What's Cooking with Prop 12?: SCOTUS Decision

https://nationalaglawcenter.org/prop12scotus/

After considering a constitutional challenge to a California ballot initiative regulating space requirements for farm animals, the Supreme Court of the United States ("SCOTUS") ruled on May 11th in favor of the state of California, allowing the law to stand. The proposal, known as "**Prop 12**," set conditions on the sale of pork meat in California- regardless of where it was produced. It required, among other things, that all products be from pigs born to a sow housed in at least 24 square feet of space. This effectively imposed Prop 12's animal housing standards on any producer, no matter the location, who wished to sell products to residents of California. This part of the law was promptly challenged and eventually heard by the Supreme Court.

The case, ***National Pork Producers Council v. Ross*** *("NPPC")* considered whether Prop 12's regulation of the out-of-state production of products to be sold within state boundaries is a permitted action under a legal doctrine known as the dormant Commerce Clause. In other words, under what circumstances can a state government pass laws that primarily affect the actions of people in other states? SCOTUS agreed to consider the case, and **oral arguments** were heard last October. Many of the arguments centered on whether the law met the provisions of the "*Pike* balancing test," which compares local benefits of a law to the burden that it places on out-of-state commerce to determine if the burden is clearly excessive.

NPPC Ruling

While parts of this ruling were agreed upon by all justices, the foundational legal analysis was a split decision, with several justices agreeing and disagreeing as to various parts. Ultimately, a plurality of the court held that Prop 12 was constitutional and enforceable by California. A minority of justices would have sent the case back to the district court for further consideration. The opinion of the Court (joined by the largest number of justices), was written by Justice Gorsuch.

In the initial, unanimously agreed upon, sections of the opinion, Gorsuch focuses on the "antidiscrimination principle" that "lies at the 'very core'" of dormant commerce clause jurisprudence. In the clearest situations, this happens if a state set different standards for out-of-state businesses vs in-state businesses (for example, if Prop 12 had required Kansas producers to give pigs more space, but allowed California producers to confine animals in smaller pens). However, Gorsuch does not apply this principle, instead pointing to a concession by the Pork Producers Council that producers are treated similarly regardless of geography. Gorsuch then

moves on to consider the constitutionality of a law that is not facially discriminatory (as in the hypothetical example above), but has a disproportionate effect on out-of-state businesses. While the court did not specify whether Prop 12 would fall into this category, it would have ultimately made no difference. Gorsuch refused to find such a law unconstitutional, writing that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial; behavior."

Next, Gorsuch considers the *Pike* balancing test in a series of sections where some justices join in his analysis while others do not. *Pike* asks the court to weigh local benefits of a law against the burden it places on out-of-state commerce. Again, Gorsuch returns to what he sees as an underlying requirement of discriminatory intent, even in the cases decided using the *Pike* analysis. He rules, in a section joined by Justice Thomas and Justice Barrett, that the cost/benefit analysis that Plaintiffs argued was not an integral part of the original *Pike* analysis, and that *Pike* does not authorize judges to "strike down duly enacted state laws… based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits'". He further highlights the perceived difficulty in doing so as a judicial body; "[h]ow is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any judicial principle." Instead, he disclaims that cost/benefit role, arguing that the responsibility is better given to those with "the power to adopt federal legislation that may preempt conflicting state laws."

Gorsuch also considers a framing of *Pike* that "requires a plaintiff to plead facts plausibly showing that the challenged law imposes 'substantial burdens' on interstate commerce before a court may assess the law's competing benefits or weigh the two sides against each other." In a section joined by Justices Thomas, Sotomayor and Kagan, Gorsuch finds that under the facts presented in the complaint, a "substantial harm to interstate commerce remains nothing more than a speculative possibility."

It's important to note that the sections of the opinion addressing the *Pike* test were not adopted by the majority. While Gorsuch wrote the opinion of the court, his reasoning was not adopted by the entire bench. In fact, several justices (Sotomayor, joined by Kagan and Roberts, joined by Alito, Kavanaugh & Jackson) also wrote or signed onto dissents outlining their disagreements with specific elements of Gorsuch's reasoning. These justices agree that courts can still consider *Pike* claims and balance a law's economic burdens against its noneconomic benefits, even if the challengers do not argue that the law has a discriminatory purpose. Much like the *Rapanos* case of WOTUS fame, this case did not result in clearly defined legal doctrine.

Justice Kavanaugh wrote as well, concurring in part and dissenting in part. He highlighted concerns about the constitutionality of statutes like Prop 12, "not only under the Commerce Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause."

NPPC: What Happens Next?

At least theoretically, other challenges to Prop 12 might be filed on dormant Commerce Clause grounds with more facts presented in the complaint. This would be possible because a plurality of Justices agreed that the Plaintiffs did not allege facts that would constitute a "substantial harm". New complaints, however, might allege facts sufficient to meet that burden. Those hypothetical challenges may or may not also include some of the additional legal grounds identified in Kavanaugh's opinion. But as of right now- and for the foreseeable future- Prop 12 is constitutional. However, there are other court cases pending that impact the immediate enforceability of Prop 12 and similar laws.

Enforceability

In *California Hispanic Chamber of Commerce v. Ross,* retailers asked for an extension of time to come into compliance with **Prop 12 regulations** for the sale of pork, which was granted by the court. For retailers selling "whole pork meat," the regulations may not be enforced until July 1, 2023. For retailers selling veal and egg products, the regulations are currently effective.

Massachusetts Restaurant Association v. Healey addresses a 2016 Massachusetts law, similar to Prop 12. The language of the statute is available **here**, and the regulations are available **here**. The MA law was challenged on dormant Commerce Clause grounds, and the parties agreed to prevent enforcement of the portions of the law relevant to the sale of pork products until 30 days after the NPPC decision was issued by the USSC. The portions relevant to the sale of egg and veal products are currently effective.

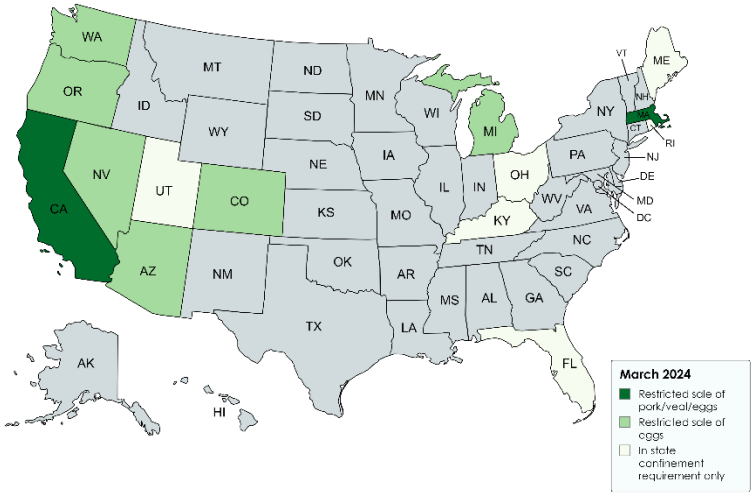
To read previous NALC updates about Prop 12 cases, click **here** and **here**.

For information on state laws governing farm animal confinement, click **here**.

Farm Animal Housing in 2024: Laws, Proposals and Challenges

https://nationalaglawcenter.org/farm-animal-housing-in-2024-laws-proposals-and-challenges/

In 2018, California passed **Proposition 12**, a high-profile ballot initiative regulating the production and sale of many veal, egg, and pork products. While "Prop 12" had some unique components, it was the latest in a series of **farm animal confinement laws** that had been passed across the United States since 2002. In the early stages, these laws included enhanced space



requirements for certain farm animals (some combination of egg-laying hens, veal calves and breeding pigs) living within that state's boundaries.

More recent iterations (including Prop 12) include space requirements for in-state production, but take it a step further, requiring that products sold within the state be traceable to animals living in similarly sized areas. These secondary statutes effectively impose that state's animal housing standards on all producers, no matter the location, who plan to sell their products within the state's boundaries.

Shortly after passage, Prop 12 was challenged in a case titled *National Pork Producers Council et al v. Ross et al* ("NPPC") that made its way to the United States Supreme Court. In May 2023, SCOTUS decided in favor of the state of California, allowing Prop 12 to go into effect as written. (NALC explainer **here**).

That decision, while answering the immediate question of whether Prop 12 was enforceable, has not ended the discussion about laws regulating living conditions for farm animals. This post will

discuss current events in this area, specifically; a challenge to a similar law in Massachusetts, another ongoing challenge to Prop 12, similar legislative proposals in other states, and federal proposals that would impact this issue.

Triumph Foods, LLC et al v. Campbell et al, 1:23-cv-11671

In 2016, voters in Massachusetts passed a ballot initiative called Question 3 ("Q3"). Similar to California's enactment, it included components prohibiting both the actual confinement of the animal and the sale of non-compliant products within the state. The language of the statute is available **here**, the regulations are available **here**, and a FAQ by the Massachusetts Department of Agricultural Resources is **here**. The provisions covering egg and veal products became effective in August of 2022. The provisions affecting the sale of pork products were postponed until after SCOTUS made its decision, ultimately becoming effective a year later, in August of 2023.

The pork provisions of Q3 were challenged by several out of state processors (NALC explainer **here**), who argued that the differences between Q3 and Prop 12 were enough to distinguish the two statutes so that the SCOTUS ruling would not force dismissal of the claims. Several of the arguments in the complaint were dismissed, but the commerce clause claims remained.

On Feb 5, 2024, **the court ruled** that a portion of Q3 was unconstitutional. Specifically, the unconstitutional portion of the act excluded mandatory compliance in situations where the buyer took physical possession of products at federally inspected establishments located in Massachusetts. As explained in the ruling, "The slaughterhouse exception has a discriminatory effect. The only way [plaintiffs] would be able to take advantage of the slaughterhouse exception would be to open its own federally inspected facility within the Commonwealth of Massachusetts, which the Supreme Court has held violates the Commerce Clause." Because it is discriminatory to out-of-state processors vs. in-state processors, and the state failed to demonstrate that the exception was passed for a legitimate local purpose, the court found that section to be unconstitutional. The court was then able to "sever" that portion of the law, which allowed for continued enforcement of the remaining sections.

However, in doing so the court decided to reconsider a claim that had been included in the original complaint, but had previously been dismissed. Specifically, he gave the plaintiffs the opportunity to submit a motion for summary judgment on the grounds that, without the severed provision, Q3 was preempted by the Federal Meat Inspection Act ("FMIA"). Preemption occurs when state laws conflict or interfere with federal laws. In these situations, the state law is invalidated by federal law, and can no longer be enforced. (NALC preemption explainer **here**).

On 3/6/24, plaintiffs submitted a **motion for summary judgment**. They argued, as expected, that Q3 was expressly preempted by the FMIA because it imposes additional conditions on facilities regulated under the FMIA. Further, plaintiffs argued that it was preempted because it conflicts with the objectives of the FMIA. Attorneys for the state of Massachusetts have until April 5 to file their response.

Iowa Pork Producers Association v. Rob Bonta, et al, 22-55336

While SCOTUS has already ruled that Prop 12 is constitutional based on the argument that it was not overtly discriminatory against out of state production but that it had a disproportionate impact on out of state businesses, another commerce-clause-based challenge is currently pending in the Ninth Circuit Court of Appeals.

The case, *Iowa Pork Producers Association v. Rob Bonta, et al,* ("Bonta") was dismissed by the District Court on Feb 28, 2022- before the SCOTUS arguments took place in NPPC. After plaintiffs appealed the dismissal, the case was stayed (or paused) until the *NPPC* case was heard and the decision published. The stay was since lifted, and the case has been briefed and advanced to oral arguments.

In terms of the commerce clause, plaintiff's arguments are twofold. The first argument was not raised in the *NPPC* case. As explained in the *NPPC* decision, "under this Court's dormant Commerce Clause decisions, no State may use its laws to discriminate purposefully against out-of-state economic interests. But the pork producers do not suggest that California's law offends this principle." However, plaintiffs in *Bonta* do argue that in-state and out-of-state producers are treated differently. The foundation for this argument traces back to Proposition 2, California's original farm animal confinement law, passed in 2008, that eliminated the use of gestation crates for in-state producers. As outlined in the plaintiff's brief, while "Proposition 2 allowed instate producers six years to comply with its provisions (November 4, 2008, to January 1, 2015), Proposition 12 was designed to take effect for out-of-state producers immediately. The turnaround requirements were to take effect on December 19, 2018—giving out-of-state producers a mere six weeks to come into compliance (as opposed to the prior five-year benefit provided to in-state producers)." **Plaintiff brief**. The discrepancy in the amount of time given to in-state versus out-of-state producers to adopt the "financial and operational burden[s]" of making the change establishes unconstitutional discrimination, according to the plaintiffs. Attorneys for the state of California disagree, arguing that Prop 12 is neutral in language and effect, because it "draws no distinction between in-state and out-of-state business owners or operators with respect to what pork products may be sold in California." **Answer brief (State of CA)**.

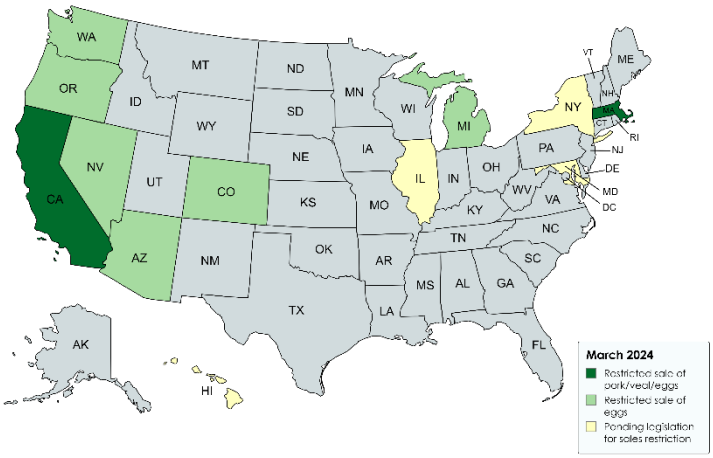
Plaintiffs also argued that Prop 12 violated the commerce clause because it has a disproportionate effect on out of state businesses. This was the central issue in NPPC, where the court found that it does not. (NALC explainer **here**). Plaintiff attempts to distinguish, or separate, itself from the NPPC ruling by claiming that the justices did not have enough information to show that effect was disproportionate. "Unlike the *NPPC v. Ross* opinion, which arose only from the context of a motion to dismiss, this Court has a full preliminary injunction record replete with evidence that Proposition 12 constitutes a federal regulation on pork production[.]" Given the additional information, plaintiffs argue, they are able to show the disproportionate effect that the *NPPC* plaintiffs could not. California, in response, argued that the *NPPC* decision answered this question in full, when the "Supreme Court considered virtually identical allegations of harm to out-of-state interests in National Pork and held that they did not suffice to state a *Pike* claim." A brief submitted by Humane

Society of the United States, who has joined the case as an intervenor/defendant, agrees with California in effect, but argued instead that the additional information was not relevant because SCOTUS ruled that *Pike* was not applicable in this situation. **Answer brief (HSUS)**.

Plaintiffs in this case also make several other (non-commerce clause) arguments. They argue that Prop 12 violates due process protections because it is unconstitutionally vague and the language defining the action of "engaging" in a "sale" is unclear enough that it could extend to an indeterminable number of points throughout the supply chain. Both the state of California and HSUS disagree, arguing instead that it provides sufficient notice as to what the statute prohibits.

Finally, the plaintiffs argues on procedural grounds that the district court erred in dismissing the original claims by failing to apply the correct standard of review and not giving credit to allegations contained in the original complaint.

Oral arguments in this case were held on on January 9 of this year in front of three judges in the Ninth Circuit. A decision is pending.



State proposals

Given the SCOTUS ruling permitting California to enforce Prop 12 sales restrictions, several other states have similar pending legislation that would allow for sales restrictions within their borders. **Hawaii**, **Illinois**, and **Maryland** all have bills that would prohibit the sale of eggs from laying hens in cage production systems. **New York** has proposed legislation similar to Prop 12 and Q3 in that it would require specific living conditions for laying hens, breeding pigs and veal calves, as well as prohibiting the sale of products from animals raised in non-compliant conditions.

Federal proposals

At this time, there are two federal proposals that would limit the ability of states to place additional conditions on the sale of products within their boundaries.

The first is the Ending Agricultural Trade Suppression Act, or "EATS Act". It has been proposed in the **Senate** by Sen Roger Marshall (R-KS), and cosponsored by 14 Republican

colleagues. The **House** version was proposed by Rep. Ashley Hinson (R-IA), and cosponsored by 36 Republican colleagues. If passed, these bills would prohibit state governments from imposing standards or conditions on preharvest production of ag products if the production occurred in different state and the standard is different than that imposed by the other state. If there are no previously set standards in the state of production, then no standards may be imposed. In terms of enforcement, the EATS Act includes a private right of action for a wide range of people along the supply chain; from producers to laborers, trade associations and transporters. It also included preliminary injunction language that would order a court to issue a requested injunction unless the non-moving party- the government actor- proves that it is likely to prevail on the merits at trial and that issuance of the injunction would cause irreparable harm to the state or local government. This would reverse the burden of proof typically required to obtain a preliminary injunction, where the moving party (usually the plaintiff) has the responsibility of proving each requirement.

However, the EATS Act has met with significant opposition on the Hill. A series of letters opposing the proposal have been signed by over 200 members of Congress (both parties) and submitted to the chair and ranking member of the House (**8/21/23**; **10/5/23**; **3/8/24**) and Senate (**8/29/23**) Agriculture Committees. Further, the Harvard Animal Law & Policy Program published a report titled ***Legislative Analysis of S.2019 / H.R.4417: The "Ending Agricultural Trade Suppression Act" 118th Congress – 2023-2024*** that raised concerns about both the language and the effect of the proposal. The report argued that significant numbers of laws affecting zoonotic diseases, plant/pest management, food safety and natural resources would also be affected, and that the proposal would result in extensive litigation, imposing costs on state/local governments and fed agencies. The EATS Act has been referred to both the Agriculture and the Judiciary committees, where it remains.

The other relevant proposal, **S. 3382**, was submitted by Senator Josh Hawley (R-MO). It is titled Protecting Interstate Commerce for Livestock Producers, and currently has no cosponsors. It is more limited than the EATS Act, with an application to "livestock and livestock-derived goods" rather than the broader "agricultural products." If passed, it would prevent state and local entities from regulating the production, raising or importation of livestock and livestock-derived goods from other states if those regulations go beyond that which were imposed by the state of production. However, there would be exceptions so that states could regulate imports in the event of animal disease. S. 3382 also includes a private right of action, but does not include the language shifting the burden in the case of a request for a preliminary injunction that was included in the EATS Act.

While no other proposals have been formally introduced, several members of Congress have expressed interest in regulating this area of law.

SEC. 12007. ENSURING THE FREE MOVEMENT OF LIVESTOCK-DERIVED PRODUCTS IN INTERSTATE COMMERCE.

a) PURPOSE.—The purpose of this section is to—
   1. protect the free movement in interstate commerce of products derived from covered livestock;
   2. encourage a national market of such products;
   3. ensure that producers of covered livestock are not subject to a patchwork of State laws restricting access to a national market; and
   4. ensure that the United States continues to uphold its international trade obligations.

b) IN GENERAL.—Producers of covered livestock have a Federal right to raise and market their covered livestock in interstate commerce and therefore no State or subdivision thereof may enact or enforce, directly or indirectly, a condition or standard on the production of covered livestock other than for covered livestock physically raised in such State or subdivision.

c) PROTECTING INTERSTATE COMMERCE.—Producers of covered livestock have a Federal right to raise and market their covered livestock in interstate commerce and therefore no State or subdivision thereof may enact or enforce, directly or indirectly, as a condition for sale or consumption, any condition or standard of production on products derived from covered livestock not physically raised in such State or subdivision that is in addition to, or different from, the conditions or standards of production in the State in which the production occurs.

d) DEFINITIONS.—In this section:
   1. COVERED LIVESTOCK.—The term ''covered livestock''
      A. means any domestic animal raised for the purpose of—
         i. slaughter for human consumption;
      or
         ii. producing products manufactured for human consumption which are derived from the processing of milk, including fluid milk products; and
      B. does not include domestic animals raised for the primary purpose of egg production.
   2. PRODUCTION.—The term ''production''—
      A. means the raising (including breeding) of covered livestock; and
      B. does not include the movement, harvesting, or further processing of covered livestock.

SEC. 12114. PILOT PROGRAM TO SUPPORT CUSTOM SLAUGHTER ESTABLISHMENTS.

(a) IN GENERAL.—

(1) STATE OPERATED PILOT PROGRAM.—Upon the receipt of an application from a custom exempt facility and subject to the requirements specified in subsection (c), a State department of agriculture may operate a pilot program to allow such custom facility to sell slaughtered meat and meat food products (referred to in this section as ''meat products'') directly to consumers within the State in which the facility is located in accordance with the pilot program.

(2) LACK OF A STATE PILOT PROGRAM.—If a State department of agriculture does not elect to operate a pilot program, the Secretary shall, upon request from a custom exempt facility in such a State, operate a pilot program administered by the Secretary for that State in accordance with this section.

(b) ALLOWABLE NUMBER OF FACILITIES.—

(1) INITIAL APPROVAL.—Except as provided in paragraph (2)—

(A) a State department of agriculture may approve not more than 5 facilities in such State for participation in a pilot program established under subsection (a)(1); and

(B) the Secretary may approve not more than 10 facilities to participate in all pilot programs established under subsection (a)(2).

(2) SUBSEQUENT APPROVAL OF FACILITIES.— Not less than 2 years after the establishment of a pilot program, a State department of agriculture or the Secretary may, if no product produced at a facility that was initially approved under paragraph (1) for participation in such pilot program has been subject to an emergency action under subsection (f) during the 2-year period following such establishment, approve—

(A) in the case of a State department of agriculture, not more than 5 additional facilities in the respective State; and

(B) in the case of the Secretary, not more than 10 additional facilities in all States.

(c) PILOT PROGRAM REQUIREMENTS.—A pilot program established under this section shall, at a minimum, require—

(1) that meat products sold under the pilot program are—

(A) sold directly to consumers within the State from—

(i) the owner of the animals from which such meat products are derived; or

(ii) the custom exempt facility at which the meat products were processed;

(B) not eligible for re-sale; and

(C) clearly labeled to indicate—

(i) the name and address of the facility at which the meat products were processed;

(ii) the name and address of the owner of the animals from which such meat products are derived;

(iii) the location where animals from which such meat products are derived were raised;

(iv) the date of slaughter of such animals and the period of time over which the owner raised such animals;

(v) that such meat products were not subject to Federal inspection; and

(vi) that such meat products shall not be resold;

(2) that custom exempt facilities participating in the pilot program comply with—

(A) Public Law 85–765 (7 U.S.C. 1901 et seq.; commonly known as the ''Humane Methods of Slaughter Act of 1958'');

(B) applicable State and local laws;

(C) section 23(d) of the Federal Meat Inspection Act (21 U.S.C. 621(d)); and

(D) Federal regulations pertaining to—

(i) sanitation standards and record keeping requirements for custom exempt facilities; and

(ii) the handling and disposition of specified risk materials;

(3) that custom exempt facilities participating in the pilot program be subject to onsite inspection by the Secretary to ensure compliance with the requirements specified in paragraphs (1) and (2); and

(4) that custom exempt facilities participating in the pilot program be subject to onsite inspection at least annually

by the local authority responsible for restaurant inspections or the State department of agriculture.

(d) IMPLEMENTATION.—Not later than 90 days after the date of the enactment of this Act, the Secretary shall issue, and make publicly available, guidance for participation in a pilot program established pursuant to this section.

(e) INELIGIBILITY.—An establishment subject to inspection by the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 et seq.)

or operating pursuant to a State meat inspection program authorized under section 301 of the Federal Meat Inspection Act (21 U.S.C. 661) shall not be eligible to participate in a pilot program established pursuant to this section.

(f) AUTHORITY FOR EMERGENCY ACTION.—If the Secretary has credible evidence that a meat product produced at a custom exempt facility participating in a pilot program established pursuant to this section is adulterated, the Secretary—

(1) shall, pursuant to the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), take such actions as may be necessary to address the risk to public health posed by such products; and

(2) may terminate the participation of a custom exempt facility in a pilot program established pursuant to this section.

(g) REPORT REQUIRED.—

(1) REPORTS BY STATE DEPARTMENTS OF AGRICULTURE TO SECRETARY.— Beginning September 30, 2025, and each fiscal year thereafter until September 30, 2029, each State department of agriculture operating a pilot program pursuant to this section shall submit to the Secretary a report detailing, with respect to each such pilot program within the relevant State for the preceding fiscal year—

(A) the number and location of persons or custom exempt facilities selling meat products under each such pilot program;

(B) the outcomes of each such pilot program; and

(C) any instances in which a meat product was subject to an emergency action under subsection (f).

(2) REPORT BY SECRETARY TO CONGRESS.— Not later than 2 years after initiating a pilot program under this section, the Secretary shall submit to the Committee on Agriculture of the House of

Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report detailing—

(A) the information received from participating State departments of agriculture under paragraph (1); and

(B) for any custom exempt facilities participating in a pilot program established by the Secretary pursuant to subsection (a)(2)—

(i) the number and location of persons or custom exempt facilities selling products pursuant to such pilot program;

(ii) the outcomes of such pilot program; and

(iii) any instances in which a meat product was subject to an emergency action under subsection (f).

(h) CUSTOM EXEMPT FACILITY DEFINED.—In this section, the term ''custom exempt facility'' means an establishment engaged in the slaughter of animals and the preparation of the carcasses, parts thereof, meat, and meat food products for commerce that is not subject to the Federal inspection requirements under title I of the Federal Meat Inspection Act (21 U.S.C. 601 et seq.).

(i) SUNSET.—A State and the Secretary may not operate a pilot program under this section on or after September 30, 2029, and no facility that is exempt from inspection under the Federal Meat Inspection Act (21 U.S.C. 601 et seq.) pursuant to this section shall be exempt from that inspection on or after September 30, 2029.

Doctrine of Chevron Deference Challenged at the High Court

https://nationalaglawcenter.org/doctrine-of-chevron-deference-challenged-at-the-high-court/

The United States Supreme Court has agreed to hear oral argument in a case challenging the authority granted to federal agencies under the legal doctrine known as *Chevron* deference. First established by the Supreme Court in the 1980s, *Chevron* deference has proven to be highly controversial. In ***Loper Bright Enters. v. Raimondo*, No. 22-451 (2023)**, the plaintiffs have asked the Court to revisit *Chevron* and either clarify how the doctrine should be applied or overturn it entirely.

Background

The dispute at the center of *Loper Bright Enters. v. Raimondo* involves a regulation adopted by the National Marine Fisheries Service ("NMFS") under its Magnuson-Stevens Act ("MSA") authority. The regulation would require certain fishing boats to allow a federal observer to accompany them on fishing trips, and pay a portion of the observer's salary. The plaintiffs argue that the regulation is beyond the scope of authority granted to NMFS by the MSA. They filed their lawsuit to challenge both the regulation itself, and the legal doctrine that lower courts relied on to uphold the regulation.

Magnuson-Stevens Act

The MSA is the primary statute regulating marine fisheries management in United States waters. The statute was passed by Congress and signed into law in 1976 in order to "conserve and manage the fishery resources found off the coasts of the United States" while also recognizing that "these fishery resources contribute to the food supply, economy, and health of the Nation[.]" 16 U.S.C. § 1801. Along with regulating foreign fisheries that operate within 200 nautical miles of the United States coast, the MSA also works to regulate overfishing and overcapacity.

Under the MSA, the United States' federal fisheries are divided into eight regions, each of which is governed by a fishery management council made up of various federal and state employees. 16 U.S.C. § 1852. Each fishery management council is responsible for developing a fishery management plan for each fishery in its region. 16 U.S.C. § 1852(h). The purpose of these fishery management plans is to establish the "conservation and management measures" which are "necessary and appropriate for the conservation and management of the fishery[.]" 16 U.S.C. § 1853(a). Once a fishery management council finalizes a fishery management plan, it submits that plan to NMFS for approval. After NMFS reviews the plan to ensure that it is consistent with the requirements of the MSA, the plan is available for a period of public comment before becoming final. 16 U.S.C. § 1854(a). The same process is followed for amendments to fishery management plans.

The MSA lays out the various required provisions that fishery management plans must contain, as well as discretionary provisions that fishery management plans may contain. Relevant to the present

case, one of the required provisions for fishery management plans involves the collection of data. Specifically, the MSA requires that fishery management plans include provisions on the collection of information regarding "the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, [and] economic information necessary to meet the requirements of [the MSA.]" 16 U.S.C. § 1853(5). While the required provisions do not speak directly to how this data should be collected, one of the discretionary provisions states that any fishery management plan may "require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery[.]" 16 U.S.C. § 1853(b)(8). The MSA also provides a catch-all provision which states that fishery management plans "may prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(14).

It is under the authority of those MSA provisions that NMFS adopted and finalized a proposal from the New England Fishery Council that would amend all the New England fishery management plans. The amendment, which became final in February, 2020, grants the option to require the fishing industry to pay the costs for monitoring and data collection when federal funding is unavailable. Specifically at issue in *Loper Bright Enters. v. Raimondo* is a portion of the rule that would require domestic vessels operating in the Atlantic herring fishery to notify NMFS prior to any trip within the herring fishery for monitoring coverage. If NMFS determines that an observer is required on the vessel, but no federal funds are available to accommodate the observer, the fishing vessel will be required to pay for the observer's service which is estimated to be about $710 per day. The text of that regulation is available **here**.

The plaintiffs in *Loper Bright Enters. v. Raimondo* challenged both the regulation itself and the authority of NMFS to issue it.

Chevron Deference

The doctrine of *Chevron* deference arises from the landmark Supreme Court case, ***Chevron U.S.A., Inc. v. Natural Resources Defense Council. Inc*., 468 U.S. 837 (1984)**. In that case, the Supreme Court established a legal test for courts to determine when a judge should defer to an agency's statutory interpretation. Most often, *Chevron* deference is applied to cases challenging an agency regulation.

To apply *Chevron* deference, courts must follow the two-step framework outlined by the Supreme Court. First, the court will consider "whether Congress has directly spoken to the precise question at issue." In other words, the court determines whether the relevant statute directly addresses the specific issue targeted by the agency's regulation, or whether the statutory language is "ambiguous." For example, if the United States Fish and Wildlife Service ("FWS") passed a regulation adopting a definition of "endangered species" under the Endangered Species Act ("ESA"), the regulation likely would not pass the first step of *Chevron* deference because the text of the ESA already defines "endangered species." However, if FWS passed a regulation to define the term "habitat" under the ESA, that regulation likely would pass step one of *Chevron* because while the ESA frequently uses the

term throughout its text, it does not include a formal definition. Therefore, the definition of "habitat" under the ESA is ambiguous for purposes of *Chevron* deference.

If a court determines that the first step of the *Chevron* framework is satisfied, it will move on to the second step which asks the court to determine whether the agency's statutory interpretation is "reasonable." If the court finds that the interpretation is reasonable, then it must defer to the agency even if the court would have adopted a different interpretation. If the court determines that the agency's interpretation is not reasonable, then it may overturn the agency's regulation. Courts may use a variety of judicial tools to determine whether an agency's statutory interpretation is "reasonable." For example, some courts may interpret "reasonableness" according to the Administrative Procedure Act's "arbitrary and capricious" standard which directs courts to find agency actions unlawful if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Courts may also rely on traditional tools of statutory interpretation when applying step two of *Chevron*, such as examining the legislative history of a statute or considering the commonly understood meaning of a particular statutory term. While the methods that courtd use to determine "reasonableness" can differ, ultimately step two of *Chevron* deference asks a court to decide whether an agency's statutory interpretation is "rationally related to the goals" of the statute.

In *Loper Bright Enters. v. Raimondo*, the plaintiffs have challenged not only NMFS's interpretation of the MSA, but the doctrine of *Chevron* deference itself.

Current Lawsuit

Prior to reaching the Supreme Court, *Loper Bright Enters. v. Raimondo* was argued in the federal D.C. Court of Appeals. There, the court applied *Chevron* deference to determine whether the challenged regulation was a reasonable interpretation of the MSA. The D.C. Circuit determined that the regulation was reasonable under *Chevron* and upheld the rule. It is this decision that the plaintiffs appealed to the Supreme Court.

Pathway to the Supreme Court

At the D.C. Circuit, the plaintiffs in *Loper Bright Enters. v. Raimondo* argued that the NMFS regulation that would require fishing vessels operating in the Atlantic herring fishery to pay around $710 per day for a federal observer if federal funds were unavailable was not a reasonable interpretation of the MSA. The plaintiffs claimed that three provisions of the MSA create monitoring programs that require vessels to pay for federal observers. Section 1821(f) of the MSA provides that foreign fishing vessels are required to pay a surcharge to cover the costs of carrying a United States observer onboard the vessel. Section 1853a(e) provides that anyone fishing under a type of permit known as a "limited access privilege" permit may be required to pay fees to cover the cost of data collection and analysis. Finally, section 1862 provides that the North Pacific Council may establish a fee system to cover the cost of a federal observer. Because none of these programs directly address the monitoring program established in NMFS's Atlantic herring fishery regulation, the plaintiffs argued that the regulation was contrary to the language of the MSA and outside the scope of NMFS's authority.

The D.C. Circuit disagreed. In applying the *Chevron* two-step framework, the court first determined that the MSA was ambiguous as to whether NMFS could approve amending a fishery management plan to allow for a monitoring fee program because the text of the statute provides that such plans may "prescribe such other measures, requirements, or conditions and restrictions" as are "necessary and appropriate for the conservation and management of the fishery[.]" 16 U.S.C. § 1853(b)(14). While the MSA did not specifically grant NMFS authority to establish an industry-funded monitoring program, it also did not specifically prevent NMFS from establishing such programs. Finding the MSA ambiguous on the question of industry-funded monitoring programs, the court moved on to step two. Under step two of the *Chevron* framework, the court found that NMFS's interpretation of the MSA was reasonable. Because section 1853(b)(8) of the MSA states that fishery management plans may require fishing vessels to carry federal observers for the purpose of collecting necessary data, and section 1853(b)(14) of the MSA allows fishery management plans to include any other measures "necessary and appropriate" for the management of a fishery, the D.C. Circuit concluded that NMFS's approval of the Atlantic herring fishery monitoring program was a reasonable interpretation of the MSA.

Before the Supreme Court

The plaintiffs appealed the D.C. Circuit's decision, presenting two questions to the Supreme Court. First, the plaintiffs ask the Supreme Court to consider "whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry." Second, the plaintiffs ask the Court to consider "whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." In essence, the plaintiffs in *Loper Bright Enters. v. Raimondo* make two arguments. First, the plaintiffs argue that the D.C. Circuit misapplied *Chevron* deference. Second, the plaintiffs argue that if the D.C. Circuit did not misapply *Chevron*, the doctrine should be either narrowed or overturned.

In making their first argument, the plaintiffs raised the same claims they did at the lower court. While the plaintiffs agree that the MSA does give NMFS the authority to require federal observers on board fishing vessels, only three provisions of the MSA outline specific instances in which NMFS could require vessels to cover the cost of such observers. Because the Atlantic herring fishery is not included in any of those three provisions, the plaintiffs argue that a correct application of *Chevron* would find that the MSA unambiguously does not allow NMFS to approve an industry-funded monitoring program in the Atlantic herring fishery, and the lower court's decision should be overturned.

The plaintiffs' second argument goes a step further. According to the plaintiffs, if the Supreme Court finds that the D.C. Circuit did appropriately apply *Chevron*, then the Court should either clarify the boundaries of *Chevron* deference by explaining that lack of statutory language on its own does not create ambiguity, or overturn the doctrine entirely. The plaintiffs claim that the doctrine of *Chevron* deference has inappropriately increased the role of federal agencies in interpreting statutes and statutory grants of authority, while simultaneously reducing the role of the judiciary. According to the plaintiffs, either overturning *Chevron* or clarifying its limits would require courts to engage in their own statutory interpretation instead of deferring to federal agencies.

Looking Forward

The Supreme Court is expected to hear oral arguments in *Loper Bright Enters. v. Raimondo* in January 2024. Recently, the Court announced that it would hear the case in tandem with ***Relentless, Inc. v. U.S. Dep't of Commerce*, No. 22-1219 (2023)**, a case challenging the same NMFS regulation and making the same legal arguments as the plaintiffs in *Loper Bright Enters. v. Raimondo*. Ultimately, however the Court rules in either of these cases, the outcome is likely to impact both federal agencies and courts tasked with reviewing agency regulations.

To read the plaintiffs' brief in *Loper Bright Enters. v. Raimondo*, click **here**.

To read the defendants' brief in *Loper Bright Enters. v. Raimondo*, click **here**.

To read the D.C. Circuit's decision, click **here**.

To read the text of the MSA, click **here**.

To read the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council. Inc*., click **here**.

For more National Agricultural Law Center resources on administrative law, click **here**.