

Strange bedfellows: Why Biden is siding with the meat industry

By Marcia Brown

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The Supreme Court is set to hear oral arguments on Tuesday in a case about livestock welfare that could have broad implications for the ability of states to regulate everything from vehicle emissions to maple syrup.

The case, [National Pork Producers Council v. Ross](#), also puts the Biden administration on the unlikely side of the meat industry, which it has spent the last two years lambasting for the mistreatment of workers and farmers and accused of using inflation to jack up prices while pocketing record profits.

At issue is a California ballot measure voters overwhelmingly passed in 2018 that aims to improve the welfare of livestock, banning battery cages for egg-laying hens and gestation crates for sows, types of confinement that restrict normal animal movement. The new law will prohibit the sale of animal products from noncompliant farms even outside California.

In 2019, industry groups sued, arguing that the law's provisions for pork are unconstitutional, a position that, if upheld by the Supreme Court, could have consequences for a state to regulate any product or standard beyond its own borders. To the NPPC and the American Farm Bureau, the California ballot measure known as Proposition 12 represents a vast overreach of state control, potentially sending Golden State farm inspectors to the barns of hog producers from Iowa to Minnesota where most of the pork Californians consume is raised.

"This is as clear of an unconstitutional law as I think that's ever maybe been passed by a state," said Michael Formica, NPPC chief legal strategist.

The groups opposing the measure also say it will raise prices for consumers and force hog farmers to add expensive upgrades to their farms to new specifications. Fueling the NPPC's case is the fact that the vast majority of the pork Californians eat is raised in other states.

Despite its broader agenda of taking the meat industry to task over what it views as rising consumer-unfriendly consolidation, the Biden administration is siding with opponents of the measure for some of the same reasons.

Biden's Solicitor General Elizabeth Prelogar filed an [amicus brief](#) — also known as friend-of-the-court brief — the administration largely sided with the groups challenging the California law. Prelogar argued that California voters can't regulate the "welfare of animals outside the state" nor should California be able to determine what is "cruel treatment" in other states.

The White House deferred comment to the Justice Department, which declined to comment.

A dangerous precedent

But defenders of Proposition 12 say that a Supreme Court ruling in favor of the pork producers could set a dangerous precedent, upending how states and cities can regulate.

"I can't overstate to you how much of a fundamental change in American society this would be," said David Muraskin, senior attorney with Public Justice's Food Project.

If the Supreme Court sides with NPPC, some legal experts argue that states could face challenges to any regulations of products originating in another state. For example, Vermont could regulate Vermont maple syrup, but that law could not apply to New Hampshire or Ohio maple syrup.

“The pork industry has asked for the most outrageous possible position,” Muraskin said. “Since Trump’s appointees got on the bench, industry across the country in basically every sector has seen this as a chance to ask for their biggest dream of a legal request.”

A ruling in favor of the pork producers could also preempt progressive or conservative local laws.

“California tends to be at the forefront of legislation in the environmental and human welfare space,” said Adam Winkler, a constitutional law professor at the University of California, Los Angeles. “I think this case could make it much more difficult for California in the future to play that leadership role.” The law “very possibly” could impact California’s ban on the [sale of new gas-powered cars](#), he added.

Small farmer advocates, anti-monopoly groups and more than a [dozen Democratic senators](#) angled for Biden’s support, hoping that the law’s benefits to small farmers would sway an administration outspokenly committed to fair competition, reversing the position former President Donald Trump’s administration took on the case in the lower courts.

But the Biden Administration position may not be quite as strange as it seems on its face, some legal experts said. Rather, it’s oversimplifying to say Biden is siding with the meatpackers, who view the national impact of California’s measure as a threat to the industry’s bottom line.

“I think the administration fully realizes the enormous market power that Tyson, Cargill have and so I don’t see this as sort of them turning away from that,” said Kelsey Eberly, a former lawyer for the Animal Legal Defense Fund who worked on the case. But their position, she explained, is about questions of state sovereignty not competition.

Nevertheless, the move was a disappointment to those who had hoped the administration would continue its crusade against the meatpackers. When the administration’s amicus brief landed, the [NPPC praised it](#) and have frequently referenced Biden’s allyship against Proposition 12.

“I think everyone felt like the Trump Administration position was a pretty radical departure and extreme,” said a senior congressional staffer. “At the end of the day, it seems like the Trump Administration is just in bed with the big packers so I think that’s why everyone expected the Biden Administration to reverse course.”

An unmeasured impact

Although an amicus brief is unlikely to determine the outcome of any Supreme Court case, briefs from a sitting administration have more weight than others. The Court [often requests briefs](#) from the Justice Department, too. It’s not unusual for the DOJ to continue its predecessor’s legal position and it’s sometimes ‘frowned upon’ to reverse course. Though the Biden Administration has rejected its predecessor’s position in many cases, it has upheld its predecessor’s position in others, Revolving Door Project, a government watchdog group, [has documented](#).

The law has yet to take effect, so some of its impact has not yet been measured, which could make proving Proposition 12’s disruption to the industry more challenging. California [finalized the regulations](#) for its implementation just last month. NPPC, which represents both farmers and meat processors, and the North American Meat Institute, which represents the meat packing and processing industry, have both challenged the law since it passed.

NPPC has said that the law will contribute to further consolidation in the industry.

Terry Wolters, a Minnesota hog farmer and NPPC board of director president, said the law would not just require new construction. “It’s going to incur added electricity, propane costs,” Wolters told reporters at a roundtable. “Individually, producers are not going to be able to handle that, and therefore they’ll end up pushing small producers out of the business. I think the ultimate problem is the fact that the consumer will be bearing those costs, right, somebody’s gonna have to pay for that.”

Advocates for small farmers disagree, saying the law will create new opportunities in the coveted California market.

“The companies are still trying to pitch this idea of this bucolic farmer that will be burdened by all these regulations,” explained Rucha Desai, an antitrust attorney with Fairmark Partners who wrote an amicus brief laying out the competitive benefits of Proposition 12. “But we have contract farmers,” she continued, “The contract farmers are really beholden to these contracts and most companies have regional monopolies. [Farmers will] be burdened if a company tries to pass the financial burden onto them but the real burden is to the companies that will have to comply.”

A moral issue

Beyond competition, the legal battle is so consequential that Sen. [Cory Booker](#) (D-NJ) has weighed in with his own friend-of-the-court brief. As a lawmaker, [he argued that](#) courts are “ill-equipped ... to weigh the costs and benefits of local, state, and national commerce policy.”

Local leadership groups like the National League of Cities and the U.S. Conference of Mayors [warned that](#) upholding the NPPC’s position “would jeopardize countless types of local laws,” including including affordable housing policies, hazardous waste regulations and child labor. A recent [Harvard Law School analysis](#) made similar conclusions.

NPPC’s Formica flatly denied that their position jeopardizes other state and local laws, calling the argument “laughable on its face” and a “red herring.” He added, “We’re not talking about ... lead in a children’s toy.” He continued, “If there was a legitimate health or safety issue in California, California could regulate it. California has admitted that there is no health or safety issue here. This is purely a moral issue.”

Still, Eberly, who co-authored the Harvard report, said a ruling in favor of NPPC would be a “sea change.”

“It’s kind of a bold argument to argue your industry is constitutionally unique,” she said. “I don’t think this will stay within the pork industry.” Proposition 12 is no different than the “myriad inconsistencies” of state laws with which large industries have already learned to comply, she said.