

February 23, 2018

The Honorable Pat Roberts
Chairman
Senate Committee on Agriculture,
Nutrition and Forestry
109 Hart Senate Office Building
Washington, DC 20510

The Honorable Debbie Stabenow
Ranking Member
Senate Committee on Agriculture,
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The Honorable Michael Conaway
Chairman
House Committee on Agriculture
2430 Rayburn House Office Building
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The Honorable Collin Peterson
Ranking Member
House Committee on Agriculture
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Re: Protect Interstate Commerce Act (H.R. 4879/H.R. 3599) and No Regulation Without Representation Act (H.R. 2887)

Dear Members of Congress,

We write as individual law professors to express our joint concern regarding the “Protect Interstate Commerce Act” (H.R. 4879/H.R. 3599 or “King legislation”) and the “No Regulation Without Representation Act of 2017” (H.R. 2887). It is the mutual opinion of the undersigned law professors at universities across the country that should any of these bills pass, they would nullify or undermine countless laws across the country, threatening public health and safety and states’ abilities to govern. We respectfully submit this letter as individual law professors and not as representatives of our respective law schools or universities.

I. Protect Interstate Commerce Act (H.R. 4879/H.R. 3599)

H.R. 4879/H.R. 3599 are the latest iterations of Rep. Steve King’s previous failed proposal to dismantle state and local agricultural laws. H.R. 3599 was introduced in July of 2017; H.R. 4879 was just introduced January 25, 2018 and contains identical language as H.R. 3599, as well as a new section, Sec. 3, “Federal Cause of Action to Challenge State Regulation of Interstate Commerce,” discussed below. As you may recall, some of the current signatories wrote to you with concerns regarding language identical to H.R. 4879 and the first two sections of H.R. 3599 when it appeared as an amendment in the Farm Bill in 2013.

Because the language of H.R. 4879/H.R. 3599 is so broad and so many interpretations are possible, we believe that an untold number of vital state laws could be implicated and nullified by the bill, including many laws that protect the health and safety of members of the public. Although the exact number of affected laws cannot be determined, Rep. King’s oft-repeated assertion that the legislation would be limited to egg laws in California and a handful of similar humane laws is patently false and represents an impossible interpretation of the legislation, as discussed below. To be clear, we would be equally opposed to a narrower version of the language that was limited to attacking state animal welfare laws. Because the legislation’s language lends itself to far broader interpretations, however, we focus on those broader possibilities for purposes of this letter.

While H.R. 4879/H.R. 3599's stated purpose is to protect interstate commerce, and, while Rep. King has stated that the effects would be limited to a handful of animal protection laws, the bill's language contains no such limitations. In fact, on its face, the legislation 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 legislation 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 section 2 of both H.R. 4879 and H.R. 3599 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 7 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 legislation is not limited to eggs, or even animal welfare, as Rep. King would have the public believe.¹

A closer analysis of the language reveals just how far beyond eggs and animal welfare the bills' reach extends. And no matter how broadly or narrowly the language of H.R. 4879/H.R. 3599 is interpreted, the clear target is the ability of states to regulate any and all agricultural products. What follows is an explanation of two of the most likely interpretations.

A. H.R. 4879/H.R. 3599 Section 2 Interpretation #1

H.R. 4879/H.R. 3599 do not prohibit states from imposing standards or conditions on the sales 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, H.R. 4879/H.R. 3599 may prevent a state from regulating the production of products made and sold in its own state—an absurd, but possible result. In addition to

¹ Note that the definition of agricultural products is, in fact, so broad that it could include things most would not consider "agricultural products" at all, such as printer paper and furniture; these are "forest products" that are "processed and manufactured."

jeopardizing California's egg laws, *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 language 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 additives. Therefore, the number of laws that could be affected under this broad interpretation of the King legislation 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 laws setting the bar lower. 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. This creates an obviously impossible burden to meet for every single state, in which every day, every law regarding agricultural products would need to be reviewed in comparison to every other state's laws. It is a gross understatement to say that this is unworkable for state governments.

B. H.R. 4879/H.R. 3599 Section 2 Interpretation #2

Even if H.R. 4879/H.R. 3599 is determined not to prohibit states from regulating production methods within their borders, they very likely will be interpreted 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 King legislation, Mississippi could not stop genetically engineered catfish produced in Louisiana from coming into Mississippi, for example, if no Louisiana law or federal law bars production of 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 catfish 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 legislation. Some of those—which extend far beyond the arenas of eggs and animal welfare—include:

- **6 V.S.A. § 491(b)** (Vermont): maple syrup sold in the state may not be bleached or lightened artificially, except by certain enumerated means.
 - New York, in contrast, has maple syrup laws but nothing explicitly prohibiting artificial lightening of syrup. Federal law is also silent on this issue. Under interpretation #2 of the King legislation, Vermont's law on lightening syrup would be a production or manufacturing condition on syrup that is in addition to federal and New York laws. It would not be allowable under the King legislation and Vermont's law would be automatically invalid (and subject to challenge and protracted litigation in federal court), and Vermont would have to accept imports of maple syrup from New York. Notably, under interpretation #1, Vermont may 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 any other state).

- **Cal. Food & Agric. Code § 5040 et seq.** (California) and **A.C.A. § 2-15-203** (Arkansas): California's Rice Certification Act and Arkansas' 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 bills, 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 impact characteristics. Federal law is likewise silent. The California and Arkansas laws would thus be subject to judicial review and invalidation and would be in violation of the King legislation. And those states would be forced to accept rice from states that do not prohibit rice with the characteristics of commercial impact. Nor would California or Arkansas even be able to apply their own laws to rice produced within their own states under interpretation #1.
- **Md. Code Ann., Agric. § 6-107.3** (Maryland): bans use, sale, and distribution of arsenic in poultry feed
 - 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 legislation 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

C. H.R. 4879 Section 3

The latest iteration of this bill, H.R. 4879, introduced on January 25, 2018, brings a new and additional section, Section 3, which no prior version of the bill has included, and which increases the uncertainty of how the bill might be interpreted and implemented. The text reads:

Sec. 3 Federal Cause of Action to Challenge State Regulations of Interstate Commerce.

(a) Private Right of Action. – A person, including, but not limited to, a producer, transporter, distributor, consumer, laborer, trade association, the Federal Government, a State government, or a unit of local government, which is affected by a regulation of a State or unit of local government which regulates any aspect of an agriculture good, including any aspect of the method of production, which is sold in interstate commerce, or any means or instrumentality through which an agricultural good is sold in interstate commerce, may bring an action in the appropriate court to invalidate such a regulation and seek damages for economic loss resulting from such regulation.

(b) Preliminary Injunction. – Upon a motion of the plaintiff, the court shall issue a preliminary injunction to preclude the State or unit of local government from enforcing the regulation at issue until such time as the court enters a final judgment in the case, unless the State or unit of local government proves by clear and convincing evidence that –

(1) the State or unit of local government is likely to prevail on the merits at trial; and

(2) the injunction would cause irreparable harm to the State or unit of local government

(c) Statute of Limitations. – No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose

Section 3 creates an almost impossibly broad private right of action, allowing virtually anyone “affected” by an agricultural regulation to bring a legal complaint. “Affected” is not defined, allowing for the possibility that any person who purchases, produces, uses, eats, or just buys an agricultural product subject to regulations—and we are unaware of any agricultural goods *not* subject to regulation(s)—to bring a lawsuit. The Section ignores the fact that Congress cannot abrogate the constitutional requirements of standing simply by naming potential plaintiffs; federal courts handling such lawsuits would be mired in endless standing challenges.

The inclusion of this section certainly strengthens the possibility that laws regulating in-state production of agricultural products (discussed in Interpretation #1) could be just as vulnerable to this bill as laws that apply to out-of-state products. In-state producers, consumers, and others could certainly argue they are “affected” by innumerable agricultural regulations. Furthermore, any state or local government sued by these “affected” plaintiffs would be subject to the mandatory preliminary injunction component of H.R. 4879’s Section 3; that section inexplicably flips to the defendant state or locality the typical burden of proving irreparable harm that would result but for an injunction. The net effect of Section 3 would be to exacerbate the bill’s already staggering interpretation problems and further open the floodgates of litigation to an almost unfathomable number of plaintiffs. All of those plaintiffs would have ten years from the date they are allegedly affected by a regulation to bring an action, under the Section 3’s statute of limitations.

II. No Regulation Without Representation Act of 2017 (H.R. 2887)

H.R. 2887, introduced by Rep. James Sensenbrenner, is far lengthier than Rep. King’s legislation and touches upon many aspects of interstate commerce, including online sales and taxes. For purposes of this discussion, we focus on what we see as the dangerous parallels to Rep. King’s H.R. 4879/H.R. 3599. The main text of H.R. 2887 reads:

To the extent otherwise permissible under federal law, a State may tax or regulate a person’s activity in interstate commerce only when such person is physically present in the State during the period in which the tax or regulation is imposed.

H.R. 2887, Sec. 2. In Rep. Sensenbrenner’s bill, “regulate” is defined with language nearly identical to the King bill:

The term “regulate” shall mean to impose a standard or requirement on the production, manufacture, or post-sale disposal of any product sold or offered for sale in interstate commerce as a condition of sale in a State when—

- (A) Such production or manufacture occurs in another State;
- (B) Such requirement is in addition to the requirements applicable to such production or manufacture pursuant to Federal law and the laws of the State and locality in which such production or manufacture occurs;
- (C) Such imposition is not otherwise expressly permitted by Federal law; and
- (D) Such requirement is enforced by a State’s Executive Branch or its agents and contractors.

H.R. 2887, Sec. 4(a)(6). Thus, although H.R. 2887 has a “physical presence” requirement not found in either version of the King legislation (and discussed further in Section B below), it similarly targets the ability of states to regulate certain products by imposing standards and conditions on them that are in addition to federal law or state law where a product was produced. And although the bill is both broader and narrower than the King legislation, as discussed below, it similarly contains vague and confusing language that is subject to multiple interpretations and could undermine or nullify an untold number of state laws.

A. Ways in Which H.R. 2887 Is Broader than H.R. 4879/H.R. 3599

H.R. 2887 is broader than H.R. 4879/H.R. 3599 because it applies to all “activity in interstate commerce.” A definition of “activity in interstate commerce” does not appear in the bill. However, the term clearly encompasses far more than the “agricultural products” included in the King legislation. H.R. 2887’s sweep includes laws relating to food products that could be affected under the King legislation, but also laws affecting an infinite number of non-agricultural products that make their way through interstate commerce. For example:

- **M.S.A. § 325F.177** (Minnesota): Bans the sale of children’s products that intentionally contain formaldehyde
 - A producer from a state that does not prohibit formaldehyde in children’s toys (which is the majority of states) and wants to sell them in Minnesota would be selling them over state lines, and therefore participating in an “activity in interstate commerce.” The Minnesota law would be considered a “regulation” on the production, manufacture, or post-sale disposal of a product that is sold in interstate commerce, and one that is in addition to federal and state laws. In addition, the regulation is being imposed on someone not “physically present” in the state. The Minnesota ban on formaldehyde products would therefore be impermissible under Sensenbrenner’s bill.
- **Cal. Penal Code § 653.1** (California) (proposed): law banning the sale of balloons constructed of certain materials and filled with gas lighter than air.
 - California is seeking to protect the environment from destructive Mylar balloons. Under H.R. 2887, however, a balloon producer from a neighboring state without such a ban could not be prohibited from selling such balloons in California. Doing so would be an “activity in interstate commerce” and the law restricting their sale is an impermissible regulation on a product in interstate commerce—one that is in addition to federal and

state law. Thus, California’s ability to protect the environment in its state would be in jeopardy.

The effects of this bill can be reasonably interpreted to be much like Interpretation #2 of the King legislation, discussed above. In other words, states will be prohibited from regulating the importation of an endless array of products—agricultural and otherwise.

H.R. 2887 is broader than H.R. 4879/H.R. 3599 in another significant way. Section 2 limits what states may “regulate,” and “regulate” is defined in Section 4(a)(6) to include imposing standards or requirements on certain “products.” “Products,” however, is not limited to tangible goods, as one might think. Rather, it is explicitly defined to include “any good or *service*, tangible or *intangible*.” Sec. 4(a)(4) (emphasis added). In that way, the bill prohibits states from regulating a variety of services (in addition to goods), where the King legislation’s proscriptions are limited to “agricultural products.” Because “services” is not defined in the bill, it can be understood to sweep in anything from medical procedures, to car repairs, to the adult entertainment industry. For example:

- **815 ILCS 306/80** (Illinois): Prohibits motor vehicle repair facilities from advertising in a deceptive manner, charging consumers for parts not delivered or unnecessary repairs, and altering a vehicle to create a condition requiring repairs, among other things.
 - This law regulates advertising, pricing practices, and repairs, all of which could be considered intangible services, and therefore “products” under the bill. Because it is in addition to other state laws (many of which do not have similar provisions) and federal law, Illinois would be prohibited from imposing this regulation, at least as applied to those not considered “physically present” in the state. (*See* Section II(B), below.)

B. Ways in Which H.R. 2887 Is Narrower than H.R. 4879/H.R. 3599

H.R. 2887 is also narrower than the King legislation in at least one important way. A main tenet of H.R. 2887 is that a State may “tax or regulate a person’s activity in interstate commerce *only* when such person is *physically present* in the State during the period [in which he or she is being regulated by the State].” Sec. 2(a) (emphasis added). By these terms, states would be free to regulate people or entities physically in the state as they see fit, but could not regulate those who are not “physically present” in the state. The “physical presence” component means that the bill does not suffer from one of the biggest vagueness problems of the King legislation; it cannot be read to say states are prohibited, generally, from regulating production within their own borders. (*See* H.R. 4897/H.R. 3599 Interpretation #1, above.) It is clear that H.R. 2887 allows states to continue to regulate in-state businesses because physical presence is defined to include things that any in-state business would have one or more of: owning an office, store, warehouse, distribution center, manufacturing operation, or assembly facility in a state; having one or more employees in the state for various purposes; regularly employing three or more employees in the state for any purpose. Sec. 2(b)(1). Thus, state laws that deal only with in-state production of products are unlikely to be affected by H.R. 2887, while they might be by H.R. 4897/H.R. 3599. For example:

- **Ariz. Rev. Stat. Ann. § 13-2910.07** (Arizona): Prohibits cruel confinement of pigs and veal calves
 - Under Interpretation #1 of the King legislation, the law could be found to be an impermissible regulation of the production of agricultural products. But without a sales component, the law lacks an “activity in interstate commerce” element and could therefore only realistically apply to the on-farm production of certain farm animals *in*

Arizona. (It is highly unlikely that a producer could operate such a facility without being physically present in the state.) The law therefore could only realistically apply to those producers who are “physically present” in Arizona and would therefore be unaffected by H.R. 2887.

In contrast, many state laws that contain sales or import restrictions necessarily regulate out-of-state sellers who are not “physically present” and such laws would, therefore, be invalid under H.R. 2887. For example:

- **F.S.A. § 601.91** (Florida): Prohibits the selling, transporting, preparing, receiving, or delivering of freeze-damaged citrus fruit.
 - Under either interpretation of the King legislation, Florida’s citrus law would be considered an impermissible regulation of an agricultural product. The law is also vulnerable under H.R. 2887, because it regulates citrus sales from both in-state and out-of-state producers, and thereby sweeps in producers who are not “physically present” in the state. Thus, the law would be in jeopardy in a way that it would not if it simply prohibited the production of freeze-damaged citrus (and thereby regulated only physically present producers, as permitted by H.R. 2887).

It is important to note that the physical presence requirement has some fairly large exceptions—exceptions that could greatly expand the bill’s impact. The “*De Minimis Physical Presence*” section states that certain “*de minimis* activities” shall not be included in the definition of “physical presence,” including things like product placement and setup and internet advertising. Sec. 2(b)(2). Perhaps most significantly, however, is the provision that states that physical presence does not include “any presence in a State,” as described in section 2(b)(1), for fewer than 15 days in a taxable year (or a greater number of days if provided by State law). Sec. 2(b)(2)(B). In other words, if a person is engaged in business activities in a state for fewer than fifteen days in a calendar year, that person is not considered “physically present” in the state and therefore cannot be regulated by that state. This amounts to a fifteen-day loophole that could allow any goods or services (under the broad definition of “product”) that may otherwise be prohibited in a state to be sold within the state’s borders if the seller is there for fewer than fifteen days. For example:

- **LSA-R.S. 40:1061.1** (Louisiana): Prohibits doctors from providing abortions after a fetus is 20 weeks.
 - A doctor from a neighboring state could be hired to perform an abortion on a woman seeking such service (which is a product under the bill’s terms) and be back in his or her own state before the doctor would ever be considered “physically present” in Louisiana.
- **2 Okl.St. Ann. § 3-106** (Oklahoma): Prohibits sale of apiaries, apiary equipment, bees, or hives unless free of bee diseases or pests.
 - A salesman from a neighboring state could enter Oklahoma and sell diseased apiaries to an Oklahoma resident, providing he was not there more than fifteen days or had other business ties that would make him “physically present” under the terms of H.R. 2887.

This fifteen-day exception could make vulnerable many state laws that were passed pursuant to states’ traditional police powers and with the intent of protecting the health, safety, and/or morals of citizens. It would also create a disparity between the way in-state and out-of-state actors are treated. For example, in a state that prohibits the production and sale of a product, an in-state producer could

neither produce nor sell the product in that state, but an out-of-state producer could still sell the product in the state if they were in the state for fewer than fifteen days (and not otherwise physically present).

III. Conclusion

Because the language of the King and Sensenbrenner bills is so vague and subject to multiple interpretations, passage of any of them would initiate years of lengthy court battles to derive their “true” meaning, as well as an endless flood of challenges to the laws that would be immediately subject to invalidation if any of these bills were to pass. This will 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 an ever-expanding, constantly changing list of laws to those of all the other states, because a state’s condition on the production or manufacture of myriad products may have to change every time another state alters its laws. This would create a staggeringly uncertain legal and regulatory landscape. These problems will only be exacerbated by the wide-open floodgates and strong financial and injunctive incentives to a huge swath of potential plaintiffs in the event that H.R. 4879 passes.

While academics and legislators may disagree as to the reach of the bills and how broadly or narrowly they will or should ultimately be interpreted, it is clear that the scope of each bill undeniably extends far past eggs and animal welfare law. Should either the King legislation or the Sensenbrenner bill be enacted, countless state laws will be invalidated and the impact on issues near and dear to the states (and within their authority to legislate) —including health and safety and consumer protection laws—will be impacted.

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