



NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
ANIMAL LAW COMMITTEE**

H.R. 2642

Rep. Lucas

THE “PROTECT INTERSTATE COMMERCE ACT” AMENDMENT (REP. KING)

Federal Agriculture Reform and Risk Management Act of 2013

THIS AMENDMENT IS OPPOSED

The Animal Law Committee of the New York City Bar Association opposes the inclusion of an amendment to the Federal Agriculture Reform and Risk Management Act of 2013, H.R. 2642 (the “Farm Bill”) that, if passed into law, would have the effect of nullifying thousands of state and local laws related to animal welfare, food safety, consumer protection and environmental protection. The amendment proposed by Representative Steve King (R-Iowa), also referred to as the “Protect Interstate Commerce Act” (“PICA” or the “King Amendment”), would prohibit states from enacting laws governing the production or manufacture of any agricultural product that is intended for interstate commerce, including food and animals raised for food, that is “in addition to the standards and conditions applicable to such production or manufacture pursuant to” federal law and the laws of any other state where an agricultural product is produced or manufactured.

THE PROPOSED AMENDMENT

The King Amendment adds a section to Title XII of the Farm Bill that would prohibit a state from passing laws that impose higher standards than existing federal standards for the production of any agricultural product intended for sale in interstate commerce, including all products listed in Section 207 of the Agriculture Marketing Act of 1946 (7 U.S.C. § 1626 et seq.).¹

Sec. 12312: Prohibition against interference by state and local governments with production or manufacture of items in other states

(a) In General: Consistent with Article I, section 8, clause 3 of the Constitution of the United States, the government of a State or locality

¹ The term “agricultural product” is defined in 7 U.S.C. 1626 to include “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.”

therein shall not impose a standard or condition on the production or manufacture of any agricultural product sold or offered for sale in interstate commerce if--

*(1) such production or manufacture occurs in another State; and
(2) the standard or condition is in addition to the standards and conditions applicable to such production or manufacture pursuant to--*

(A) Federal law; and

(B) the laws of the State and locality in which such production or manufacture occurs.

THE COMMITTEE OPPOSES THE PROPOSED AMENDMENT

If enacted, the King Amendment would have far-reaching negative implications with respect to public health and food safety, animal welfare, and state sovereignty by effectively nullifying the reach of state and local laws enacted for the purpose of protecting public health and safety, consumer interests, animal welfare and the environment with respect to the sale of out of state agricultural products. In essence, the King Amendment would place each state at the mercy of any other state whose laws present a differing view about the public health, safety, or welfare associated with an agricultural product. Namely, if a state chooses to protect its human and animal populations by providing reasonable standards or conditions on the production or manufacture of agricultural products offered for sale in that state, it would not be able to enforce those conditions and standards with respect to products of states with less protective laws. Under these circumstances, agricultural producers will likely seek to locate in states with the most lax regulations, thus effectively nullifying the laws of states offering its population more protection. The result would be increased risk to both human health and safety and animal welfare, with states being unable to protect their own inhabitants even in the face of clear scientific evidence of the harm lax regulations would cause. Additionally, passage of the King Amendment may encourage states to engage in a “race to the bottom” to offer the least restrictive agricultural production standards in an attempt to retain those producers within their jurisdictions.

Because the scope of the term “agricultural products” is broad enough to include a wide range of horticultural products, the King Amendment would impact a great number of laws enacted by states to protect their inhabitants with regard to:

- the non-therapeutic use of antibiotics in food-producing animals;²

² A growing public health concern relates to antibiotic-resistant bacteria as a consequence of the non-therapeutic uses of certain drugs on food-producing animals in industrial farming. U.S. Department of Health and Human Services, Center for Disease Control and Prevention, “Antibiotic Resistance Threats in the United States, 2013,” p.6, April 23, 2013, available at <http://www.cdc.gov/drugresistance/threat-report-2013/pdf/ar-threats-2013-508.pdf> (last visited Oct. 18, 2013); *Industrial Food Animal Production in America: Examining the Impact of the Pew Commission’s Priority Recommendations*, Johns Hopkins Center for a Livable Future, Fall 2013, available at http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/pdf/research/clf_reports/CLF-PEW-for%20Web.pdf (last visited Oct. 23, 2013).

- the labeling of genetically modified food items;³
- mandating basic standards of care for farmed animals,⁴ including prohibitions on the use of intensive confinement methods of farmed animals⁵ such as gestation crates for pigs,⁶ veal crates for calves⁷ and battery cages for hens,⁸ (see the different approaches in Arizona,⁹ California,¹⁰ Colorado,¹¹ Florida,¹² Maine¹³ and Oregon);¹⁴

³ See, e.g., Public Act NO. 13-183 (CT 2013); LD 718 (HP 490) (ME 2013)

⁴ Many states have sought to implement laws that would mandate minimum standards of care for the treatment of farmed animals given that no federal law addresses the treatment of animals raised for food prior to transport and slaughter. The Animal Welfare Act expressly excludes farm animals from its protections (7 U.S.C. § 2132(g) (2006) (definition of “animal”)); The Twenty-Eight Hour Law (49 U.S.C §80502) solely addresses the treatment of animals being transported across state lines; The Humane Methods of Slaughter Act (7 U.S.C. 1901 et. seq.) only regulates the treatment of animals at the time of slaughter; The Federal Meat Inspection Act (FMIA) (21 U.S.C. §§601(h), 603(a)) only regulates the handling of animals at the time of slaughter. See also *Nat’l Meat Assn. v. Harris*, 132 S.Ct. 965, 969 (2012) (FMIA “applies from the moment a truck carrying livestock ‘enters, or is in line to enter,’ a slaughterhouse’s premises.”).

⁵ Intensive confinement of farmed animals is recognized to contribute to serious public health and environmental concerns, including air and water pollution and global warming. See, e.g., Pew Commission on Industrial Farm Animal Production, *Environment*, available at <http://www.ncifap.org/issues/environment/> (last visited Oct. 8, 2013); *Industrial Food Animal Production in America: Examining the Impact of the Pew Commission’s Priority Recommendations*, Johns Hopkins Center for a Livable Future, Fall 2013, available at http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/pdf/research/clf_reports/CLF-PEW-for%20Web.pdf (last visited Oct. 23, 2013); *Livestock’s Long Shadow*, Food and Agriculture Organization of the United Nations, 2006, available at <ftp://ftp.fao.org/docrep/fao/010/a0701e/a0701e00.pdf> (last visited Oct. 8, 2013).

⁶ Gestation crates for breeding sows are individual, concrete-floored metal stalls measuring 2 – 2.3 feet wide by 6.6 – 6.9 feet long, which is only slightly larger than the animal and so severely restrictive of her movement that sows are unable to turn around within the crate. See *Welfare Issues with Gestation Crates for Pregnant Sows*, Humane Society of the United States, June 2012, available at <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Gestation-Crates-for-Pregnant-Sows.pdf> (last visited Oct. 18, 2013).

⁷ Veal calves may be tethered or confined for as long as sixteen weeks in two-foot-wide crates which do not permit them to walk or exercise, leading to such physical ailments as digestive problems, discomfort, impaired locomotion, and a greater susceptibility to disease. See “An HSUS Report: The Welfare of Animals in the Veal Industry,” Humane Society of the United States, July 2012, available at <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-animals-in-the-veal-industry.pdf> (last visited Oct. 18, 2013); Farm Sanctuary, *The Welfare of Cattle in Dairy Production: A Summary of the Scientific Evidence*, April 2011.

⁸ Approximately 98% of egg-laying hens in the United States are confined in battery cages, where they also cannot turn around, or spread their wings. Each bird is allotted an average space of about 61 square inches, smaller than an 8 ½ by 11 inch piece of paper. See United Egg Producers, *United Egg Producers Animal Husbandry Guidelines for U.S. Egg Laying Flocks*, available at http://www.unitedegg.org/information/pdf/UEP_2010_Animal_Welfare_Guidelines.pdf (last visited Oct. 8, 2013).

⁹ Ariz. Rev. Stat. §13-2910.07 (2007) (Prohibiting gestation crates and veal crates). Similar legislation has been introduced in New York State. See A. 1656/S. 4987, 236th Session (N.Y. 2013) (concerning the intensive confinement of sows and calves).

- standards on food additives;¹⁵
- labeling requirements for farm-raised fish;¹⁶
- the humane care and treatment of dogs at breeding facilities;¹⁷
- “pet lemon laws,” which require pet dealers to guarantee the good health of an animal sold to consumers within the state;¹⁸
- banning the sale of cat or dog meat;¹⁹
- banning the sale or possession of shark fins;²⁰
- banning foie gras;²¹
- the movement of forest products to prevent the spread of diseases among local

¹⁰ California Health & Safety Code §§ 25990-25994 (2009) (prohibiting the confinement of a farm animal “in a manner that prevents such animal from lying down, standing up, and fully extending his or her limbs; and turning around freely”).

¹¹ Colo. Rev. Stat. §35-50.5 (2008) (prohibiting the use of gestation crates and veal crates).

¹² Art. X, §21, Fla. Const. (adopted 2002) (prohibiting the use of gestation crates).

¹³ 7 MRSA §4020 (2009) (prohibiting the use of gestation crates and veal crates).

¹⁴ Or. Rev. Stat. § 632.850 (2011) (prohibiting the sale of eggs from battery caged hens).

¹⁵ *See e.g.*, N.Y. AGRIC. & MKTS. LAW § 199-a.

¹⁶ *See, e.g.*, Alaska Stat. § 17.20.040: Misbranded Foods.

¹⁷ *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 401. Given that in a number of states dogs are considered “livestock” (*see, e.g.*, Or. Rev. Stat. § 596.010(3) (2012) (Oregon law defining “livestock” to include dogs); Mont. Code Anno. § 87-1-303(4)(a) (2012) (Montana law defining “domestic livestock” to include dogs)), the King Amendment would likely also impact state and local legislation regarding the humane care and treatment of dogs.

¹⁸ *See* N.Y. GEN. BUS. LAW § 753.

¹⁹ *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 96-e: Unlawful Acts (2006); Ga. Code Ann., § 26-2-160; CA Penal Code §594-625c).

²⁰ *See* NYS A.1769-A/S.1711-A (banning the sale, trade or possession of shark fins); *see also* Hawaii law (HRS. § 188-40.7), Washington law (Rev Code Wash. § 77.15.770), Illinois law (§ 515 ILCS 5/5-30), Oregon law (Or. Rev. Stat. § 509.160), California law (CA Fish and Game Code § 2021).

²¹ *See* CA HEALTH & SAFETY CODE sec. 25980-25984.1.

forests;²² and

- fur product labeling laws.²³

Additionally, the King Amendment raises significant Tenth Amendment concerns because the state laws that would essentially be nullified by enactment of the King Amendment, such as the examples above, are fully within the states' police powers under the Tenth Amendment. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."²⁴ States have traditionally been deemed to have the power to legislate in areas such as public health and food safety in order to protect against harm to their citizens²⁵ and such state laws have been upheld where they do not treat out-of-state businesses any differently than in-state businesses²⁶ and where such laws are not less restrictive than, or otherwise preempted by, federal law.²⁷ By precluding a state from enforcing its laws concerning the standards or conditions of production of an agricultural product with respect to products of states with less protective laws where the state law sought to be enforced is not less restrictive than, or otherwise preempted by, federal laws regulating that agricultural product, the King Amendment would thus create an unprecedented, and ostensibly impermissible, expansion of federal power by shifting the states' reserved power to regulate agricultural products into Congress' hands.

Proponents have asserted that the King Amendment is needed because it "prohibits states from entering into trade protectionism by forcing cost prohibitive production methods on farmers

²² See, e.g., 505 Ill. Comp. Stat. 90/1 et.seq.: Insect and Plant Pest Disease Act (2012).

²³ See, e.g., N.Y. GEN. BUS. LAW § 399-aaa.

²⁴ U.S. Const. Amend. X.

²⁵ *U.S. v. Butler*, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1936) (holding that a federal law aimed at increasing the price of certain farm products for farmers by decreasing the quantities produced, was beyond the delegated powers of the federal government because it regulated and controlled agricultural production); *New York v. U.S.*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (stating that, although the federal government could regulate the interstate market of radioactive waste disposal, it could not commandeer the states' legislative processes by directly compelling them to enact and enforce a federal regulatory program).

²⁶ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 127 S. Ct. 1786, 167 L. Ed. 2d (2007) (holding that county ordinances which treated in-state private business interests the same as out-of-state ones, did not "discriminate against interstate commerce" for purposes of the dormant Commerce Clause). State laws enacted for the public health and safety which do discriminate against out-of-state businesses have also been upheld where there is no nondiscriminatory alternative. See also *Maine v. Taylor*, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (upholding state law prohibiting the importation of live baitfish because it served the legitimate local purpose of preventing the accidental importation of parasites, nonnative fish species, and there were no nondiscriminatory alternatives).

²⁷ *Wisconsin Public Intervenor et. al. v. Mortier et. al.*, 111 S.Ct. 2476, 2483 (1991) (upholding state law regulating pesticide usage where not in conflict with federal law concerning pesticide usage, noting that "the States' historic powers are not superseded by federal law unless that is the clear and manifest purpose of Congress.").

in other states.”²⁸ However, the Commerce Clause of the Federal Constitution already protects states from such legislation. States may not discriminate against interstate commerce or impose “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”²⁹ A state also cannot enact a rule or regulation the practical effect of which is to “control conduct beyond the boundaries of the state.”³⁰ Even beyond that, courts carefully scrutinize state laws to determine whether the statute’s burden on interstate commerce is “clearly excessive in relation to the putative local benefits.”³¹ There is thus a rigorous regime in place to protect states from the kind of trade protectionism that is cited by King Amendment proponents.³²

CONCLUSION

For the reasons stated above, the Animal Law Committee of the New York City Bar Association opposes the King Amendment to the Farm Bill.³³

October 2013

²⁸ *Two King Amendments Included in Farm Bill*, *supra*.

²⁹ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995).

³⁰ *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

³¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1990).

³² *See Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977); *American Beverage Ass’n v. Snyder*, 700 F.3d 796 (6th Cir. 2012).

³³ We note that as of October 2013, over 100 organizations, including governmental, agricultural and food processing, animal welfare, consumer protection, public health, food safety, environmental, fire and safety services, and labor and civil rights organizations, as well as over 100 members of Congress have expressed opposition to the King Amendment. *See Stated Opposition to Rep. Steve King’s Farm Bill Amendment*, The Humane Society of the United States, Oct. 7, 2013, available at <http://www.humanesociety.org/assets/pdfs/legislation/king-amendment-opposition-master.pdf> (last visited Oct. 21, 2013).