

December 6, 2013

The Honorable Debbie Stabenow
Chairwoman
Senate Committee on Agriculture,
Nutrition & Forestry
328A Russell Senate Office Building
Washington, DC 20510
Email: karla_thieman@ag.senate.gov

The Honorable Thad Cochran
Ranking Member
Senate Committee on Agriculture,
Nutrition & Forestry
328A Russell Senate Office Building
Washington, DC 20510
Email: Taylor_Nicholas@ag.senate.gov

The Honorable Frank Lucas
Chairman
House Committee on Agriculture
1301 Longworth House Office Building
Washington, DC 20515
Email: john.goldberg@mail.house.gov

The Honorable Colin Peterson
Ranking Member
House Committee on Agriculture
1305 Longworth House Office Building
Washington, DC 20515
Email: mary.knigge@mail.house.gov
Nathan.fretz@mail.house.gov

Re: King Amendment (in Section 11312 of the House version of the Farm Bill
(H.R. 2642))

Dear Members of Congress,

We are writing concerning the poorly named "Protect Interstate Commerce Act," also known as the "King Amendment," which is currently in Section 11312 of the House version of the Farm Bill (H.R. 2642), to set out the mutual opinion of the undersigned tenured law school professors at a number of universities around the country. It is the opinion of the undersigned, as set out further below, that should the Amendment pass, there is a significant likelihood that many state agricultural laws across the country will be nullified, that public health and safety will be threatened, and that the Amendment could ultimately be deemed unconstitutional.

Because the language of the King Amendment is so broad and so many interpretations are possible, we believe that an untold number of vital state agricultural laws could be implicated by the Amendment, including many that protect the health and safety of members of the public. Although the exact number of laws that might be affected cannot be determined, we believe Representative King's oft repeated assertion that the law is limited to egg laws in California and a handful of similar humane laws is patently false and represents an impossible interpretation of the Amendment, as discussed below. To be clear, we would be equally opposed to a narrower version of the Amendment that was limited to attacking state animal welfare laws. Because the current Amendment's language lends itself to far broader interpretations, however, we focus on those possibilities for purposes of this letter.

The King Amendment is currently in Section 11312 of the House version of the Farm Bill (H.R. 2642). While the King Amendment's stated purpose is to protect interstate commerce and while Representative King has stated that the Amendment's effect would be limited to overturning California's Proposition 2, the Amendment's language contains no such obvious limitations. In fact, on its face, the Amendment prohibits states from enacting *any* laws that impose "a standard or condition on the production or manufacture of *any* agricultural product" if that standard or condition is more protective/restrictive than the regulations of any other state and the federal government. (Emphasis added.) The Amendment denies states their fundamental duty and right to protect the health, safety, and welfare of their citizens and forces every state to adopt the lowest standards among the states. To our knowledge, no other obligation of this kind has been imposed on the states. The text of the King Amendment reads:

Consistent with Article 1, Section 8, Clause 3 of the Constitution of the United States, the government of a State or locality 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 term "agricultural products" is defined by U.S.C.A. § 1626, which states that such products are "agricultural, horticultural, viticultural, and dairy products, livestock and poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured product thereof." This broad definition of "agricultural products" makes clear that the potential subject matter of laws covered by the

King Amendment is not limited to eggs, or even animal welfare, as Rep. King would have the public believe.

A closer analysis of the King Amendment's language reveals just how far beyond eggs and animal welfare the Amendment's reach extends. No matter how broadly or narrowly the Amendment is ultimately interpreted, its clear target is the ability of states to regulate any and all agricultural products. And because the language is so vague as written, passage of the King Amendment would initiate years of lengthy court battles to derive the amendment's "true" meaning. This will likely result in a significant burden on the courts, as well as the clear chance of conflicting rulings from different courts. In the meantime, each state will have to spend considerable time and resources constantly comparing its agricultural laws to those of all of the other states. What follows is an explanation of two of the most likely interpretations of the Amendment.

Interpretation #1

The King Amendment does not prohibit states from imposing standards or conditions on the sale of products, but rather prohibits them from imposing standards or conditions on the *production or manufacture* of agricultural products that are "sold or offered for sale in interstate commerce." A plausible reading of this language, then, is that any agricultural product—*regardless of what state it is produced in*—that is sold in interstate commerce cannot have conditions placed on its manufacturing or production by any state if those conditions go beyond what any other state or the federal government has adopted. Therefore, under this view, the King Amendment may prevent a state from regulating the production of products made and sold in its own state—an absurd but literally possible result. In addition to jeopardizing California's Proposition 2, *any state* (California or otherwise) *law* that restricts the way agricultural products are produced in the state could be in jeopardy.

For example, California could not limit the use of harmful chemical additives in the production of its apples if they are also sold in Massachusetts or anywhere else outside the state and other states do not object to such chemical additives. The Amendment can even be read to mean that as long as apples in general (and not just the California apple) are sold in interstate commerce, California cannot regulate apples that are produced and sold in California if any other state allows the additive. Therefore, the number of laws that could be affected under this broad interpretation is practically innumerable.

Another way of looking at this is that the state with the lowest legal standards on the production or manufacture of a particular product would control all of the other states; no other state would be able to set higher standards if there were existing state law setting the bar lower. And each time a state established a law with respect to agricultural

products, even if the law was permissible at the moment of enactment, the law could be effectively nullified if another state changed its laws in a less protective fashion. No state could be certain of the enforceability of its laws without constantly consulting the statutes of all fifty states, and the federal government, to ensure no conflicts. To say that this is unworkable for state governments is a gross understatement.

Interpretation #2

Even if the King Amendment is determined to not prohibit a state from regulating production methods within its borders, it very likely will be determined to prohibit states from regulating the importation of agricultural products produced outside of that state. This is so regardless of whether the products were produced in a way that the state believes to be harmful to the health and safety of its citizens. Per the language of the Amendment, Mississippi could not stop genetically engineered catfish produced in Louisiana from coming into Mississippi, for example, if no Louisiana law or federal law bars genetically engineered catfish. In this scenario, the catfish are agricultural products offered for sale in interstate commerce, the genetic engineering is the “condition” placed upon the production or manufacture of the product, the production occurred in another state, and the ban on genetically engineered fish is in addition to existing Louisiana state and federal law; therefore, the law would not be allowable.

Many laws would come toppling down under this interpretation of the King Amendment. Some of those—which extend far beyond the arenas of eggs and animal welfare—include:

- **6 V.S.A. § 491(b):** maple syrup sold in the state may not be bleached or lightened by artificial means except certain enumerated means (Vermont)
 - New York, in contrast, has maple syrup laws but nothing explicitly prohibiting artificial lightening of syrup. Under interpretation #2 of the King Amendment, Vermont’s law on lightening would be a production or manufacturing condition on syrup that is in addition to federal and New York laws. Federal law is also silent on this issue. It would not be allowable under the Amendment and Vermont would have to accept imports of maple syrup from New York. Notably, under interpretation #1, Vermont would not even be able to sell its own syrup within the state, because of this condition that is in addition to existing federal law and the law of NY (or of any other state).

- **Cal. Food & Agric. Code § 55040 et seq. (California) and A.C.A. § 2-15-203 (Arkansas):** California's Rice Certification Act and Arkansas's similar law prohibit introducing, selling, producing, etc. rice having characteristics of commercial impact (characteristics that may adversely affect the marketability of rice in the event of commingling with other rice) except under certain circumstances.
 - These two states' laws regarding rice production and sales are unique. Under interpretation #2 of the King Amendment, such restricting of commercial impacts on rice (e.g., the use of biotechnology-affected crops) would be seen as a standard or condition on the manufacturing of rice that is in addition to state and federal standards, because other states' laws do not prohibit the sale of rice with commercial impacts. Federal law is likewise silent. California and Arkansas would therefore be in violation of the King Amendment and would be forced to accept rice from states that do not prohibit rice with characteristics of commercial impact. Nor would California or Arkansas be able to apply their own laws to rice produced within their own states under interpretation #1.

- **SB 206/HB 167 (approved 5-22-12):** bans use of arsenic in poultry feed (Maryland)
 - Because Maryland is the only state, thus far, to ban arsenic in poultry feed, the state is placing a standard or condition on the manufacturing of this product that is in addition to federal law and the law of another state (in this case, all of the other states). Maryland's ban on selling the feed that does not meet its requirements would therefore violate the King Amendment under interpretation #2, and would be invalid, despite Maryland's desire to protect its citizens from arsenic-laced poultry feed. Under interpretation #1, Maryland would not even be able to protect its own citizens from exposure to arsenic from feed produced within the state's borders.

It is clear that the laws that would be in jeopardy would affect far more than animal welfare. If states cannot quarantine or restrict the entry of agricultural products that they consider dangerous, for example, both state agricultural economies and the health and safety of the consumer populations in the states could be threatened.

While academics and legislators may disagree as to the reach of the King Amendment, both the broader interpretation #1 and the narrower interpretation #2 summarized above make clear that under any interpretation (1) the King Amendment's scope is not limited to eggs and animal welfare laws—though a version of the Amendment drafted to be so limited would be equally objectionable, (2) it will likely negatively impact

December 6, 2013

Page 6

health and safety issues near and dear to the states (and within the states' authorities to legislate), and (3) it will lead to years of litigation over its meaning and constitutionality. Even if the Amendment is clarified to specifically adopt one of the many plausible interpretations, all three flaws will remain.

Very truly yours,



Taimie Bryant
Professor of Law
UCLA School of Law

Kristen Stilt
Harry R. Horrow Professor in International Law
Northwestern University Law School

Howard E. Abrams
William K. Jacobs, Jr. Visiting Professor
Harvard Law School

David N. Cassuto
Professor of Law and Director
Brazil-American Institute for Law & Environment
Pace Law School

Sherry F. Colb
Professor of Law and Charles Evans Hughes Scholar
Cornell University Law School

Michael C. Dorf
Robert S. Stevens Professor of Law
Cornell University Law School

David Favre
Professor of Law
Michigan State University
College of the Law

Peter Fitzgerald
Professor of Law
Stetson University College of Law

Peter H. Huang
Professor and DeMuth Chair of Business Law
University of Colorado Law School

Rebecca Huss
Professor of Law
Valparaiso University Law School

Thomas G. Kelch
Professor of Law
Whittier Law School

Justin Marceau
Associate Professor of Law
University of Denver
Sturm College of the Law

Ani B. Satz
Associate Professor of Law
Emory University School of Law

Joan Schaffner
Associate Professor of Law
George Washington University Law School