants<sup>680</sup>
- Protects flocks of birds from avian flu<sup>681</sup>
- Prohibits the sale of products containing hydrofluorocarbons (HFCs)<sup>682</sup>

## Virginia

- Requires a certificate of need (CON) to establish or expand medical facilities and services<sup>683</sup>
- Requires tobacco manufacturers who did not participate in a multistate master settlement agreement to contribute to a healthcare costs escrow fund<sup>684</sup>
- Prevents a motor vehicle manufacturer or distributor from granting an additional franchise for a particular line-make of vehicle in a trade area already served by one or more dealers carrying the same line if it is determined that the market will not support all of the dealerships<sup>685</sup>
- Governs corporate takeovers of business corporations chartered in the states<sup>686</sup>
- Allows admission to the State's bar without examination only for out-of-state attorneys who intend to practice full time in Virginia<sup>687</sup>
- Restricts commerce in stolen property<sup>688</sup>
- Protects flocks of birds from avian flu<sup>689</sup>

## Washington

- Requires a certificate of public convenience and necessity in order to collect and transport solid waste<sup>690</sup>

675. Utah Admin. Code r. R70-410-3.

676. Utah Admin. Code r. R58-1-8.

677. Vt. Stat. Ann. tit. 30 §§ 8001 et seq. (55% renewable by 2017; 75% by 2032).

678. *Id.* tit. 10, § 577.

679. *Id.* § 6620a.

680. 2-3 Vt. Code R. § 100.

681. 2-4 Vt. Code R. § 301:III.

682. Vt. Stat. Ann. tit. 10, § 586.

683. Cited in *Colon Health Centers of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016).

684. Cited in *Star Sci. Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002).

685. Cited in *Am. Motors Sales Corp. v. Div. of Motor Vehicles of Com. of Va.*, 592 F.2d 219 (4th Cir. 1979).

686. Cited in *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172 (4th Cir. 1995).

687. Cited in *Goldfarb v. Supreme Ct. of Virginia*, 766 F.2d 859 (4th Cir. 1985).

688. Va. Code Ann. § 18.2-108.

689. 2 Va. Admin. Code §§ 5-30-30; 5-141-60.

690. Cited in *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995).



- Prohibits the importation, possession, propagation, transfer, or release of listed “deleterious” exotic wildlife<sup>691</sup>
- Requires that elective percutaneous coronary interventions (PCI) be performed only at hospitals having a minimum annual volume of 300 procedures<sup>692</sup>
- Requires oil tankers over a certain size that do not satisfy the state’s design provisions be accompanied by a tug escort when moved in Puget Sound<sup>693</sup>
- Sets renewable energy standards<sup>694</sup>
- Sets low-carbon fuel standards<sup>695</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>696</sup>
- Protects flocks of birds from avian flu<sup>697</sup>
- Sets standards for post-consumer recycled content in plastic containers and trash bags<sup>698</sup>
- Prohibits the sale of products containing hydrofluorocarbons (HFCs)<sup>699</sup>
- Requires gas sold in state to include a certain percentage of ethanol<sup>700</sup>

## West Virginia

- Protects flocks of birds from avian flu<sup>701</sup>
- Prohibits feeding untreated garbage to swine<sup>702</sup>

## Wisconsin

- Prohibits licensed tobacco wholesalers, but not other wholesalers, from deducting trade discounts when calculating their “cost to wholesaler” under state’s Unfair Sales Act<sup>703</sup>
- Requires butter sold in the state to be graded by either a Wisconsin-licensed butter grader or the United States Department of Agriculture<sup>704</sup>
- Requires egg labeling<sup>705</sup>
- Prohibits the sale of human organs for transplant<sup>706</sup>
- Sets renewable energy standards<sup>707</sup>
- Sets limits for methyl tert-butyl ether (MTBE) in gasoline<sup>708</sup>

691. Cited in *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994).

692. Cited in *Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 731 F.3d 843 (9th Cir. 2013).

693. Cited in *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

694. Wash. Rev. Code Ann. § 19.285.040; Wash. Admin. Code 480-109-010 *et. seq.*; 194-37-010 *et. seq.* (15% renewable sources by 2020; 100% greenhouse gas-neutral by 2030; 100% renewable or zero-emitting by 2045).

695. Wash. Rev. Code Ann. §§ 70A.535.001 *et. seq.*

696. *Id.* § 19.112.100.

697. Wash. Admin. Code 16-54-145; 16-70-020t.

698. Wash. Rev. Code Ann. § 70A.245.020.

699. *Id.* §§ 70A.60.060; 70A.60.080.

700. *Id.* § 19.112.120.

701. W. Va. Code R. 61-1-8.

702. W. Va. Code Ann. § 19-9A-2.

703. Cited in *Eby-Brown Co., LLC v. Wisconsin Dep't of Agric.*, 295 F.3d 749 (7th Cir. 2002), *as amended on denial of reh'g* (Aug. 12, 2002).

704. Cited in *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018).

705. Wis. Admin. Code ATCP § 88.34.

706. Wis. Stat. Ann. § 146.345.

707. *Id.* §§ 196.377-78 (10% sold in state must be from renewable sources).

708. *Id.* § 168.04.

- Protects flocks of birds from avian flu<sup>709</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>710</sup>
- Protects public and animal health by imposing agricultural product shipping and sanitation requirements<sup>711</sup>
- Sets standards for recycled or remanufactured content in plastic containers<sup>712</sup>

## Wyoming

- Imposes rules and regulations governing drilling units for oil and gas<sup>713</sup>
- Regulates the importation of garbage-fed swine so as to protect animal health, prevent zoonotic disease transmission, and protect food safety<sup>714</sup>

## Counties and Municipalities

- Lebanon County's flow control ordinances that benefited the refuse authority's public waste disposal site<sup>715</sup>
- Horry County's flow control ordinance, which prohibited disposal of waste generated in the county at any site other than a designated publicly owned landfill<sup>716</sup>
- The City of Baltimore's zoning ordinance, which limited the operator of a medical waste facility to medical waste generated within the city<sup>717</sup>
- An Alameda County ordinance requiring prescription drug manufacturers to operate and finance a program to collect, transport, and dispose of any unwanted prescription medication<sup>718</sup>
- An Alameda County ordinance banning possession of firearms and ammunition on county-owned property<sup>719</sup>
- A City of San Francisco ban on the sale of fur products<sup>720</sup>
- A City of San Francisco ordinance requiring city contractors to provide nondiscriminatory benefits to employees with registered domestic partners<sup>721</sup>
- A City of Berkeley, California living wage ordinance<sup>722</sup>
- A City of Berkeley ban on natural gas infrastructure in new buildings<sup>723</sup>
- A City of Los Angeles minimum wage ordinance<sup>724</sup>

709. Wis. Admin. Code Amin. Disease & Movement § 10.83.

710. Wis. Stat. Ann. § 95.10.

711. Wis. Admin. Code ATCP § 57.20.

712. Wis. Stat. Ann. § 100.297.

713. Wyo. Stat. Ann. § 30-5-109.

714. Wyo. Admin. Code 051.0001.8 § 21.

715. Cited in *Lebanon Farms Disposal, Inc. v. Cty. of Lebanon*, 538 F.3d 241 (3d Cir. 2008).

716. Cited in *Sandlands C & D LLC v. Cty. of Horry*, 737 F.3d 45 (4th Cir. 2013).

717. Cited in *Med. Waste Assocs. Ltd. P'ship v. Mayor & City Council of Baltimore*, 966 F.2d 148 (4th Cir. 1992), as amended (July 17, 1992).

718. Cited in *Pharm. Rsch. & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037 (9th Cir. 2014).

719. Cited in *Nordyke v. King*, 44 P.3d 133 (Cal. 2002).

720. Cited in *Int'l Fur Trade Fed'n v. City & Cty. of San Francisco*, 472 F. Supp. 3d 696 (N.D. Cal. 2020).

721. Cited in *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461 (9th Cir. 2001).

722. Cited in *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004).

723. Cited in *California Rest. Ass'n v. City of Berkeley*, 547 F. Supp. 3d 878 (N.D. Cal. 2021).

724. Cited in *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958 (9th Cir. 2016).

- A County of Los Angeles ordinance banning the sale of firearms and ammunition on county-owned property<sup>725</sup>
- A County of Los Angeles ordinance banning flavored tobacco products<sup>726</sup>
- A City of Coachella, California ordinance mandating that agricultural and grocery workers employed by designated employers in the area be paid premium pay during the coronavirus pandemic<sup>727</sup>
- A City of Long Beach, California ordinance mandating that agricultural and grocery workers employed by designated employers in the area be paid premium pay during the coronavirus pandemic<sup>728</sup>
- A City of Long Beach, California ordinance restricting municipal airport noise<sup>729</sup>
- A City of West Hollywood, California ordinance banning “junk” guns<sup>730</sup>
- A City of Santa Monica, California ordinance prohibiting vacation rentals unless the primary resident remained in the dwelling<sup>731</sup>
- A City of Lafayette, California ordinance regulating the location and operation of firearms dealers<sup>732</sup>
- A City of Turlock, California ban on big-box discount super stores<sup>733</sup>
- A Chicago ordinance prohibiting the sale of spray paint and jumbo indelible markers within city limits<sup>734</sup>
- A Chicago ordinance prohibiting the sale of phosphate detergents in the city<sup>735</sup>
- A Chicago “puppy mill” ordinance limiting the sources from which pet stores can obtain certain animals for resale<sup>736</sup>
- A Town of East Hampton, New York law imposing permitting and vessel use requirements on ferry operators<sup>737</sup>
- New York City Fire Department regulations prohibiting the transportation of hazardous gases by tank truck within the city except when no practical alternative route exists, and establishing a hazardous gas routing requirement<sup>738</sup>
- A City of New York ordinance requiring pet shops to sell only animals acquired from breeders holding Class A licenses<sup>739</sup>
- A City of Cincinnati ordinance requiring the licensing of and imposing safety requirements on tow trucks<sup>740</sup>
- Municipal ordinances authorizing the inspection of meat delivery vehicles<sup>741</sup>

725. Cited in *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120 (Cal. 2002).

726. Cited in *R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542 (9th Cir. 2022).

727. Cited in *W. Growers Ass’n v. City of Coachella*, 548 F. Supp. 3d 948 (C.D. Cal. 2021).

728. Cited in *California Grocers Ass’n v. City of Long Beach*, 521 F. Supp. 3d 902 (C.D. Cal. 2021).

729. Cited in *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991), *as amended on denial of reh’g* (Jan. 9, 1992).

730. Cited in *Cal. Rifle and Pistol Ass’n, Inc. v. City of W. Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998).

731. Cited in *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019).

732. Cited in *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420 (Cal. Ct. App. 1997).

733. Cited in *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006).

734. Cited in *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995).

735. Cited in *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975).

736. Cited in *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495 (7th Cir. 2017).

737. Cited in *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 42 (2d Cir. 2007).

738. Cited in *Nat’l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982).

739. Cited in *New York Pet Welfare Ass’n, Inc. v. City of New York*, 850 F.3d 79 (2d Cir. 2017).

740. Cited in *Interstate Towing Ass’n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154 (6th Cir. 1993).

741. Cited in *Chicago-Midwest Meat Ass’n v. City of Evanston*, 589 F.2d 278 (7th Cir. 1978).

- A City of Seattle ordinance classifying franchisees affiliated with large networks as large businesses under the city's minimum wage ordinance<sup>742</sup>
- A Spalding County zoning regulation requiring that manufactured housing in residential-zoned districts be built with 4:12 roof pitch<sup>743</sup>
- A Madison, Wisconsin ban on phosphorus in lawn and turf fertilizers<sup>744</sup>
- A Town of Opal, Wyoming ordinance prohibiting installation of any manufactured home that was older than 10 years at time of permit application<sup>745</sup>
- A City of La Porte, Texas ordinance excluding manufactured homes from a certain zoning classification<sup>746</sup>
- A City of South Portland, Maine ordinance prohibiting the loading of crude oil onto tankers in the City's harbor<sup>747</sup>

742. Cited in *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).

743. Cited in *Georgia Manufactured Hous. Ass'n, Inc. v. Spalding Cty., Ga.*, 148 F.3d 1304 (11th Cir. 1998).

744. Cited in *Croplife Am., Inc. v. City of Madison*, 432 F.3d 732, 735 (7th Cir. 2005).

745. Cited in *Schanzenbach v. Town of Opal, Wyo.*, 706 F.3d 1269 (10th Cir. 2013).

746. Cited in *Texas Mfrs. Hous. Ass'n, Inc. v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996).

747. Cited in *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264 (D. Me. 2018), amended, No. 2:15-CV-00054-JAW, 2018 WL 4901162 (D. Me. Oct. 9, 2018).