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WHEN PIGS FLY: SUCCESSFULLY CHALLENGING STATE EXTRATERRITORIAL REGULATIONS AFTER Ross

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REMARKS AT THE TRANSATLANTIC LAW FORUM A New Era of Disintegration?

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Thank you Michael and it is my privilege to be here with my fellow panelists. I will start with a standard disclaimer: the views I express today are my own. They do not necessarily represent those of the Federal Trade Commission or any other Commissioner.

Prior to joining the Federal Trade Commission, I was the Solicitor General for the State of Utah – the chief appellate advocate for the State. Utah would often file amicus briefs by itself or together with other states in various appellate courts and the U.S. Supreme Court to assist the court in understanding the interests of the states and their citizens in the matter before the court. I would like to begin by reading the opening paragraph of one amicus brief Utah joined that was led by the State of Iowa, a state that is over 1,000 miles away from the Atlantic Ocean:

Suppose Iowa voters began to worry about overfishing and the inhumane harvesting of Atlantic shellfish. So the Iowa legislature passes a law about how lobsters, claims, and steamers must be harvested to be lawfully sold in the State. For example, lobsters must be able to turn around in the lobster cages that capture them. Perhaps the Atlantic fishermen think that the rules are unworkable and would dramatically raise the cost of otherwise ethical fishing. Iowa neither employs nor consults experts within the field—the Atlantic fishing community is simply not that large. And so, without fishermen to raise their concerns with local legislators or voters, this new hypothetical law is enacted.¹

While this hypothetical posed by Iowa seems far-fetched, it is not so different than the reality Iowa and other states face regarding restrictions on pig farmers. The particular case in which the states filed their amicus involved a Massachusetts regulation that bans the sale of pork products that do not meet Massachusetts' standards on the size of pigpens.² But remarkably, as Iowa points out, Massachusetts residents "annually consume 396 million pounds of pork but produce only 1.9 million in state"—it thus produces less than one percent of the pork it eats.³

The Massachusetts case remains pending, but pork producers were not so lucky in their challenge to a similar California law that reached the U.S. Supreme Court. There, the National Pork Producers Council argued that the California law violated the U.S. Constitution under what is known as the "dormant Commerce Clause."⁴ The Constitution empowers Congress to "regulate Commerce" among the States⁵ and thus the negative implication—the "dormant" Commerce Clause—is the idea that it is unconstitutional for individual States to unduly burden out-of-state economic interests.⁶

¹ Brief of Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming as Amici Curiae in Support of Petitioners, *Triumph Foods v. Campbell*, No. 1:23-cv-11671-WGY, Dkt. 71, at 5 (D. Mass.) (Oct. 10, 2023).

 $^{^{2}}$ *Id*. at 6.

³ *Id.* at 7 (citing Chris Lisinski, *New Mass. Law on Pork Sales Takes Effect This Month* (Aug. 8, 2023), NBC BOSTON, https://perma.cc/24J7-NE2M).

⁴ Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 364 (2023).

⁵ U.S. Const. art. I, § 8, cl. 3.

⁶ See Nat'l Pork Producers Council, 598 U.S. at 369-70.

In a fractured decision, different groups of justices adopted various conclusions. The majority of the justices recognized that at the "very core" of the dormant Commerce Clause jurisprudence is preventing *discrimination* by the states.⁷ In other words, the Court's previous cases "prohibit[] the enforcement of state laws driven by . . . economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."⁸

A state law thus offends the dormant Commerce Clause if it is facially discriminatory, or under a balancing test, if it imposes a substantial burden on interstate commerce such that its practical effects disclose a discriminatory purpose.⁹ In *National Pork Producers*, however, the producers were not alleging discrimination. Like Massachusetts, California imports 99.9% of the pork it consumes.¹⁰ Therefore, since California was not trying to protect its *own* pig farmers, it was free to regulate those farmers outside of its borders.

The California law went into effect on January 1, 2024, and thus far has resulted in even higher prices for consumers than was originally expected. Economists with the U.S. Department of Agriculture observed price increases of 16% for bacon and 41% for pork loin for California consumers.¹¹ Unfortunately, this burden largely impacts California's Hispanic and lower-income communities.¹² And not surprisingly, California's fresh pork consumption has dropped from 10% to 8%.¹³

The long-term impact on the market remains unclear. University studies predict that building new "compliant barns can cost 40% more than traditional barns and 25% more than conventional group housing, not including the estimated 15% higher operating costs caused by reduced productivity."¹⁴ It is likely that many small farms will be forced "to decide between exiting the business or entering into a production contract, resulting in fewer, larger farms owning a greater portion of sows in the U.S."¹⁵

Of course, as a Commissioner with the Federal Trade Commission tasked with promoting competition and protecting consumers, it is troubling for me to hear of a market faced with decreased competition and higher consumer prices, even if the FTC is potentially unable to address

⁷ *Id.* at 369.

⁸ *Id.* (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–338 (2008)) (ellipses and internal quotations omitted).

⁹ Id. at 377.

¹⁰ Brief for Petitioners, Nat'l Pork Producers Council v. Ross, No. 21-468, at 3 (U.S.) (June 10, 2022).

¹¹ ARE Update 27(3), University of California Giannini Foundation of Agricultural Economics (Jan/Feb 2024), available at https://giannini.ucop.edu/filer/file/1710543749/20936/.

¹² Reanalysis of Economic Impact of Proposition 12 on Pork Pricing and Consumption in California after Implementation, The Hatamiya Group at 3 (Mar. 29, 2024), available at <u>https://foodequityalliance.org/wp-content/uploads/2024/05/Hatamiya-Group-Economic-Reanalysis-of-Proposition-12-on-Pork-March-2024.pdf</u>. ¹³ Id at 2.

¹⁴ Letter to U.S. House Agriculture Committee Chairman G.T. Thompson (R-PA) and Ranking Member David Scott (D-GA) at 1 (May 21, 2024), *available at* https://nppc.org/wp-content/uploads/2024/05/Agriculture-Stakeholder-Proposition-12-Letter-to-House-Ag.-Leadership.pdf.

¹⁵ *Id.* at 2.

these concerns.¹⁶ But what's interesting about the *National Pork Producers* case is the important constitutional tension it presents and where the consequences of the decision could lead.

In the 1780s, shortly before the Constitution was adopted, "state interference with interstate commerce was cutting off the lifeblood of the Nation."¹⁷ Thus, one of the principal reasons for adopting the Constitution was to "create a national economic market [to] overcome state restrictions on free trade."¹⁸ Like the trade barriers before the Constitution was adopted, the California law denies "market access to out-of-state pork producers unless their farming and production practices in those other States comply with California's dictates."¹⁹

Of course, the States are empowered to regulate within their borders. "When the States ratified the Federal Constitution, the people of each State acquiesced in the transfer of limited power to the Federal Government."²⁰ Thus, "[w]here the Constitution is silent about the exercise of a particular power[,] that is, where the Constitution does not speak either expressly or by necessary implication, the power is either delegated to the state government or retained by the people."²¹ This Constitutional structure provides for "lawmaking by governments more local and more accountable than a distant federal authority,"²² and "allows States to serve as laborator[ies] for novel social and economic experiments."²³

As a former state solicitor general, I emphatically support States as laboratories of democracy and protecting the States' sovereign authority to legislate. And I thus share the concerns recognized in the pork case that an expansive dormant Commerce Clause could "authoriz[e] judges to strike down duly enacted state laws ... based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits."²⁴ But, I am equally concerned that some States' legal experimentation are using out-of-state industries' as guinea pigs.

Practically speaking, this legal experimentation favors States with large economies. For example, in *National Pork Producers*, because California constitutes 13% of the consumer pork market, it "makes it economically infeasible for many pig farmers and pork producers to exit the California

¹⁶ The FTC shares responsibility with the Department of Justice for antitrust enforcement; the DOJ Antitrust Division handles investigations into the hog sectors. Congress has been exploring bills that would deal with the issue presented by the California law. For example, the House Committee on Agriculture advanced with bipartisan support the Farm, Food, and National Security Act of 2024 ("Farm Bill 2024") on May 23, 2024, which would address the California law by prohibiting state and local laws that impose "as a condition for sale or consumption, a condition or standard on the production of covered livestock unless the livestock is physically located within such state or local government." *See* https://agriculture.house.gov/uploadedfiles/prop_12_one_pager.pdf; *see also*

https://agriculture.house.gov/news/documentsingle.aspx?DocumentID=7781.

²⁴ Nat'l Pork Producers, 598 U.S. at 380.

¹⁷ Nat'l Pork Producers Council, 598 U.S. at 404 (Kavanaugh, J., concurring).

¹⁸ Id.

¹⁹ Id. at 406 (Kavanaugh, J., concurring).

²⁰ Chiafalo v. Washington, 591 U.S. 578, 606 (2020) (Thomas, J., concurring).

²¹ Id. at 607 (Thomas, J., concurring) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 847-48 (1995) (Thomas, J., dissenting)).

²² West Virginia v. EPA, 597 U.S. 697, 739 (2022) (Gorsuch, J., concurring) (internal quotations omitted) (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (plurality opinion)).

²³ West Virginia, 597 U.S. at 739 (Gorsuch, J., concurring) (internal quotations omitted) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

market."²⁵ With its population of 38.9 million, California likely constitutes an important part of nearly every market. By contrast, in my lobster example, with Iowa's population of 3.2 million, it would not likely be as costly for the Atlantic fisherman to simply leave the Iowa market if faced with an Iowa regulation on lobster cages.

Interestingly, States like California and New York with larger economies also tend to have "leftleaning state economies, liberal legislators and voters [that] support economic regulation more than their conservative counterparts."²⁶ After the *National Pork Producers* case, it is likely that these far-reaching regulations will continue for several reasons. *First*, the dormant Commerce Clause no longer stands as an impediment to extraterritorial regulation. While a regulation could still be overturned if the burden on interstate commerce outweighs the benefit, several of the justices in the *National Pork Producers* case provided a strategic path forward to overcoming that balancing test.

Those justices recognized that the task of balancing the burden on interstate commerce with a benefit that is not *economic* in nature is impossible. As Justice Barrett explained, "California's interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians."²⁷ It is impossible for a court to balance the burden and the benefit when the "competing goods are incommensurable."²⁸

In other words, if a law purports to serve the moral and health interests of the in-state residents, how can that possibly be weighed against an economic burden of compliance? Thus, states faced with creating extraterritorial legislation will likely seek to justify the interstate burden by identifying non-economic benefits that are incapable of judicial balancing. This would not likely be difficult as many of the far-reaching extraterritorial regulations often involve such issues like the environment or labor.

For example, freight hauling drivers and related associations challenged a California law that addressed "the misclassification of employee workers, including freight hauling drivers . . . as independent contractors."²⁹ The plaintiffs claimed that the statute violated the dormant Commerce Clause because the out-of-state freight hauling businesses were economically burdened. Specifically, by requiring reclassification of contracted drivers as employees, the law led to difficulty recruiting independent contractors to become employees, as well as related costs.³⁰

Relying on the *National Pork Producers* case, the court held that it was not well-equipped to balance the economic burden of compliance with the non-economic benefits: "California's interest in protecting in-state drivers from being misclassified as independent contractors and losing

²⁵ *Id.* at 405 (Kavanaugh, J., concurring); *see id.* at 388 ("California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate.").

²⁶ Dormant Commerce Clause-Interstate Commerce- State Law-Extraterritoriality-National Pork Producers Council v. Ross, 137 Harv. L. Rev. 330, 338 (2023).

²⁷ National Pork Producers, 598 U.S. at 393 (Barrett, J., concurring).

²⁸ *Id.* at 382 (Gorsuch, J., concurring).

²⁹ Cal. Trucking Ass'n v. Bonta, No. 18-cv-2458, 2024 WL 1249554, at *1 (S.D. Cal. Mar. 15, 2024), appeals docketed, Nos. 24-2351 & 24-2341 (9th Cir. Apr. 15, 2024).

³⁰ *Id.* at *6-7.

statutory entitlements under state labor laws *cannot be weighed* on a scale opposite the additional dollars spent on compliance by freight hauling businesses."³¹

In another example, California passed two laws in 2023 that will require public and private companies that do business in California to disclose their greenhouse gas emissions and their climate-related financial risks.³² The U.S. Chamber of Commerce and others filed a lawsuit against the State of California that included a dormant Commerce Clause claim because plaintiffs alleged that the law placed a burden on interstate commerce that outweighed any benefit to California.³³

The State of California moved to dismiss the case, arguing that plaintiffs had failed to plausibly allege a substantial burden so the court need not consider any benefit to the State.³⁴ But as the case proceeds, California will be tasked with defending the benefits of the law in relation to the burdens—it will likely argue not just the economic benefits, but the non-economic benefits relating to greenhouse gas emissions, including potential health benefits.

I anticipate that in future challenges, courts will seek to avoid the difficult balancing required under a dormant Commerce Clause challenge by pointing to incommensurable benefits.

Second, where state regulation burdens out-of-state businesses more than in-state businesses (as was the case in *National Pork Producers*), such far-reaching regulation is also likely to continue because of the lack of immediate political accountability. State legislators may not always face direct political pressure from the out-of-state businesses that they are burdening. From a democratic perspective, it is troubling that states are legislating for those to whom they are not accountable.

In the *National Pork Producers* case, I believe the market solution—where consumers already can choose pork products with labels that state that the pigs were raised crate-free³⁵—better serves principles of democracy because consumers can vote with their pocketbooks every time they go to the store.

In addition to these previous examples, as an FTC Commissioner, one area in which I am particularly concerned with extraterritorial regulation is data privacy and security. The FTC has a strong history of enforcement in these areas. For example, in GoodRx, the telehealth and prescription drug discount provider allegedly disclosed consumers' personal health information to Facebook and other companies, despite promising to keep that information private.³⁶

https://www.uschamber.com/assets/documents/2024.03.27-38-1-Memo-of-Points-and-Authorities-ISO-Defs-Motion-to-Dismiss.pdf.

³¹ *Id.* at *7 (emphasis added).

³² The Climate Corporate Data Accountability Act, S.B. 253, 2023-2024 Sess. (Cal. 2023); Greenhouse Gases: Climate-Related Financial Risk, S.B. 261, 2023-2024 Sess. (Cal. 2023).

³³ Amended Complaint, at 27-29, *Chamber of Commerce of the United States v. Randolph*, No. 2:24-cv-00801 (C.D. Cal. Feb. 22, 2024), ECF No. 28, *available at* <u>https://www.uschamber.com/assets/documents/Amended-</u>Complaint.pdf.

³⁴ Mem. In Support of Mot. to Dismiss, at 19-21, *Chamber of Commerce of the United States v. Randolph*, No. 2:24-cv-00801 (C.D. Cal. Mar. 27, 2024), ECF No. 38-1, *available at*

³⁵ Nat'l Pork Producers, 598 U.S. at 364.

³⁶ See United States v. GoodRx Holdings, Inc., No. 3:23-cv-460-DMR (N.D. Cal 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2023090-goodrx-holdings-inc.

The State of Utah in 2022 passed the Utah Consumer Privacy Act, which seeks to protect and enforce consumers' access, deletion, and data portability rights; it also provides consumers the right to opt out of targeted advertising and sale of personal data.³⁷ Prior to the 2022-2023 legislative session, only five states (California, Virginia, Utah, Colorado, and Connecticut) had passed consumer privacy laws.³⁸ But now there are 18 states.³⁹ And while some of these laws are very similar, there are variations. The problem is that the various laws will likely lead to conflicts. For example, "one state chooses an opt-out model while another chooses an opt-in model."⁴⁰

There have been multiple efforts to pass federal legislation, but none have been successful yet. Entities operating nationwide have a patchwork of data privacy laws with which they must comply. The patchwork "can potentially amplify compliance costs" and it is estimated that "complying with 50 distinct state laws could surpass \$1 trillion over a decade, with a minimum of \$200 billion being borne by small businesses."⁴¹ Enormous compliance costs can have a devastating impact to competition. Extraterritorial regulation may harm consumers with higher prices, decreased output, and barriers to entry that favor large incumbents.

So what are we left with? Apart from waiting for congressional action, can anything be done by businesses faced with non-discriminatory extraterritorial regulation? Justice Kavanaugh in *National Pork Producers* suggests several other potential claims under different constitutional provisions. *First*, under the Import-Export Clause, states may not impose any imposts or duties on imports or exports.⁴² Thus Justice Kavanaugh posits that "if one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause." *Second*, the Privileges and Immunities Clause—where "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"—may provide a path to challenging "one State's efforts to effectively regulate farming, manufacturing, or production in other States."⁴³

And *third*, under the Full Faith and Credit Clause, States may not "adopt[] any policy of hostility to the public Acts" of another State.⁴⁴ Therefore, Justice Kavanaugh suggests that a "State's effort to regulate farming, manufacturing, and production practices in another State (in a manner different from how that other State's laws regulate those practices) could in some circumstances raise questions under that Clause."⁴⁵

In the coming years, as extraterritorial regulation continues, challengers may very well pull from Justice Kavanaugh's playbook and develop a new means of defeating such regulation.

https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/.

³⁷ Utah Consumer Privacy Act, Utah Code § 13-61-101, et seq.

³⁸ Jennifer Huddleston and Gent Salihu, *The Patchwork Strikes Back: State Data Privacy Laws after the 2022–2023 Legislative Session*, CATO Institute (July 6, 2023), *available at* https://www.cato.org/blog/patchwork-strikes-back-state-data-privacy-laws-after-2022-2023-legislative-session-0.

³⁹ Which States Have Consumer Data Privacy Laws?, Bloomberg Law (March 18, 2024), available at

⁴⁰ Huddleston & Salihu, *supra* note 38.

⁴¹ Id.

⁴² Nat'l Pork Producers, 598 U.S. at 408 (Kavanaugh, J., concurring) (citing U.S. Const. Art. I, § 10, cl. 2).

⁴³ Id. at 408-09 (Kavanaugh, J., concurring) (citing U.S. Const. Art. IV, § 2, cl. 1).

⁴⁴ Id. at 409 (Kavanaugh, J., concurring) (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).

⁴⁵ Id.