November 13, 2023

The Honorable Debbie Stabenow
Chairwoman
Senate Committee on Agriculture,
Nutrition and Forestry
328-A Russell Senate Office Building
Washington, DC 20510

The Honorable John Boozman
Ranking Member
Senate Committee on Agriculture,
Nutrition and Forestry
328-A Russell Senate Office Building
Washington, DC 20510

The Honorable Glenn "GT" Thompson
Chairman
House Committee on Agriculture
1301 Longworth House Office Building
Washington, DC 20515

The Honorable David Scott
Ranking Member
House Committee on Agriculture
1010 Longworth House Office Building
Washington, DC 20515

Re: Ending Agricultural Trade Suppression Act ("EATS Act") (S. 2019/H.R. 4417)

Dear Members of Congress,

We write as individual law professors to express our joint concern regarding the Ending Agricultural Trade Suppression Act ("EATS Act") (S. 2019/H.R. 4417). It is the opinion of the undersigned law professors at universities across the country that, should this legislation be enacted, it would nullify or undermine countless laws across the country, threatening public health and safety and states' abilities to govern. We respectfully submit this letter as individual law professors and not as representatives of our respective law schools or universities.

I. Background

The EATS Act is the latest iteration of Rep. Steve King's previous failed proposals to dismantle state and local agricultural laws. These efforts date back to a failed amendment to the 2014 Farm Bill. The currently proposed EATS Act is very similar to a bill introduced in 2018 (Protect Interstate Commerce Act (H.R. 4879/H.R. 3599)), which also failed both as a standalone bill and as an amendment to the 2018 Farm Bill. Some of the current signatories wrote to members of the Senate and House Committees on Agriculture with concerns regarding these proposals when they appeared as an amendment in the Farm Bill in 2013 and as standalone bills in 2018.[1]

These efforts have again been renewed in the form of the EATS Act in response to the recent Supreme Court decision in *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023). The Court in that case upheld California's Proposition 12—a 2018 ballot initiative prohibiting the sale of certain pork, veal, and egg products derived from cruelly confined animals—as consistent with the Dormant Commerce Clause. While the Supreme Court decision was the prompt for the EATS Act, the legislation is not written to simply circumvent that decision. To the contrary, because the EATS Act,

[1] February 23, 2018, Letter from Law Professors to Senate and House Committees on Agriculture regarding Protect Interstate Commerce Act (H.R. 4879/H.R. 3599) and No Regulation Without Representation Act (H.R. 2887).

like its failed 2018 predecessor, is so broad and so many interpretations are possible, we believe that an untold number of vital state laws could be implicated and nullified by the legislation.

Although the exact number of affected laws cannot be determined, a wide swath of laws—including those that protect the health and safety of members of the public—are likely to be jeopardized, and any assertion that the legislation would be limited to farm animal confinement and sales laws in California and a handful of similar humane laws is false. Such a narrow view represents an impossible interpretation of the legislation. In fact, a report issued by the Brooks McCormick Jr. Animal Law & Policy Program at Harvard identified over 1,000 laws that could be in jeopardy if the EATS Act were enacted.[2] To be clear, we also would be opposed to a narrower version of the legislation limited to attacking state animal welfare laws. Because the legislation's language lends itself to far broader interpretations, however, we focus on those broader possibilities for purposes of this letter.

Ultimately, the EATS Act is a major infringement on state and local governments' abilities to set standards that fit the local community. For a potentially wide variety of products and laws, the Act would shift the federalism balance away from state powers toward the federal government and its agencies.[3] The federal government then would essentially pick winners and losers among the states, by letting the state with the lowest standard set the national standard—until yet an even lower standard is issued by yet another state, which becomes the new national standard.

II. Interpretation of the EATS Act

A. Executive Summary

The EATS Act poses insurmountable problems and should be rejected for the following reasons:

- It has the potential to invalidate hundreds if not thousands of state laws, regulations, and even government procurement requirements relating to a wide variety of products from food to timber to narcotics.
- It eliminates broad swaths of traditional state and local authority, giving rise to constitutional questions and preventing states from protecting public and environmental health and safety, as well as community norms.
- It creates a regulatory flattening where the lowest standard imposed by any jurisdiction could become the de facto standard everywhere in the country,
- It shifts the federalism balance away from authority of the states (under the current longstanding system) toward what would be a constantly changing rule depending on which particular state had the least regulation at any particular moment, or depending on whether the federal rule, if any, was even less restrictive than any state rule,
- It creates a private right of action to challenge state laws and regulations, which would subject states and localities to lengthy and costly litigation given the broad sweep of the law.

[2] Anim. L. & Pol'y Prog., Harvard Law School, *Legislative Analysis of S.2019/H.R.4417: The "Ending Agricultural Trade Suppression Act" 118th Congress – 2023-2024* at 35-47 & App'x (July 2023) (hereinafter, "Harvard Analysis") (describing various types of laws and regulations potentially affected and listing in Appendix all such laws by state).
[3] *See* Harvard Analysis at 7, 48-49.

B. Interpretation of Section 2

Subsection 2(a) of the EATS Act defines "agricultural products" by reference to 7 U.S.C. § 1626, which states that such products are "agricultural, horticultural, viticultural, and dairy products, livestock and poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured product thereof." This definition of "agricultural products" is so broad that it could include things most people would not consider "agricultural products" at all, such as printer paper and furniture as these are "forest products" that are "processed and manufactured."[4]

The text of subsection 2(b) of the EATS Act is very similar to prior proposals, and states:

> Prohibition.—The government of a State or a unit of local government within a State shall not impose a standard or condition on the preharvest production of any agricultural products sold or offered for sale in interstate commerce if—
>
> (1) the production occurs in another State; and
>
> (2) subject to subsection (c),[5] the standard or condition is in addition to the standards and conditions applicable to the production pursuant to—
>
> (A) Federal law; and
>
> (B) the laws of the State and unit of local government in which the production occurs.

Nothing in the EATS Act would limit its reach to only a small number of laws like California's Proposition 12. In fact, on its face, the legislation prohibits states from enacting *any* law or regulation that imposes a "standard or condition on the preharvest production of *any* agricultural products" (emphasis added) if that standard or condition is more protective or restrictive than the regulations of any other state that produces the product and any regulation of the federal government. At its core, the legislation undermines states' ability to protect the health, safety, and welfare of their citizens. The potential scale of the disruption to state and local laws and regulations that the EATS Act could cause would be massive.

1. "Preharvest production"

One major difference between prior proposals and the EATS Act is the addition of the phrase "preharvest" before "production." Previous versions would have prohibited imposition of any "standard[s] or condition[s]" on "production or manufacture," without the "preharvest" modifier. Presumably, the addition of "preharvest" and removal of "or manufacture" were intended to narrow the scope of the legislation. However, the legislation does not define the term "preharvest" and its inclusion creates new and unwieldy interpretation problems.

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[4] As the Harvard Analysis notes, the EATS Act's broad reach has the potential to invalidate laws and regulations relating to pest and plant disease, zoonotic and infectious diseases, food quality and safety, fishing, horse slaughter, food and seed labeling, narcotics, procurement, and licensing. *See* Harvard Analysis at 6, 17-19.

[5] This clause varies between the Senate and House bill versions of the EATS Act, S. 2019 (which includes it) and H.R. 4417 (which does not).

It is not clear where the "harvest" cutoff is for many products. For meat products, "preharvest" could be interpreted to encompass the entire time up until the very moment that an animal is slaughtered. Alternatively, "preharvest" could be interpreted to mean only the time up until the animal is loaded onto a transport truck or arrives at a slaughterhouse.

Further, it is unclear how courts would interpret "preharvest production" as it relates to inputs in agricultural products and whether a state or locality could still regulate those inputs under the EATS Act. For example, seeds might be viewed as agricultural products themselves, but also as necessary inputs during the "preharvest production" of other agricultural products such as the vegetables that grow from those seeds. Under such a reading of the EATS Act, a state or locality could not regulate any phase of the lifecycle for seeds, even after the seeds themselves have been harvested, because any seed regulation could be a "standard or condition" on the production of the vegetables prior to the harvest of the vegetable crops themselves. As these examples highlight, the line drawn in the legislation between "preharvest" and "harvest" is undefined, arbitrary, and unwieldy.

2. "Impos[ing] a standard or condition" on products "in interstate commerce"

Subsection 2(b) of the EATS Act would prohibit states from "impos[ing] a standard or condition" on agricultural products that are "sold or offered for sale in interstate commerce" if those standards would be "in addition to" other federal or state standards. While at first glance this prohibition may seem to simply state a rule against extraterritorial regulation, its practical meaning is far broader and more impactful. It would mean that a state cannot set its own health and safety rules for products imported into the state if those rules exceed the existing rules effective for that product in the place of production. This prohibition would include, for example, regulation of the importation and sale of crops treated with certain pesticides, genetically engineered plants, livestock and plants that may carry pests or diseases, and many more.[6]

"*Standard or Condition."* Because the EATS Act would prohibit any "standard or condition," it is not limited to formal legislative or regulatory measures.[7] For example, the Act could prohibit states from enforcing procurement requirements, such as mandates that state food assistance programs and public schools purchase locally grown food. The place where a crop is sown and grown is, presumably, a "preharvest" condition subject to challenge under the EATS Act. As another example, any producer around the country with standing could conceivably invoke the EATS Act to sue a state or local government for enforcing regulations that establish procurement percentages for purchases of agricultural products from veteran or minority-owned businesses.

Rule of Construction. The EATS Act, in another change from prior proposals, includes in subsection 2(c) an explicit "rule of construction" that states that a *lack* of federal, state, or local standards or conditions effective in a place of production for a given agricultural product is itself a standard or condition. Given the practical impossibility of tailoring regulations for every place of origin for every agricultural product, this language likely means that if there are no applicable federal standards or conditions governing the production of an agricultural product, the absence of regulation in a single production jurisdiction becomes the new, *de facto* national regulatory ceiling for that product.

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[6] The Harvard Analysis has compiled an extensive list of laws, from every state, that could be affected by the EATS Act. Harvard Analysis, App'x.

[7] *See* Harvard Analysis at 45-46.

As a hypothetical example of this, suppose State A wanted to prohibit the sale of tomatoes grown in contaminated soil, as State A defines contaminated. To do so under the EATS Act, State A would first have to look at where it imports tomatoes from (unless it is wholly self-sufficient in tomato production). If State A finds that it imports tomatoes from States B and C, it would need to research the laws and regulations effective at the federal and state levels, as well as at the local level in each locality that exports tomatoes to State A. If State B imposes the exact same regulation State A seeks to impose, State A could proceed with the regulation as applied to tomatoes from State B. If, however, State C imposes no regulation on the production of its tomatoes and there is no applicable federal regulation, State A could not impose its regulation on tomatoes from State C. Because state-by-state and locality-by-locality regulatory tracking, tailoring, and enforcement like this would be a near logistical impossibility, all states would be pushed to adopt the lowest regulation effective in any one place of production, or as set by the federal government, as the uniform standard for all such agricultural products, regardless of their place of origin.[8]

In this way, the EATS Act could effectively nullify all laws and regulations relating to "preharvest production" (whatever that phrase may mean) that are not federal and not universally adopted by all states. Such a result would mean a regulatory flattening across the country with respect to standards for "agricultural products," and it effectively could give any single jurisdiction the *de facto* ability to lower standards nationwide for the purpose of advantaging its own producers. The elevation of a single state standard to effectively become the unitary, federally enforceable national standard is repugnant to long-standing principles of federalism and equality between the states, including the historical right of each state to create regulations to protect its citizens. As several federalism scholars wrote in an *amicus* brief in the *Ross* case, "A state's police power merely to duplicate other states' laws is no police power at all."[9]

C. Interpretation of Section 3

The EATS Act, like some of the prior proposals, includes a "federal cause of action" in Section 3 of the legislation, which reads, in part:

> Sec. 3 Federal cause of action to challenge state regulation of interstate commerce.
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> . . .
>
> (b) Private Right of Action.—A person, including a producer, a transporter, a distributer, a consumer, a laborer, a trade association, the Federal Government, a State government, or a unit of local government, that is affected by a regulation of a State or unit of local government that regulates any aspect of 1 or more agriculture products that are sold in interstate commerce, including any aspect of the method of production, or any means or instrumentality through which 1 or more agricultural products are sold in interstate commerce may bring an action in the appropriate court to invalidate that regulation and seek damages for economic loss resulting from that regulation.

[8] To avoid disadvantaging in-state producers by subjecting them to stricter standards than those that could be applied to imported products under the EATS Act, states would be incentivized to adopt lowest-common-denominator regulations even for agricultural products produced within their own borders.

[9] Brief for *Amici Curiae* Federalism Scholars Supporting Respondents, *Nat'l Pork Producers Council v. Ross*, No. 21-468, at 2-3 (Aug. 15, 2022).

> (c) Preliminary Injunction.—On a motion of the plaintiff in an action brought under subsection (b), the court shall issue a preliminary injunction to preclude the applicable State or unit of local government from enforcing the regulation at issue until such time as the court enters a final judgment in the case, unless the State or unit of local government proves by clear and convincing evidence that—
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> > (1) the State or unit of local government is likely to prevail on the merits at trial; and
> >
> > (2) the injunction would cause irreparable harm to the State or unit of local government.
>
> (d) Statute of Limitations.—No action shall be maintained under this section unless the action is commenced not later than 10 years after the cause of action arose.
>
> . . .

Section 3 creates an almost impossibly broad private right of action, allowing virtually anyone "affected" by an agricultural regulation to bring a legal complaint. Notably, section 3 is vague and open to many potential interpretations, especially since its language differs from Section 2. For example, it does *not* include any reference to regulation on "preharvest" conditions. On its face, it requires courts to enjoin regulations affecting "*any* aspect" of production of agricultural products. "Affected" is not defined, and the enumeration of "person" indicates that any person who purchases, produces, uses, eats, or just buys an agricultural product subject to regulations—and we are unaware of any agricultural goods *not* subject to some kind of regulation—could bring a lawsuit. Section 3 ignores the fact that Congress cannot abrogate the constitutional requirements of standing simply by naming potential plaintiffs; federal courts handling such lawsuits could be mired in endless standing challenges.[10]

The inclusion of this section creates the possibility that laws regulating in-state production of agricultural products also could be vulnerable to challenge under the EATS Act. In-state producers, consumers, and others could certainly argue they are "affected" by any number of regulations that "regulate[] any aspect of 1 or more agricultural products that are sold in interstate commerce." Any state or local government sued by these "affected" plaintiffs would be subject to the preliminary injunction component of Section 3. The defendant state or locality would then have the burden of proving a lack of irreparable harm and likelihood of success to defeat the preliminary injunction, an inversion of the typical standard. As a result, innumerable state and local laws and regulations, potentially including those governing wholly in-state production, could be subject to challenge and injunctions that could last for years as litigation proceeds under the EATS Act, even if they were ultimately upheld.

The net effect of Section 3 would be to exacerbate the legislation's already staggering interpretative problems and further open the floodgates of litigation. Plaintiffs would have ten years from the date they are allegedly "affected" by a regulation—which could be many decades after the law or regulation first became effective—to bring an action under Section 3's statute of limitations. If

[10] *See also* Harvard Analysis at 26-34 (analyzing Section 3).

the EATS Act were enacted, state and local governments could be incentivized to steer clear of regulating anything that could potentially fall under Section 3's private right of action to avoid the risk of lengthy, costly litigation over any regulation they adopt.

III. Conclusion

Because the language of the EATS Act is extremely vague and subject to multiple interpretations, its enactment would initiate years of lengthy court battles to resolve the Act's constitutionality and derive the Act's scope, as well as an endless flood of concurrent challenges to innumerable state and local laws that would be immediately subject to preclusion if the EATS Act were enacted. Courts could be significantly burdened, and different courts could reach conflicting rulings. In the meantime, each state would have to spend considerable time and resources constantly comparing its own constantly changing laws to those of other states, because a state's conditions on the production of myriad products may have to change every time another state alters its laws. This would create a staggeringly uncertain legal and regulatory landscape. These problems would only be exacerbated by wide-open floodgates and strong incentives for plaintiffs to challenge state and local laws and regulations under Section 3 of the EATS Act. The result would surely be an unprecedented chilling of state and local legislation on matters historically regulated at the state and local level.

Indeed, states have a strong sovereign interest in using their police powers, which are not similarly vested in Congress by the Constitution, to promote the health, safety, and welfare of their citizens. While academics and legislators may disagree as to the reach of the EATS Act and how broadly or narrowly it would or should ultimately be interpreted, the scope of the Act as written undeniably extends far beyond animal welfare laws. Should the EATS Act be enacted, countless state laws will be jeopardized, including laws advancing consumer health and safety, advancing community norms, and protecting livestock and crops from pests and diseases.

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