

No. 03-1411

**In the United States Court of Appeals
for the Eighth Circuit**

SMITHFIELD FOODS, INC.; MURPHY FARMS, LLC; and
PRESTAGE-STOECKER FARMS, INC.,

Plaintiffs-Appellees,

vs.

THOMAS J. MILLER, Attorney General of the State of Iowa, in
his Official Capacity,

Defendant-Appellant,

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
Hon. ROBERT W. PRATT, Judge

**Brief of *Amici Curiae* Iowa Citizens for Community
Improvement, Missouri Rural Crisis Center, Land
Stewardship Project, Illinois Stewardship Alliance, Citizens
Action Coalition of Indiana, Campaign for Family Farms, and
National Family Farm Coalition in Support of Defendant-
Appellant Thomas J. Miller and in Support of Reversal of the
Judgment Below**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Land Stewardship Project, Illinois Stewardship Alliance, Citizens Action Coalition of Indiana, and National Family Farm Coalition are all not-for-profit corporations. The Campaign for Family Farms is an unincorporated association.

s/ David R. Moeller

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Dated: April 22, 2003

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF IDENTITY OF <i>AMICI CURIAE</i> , THEIR INTERESTS IN THE CASE AND SOURCE OF AUTHORITY	1
ARGUMENT	4
I. THE IOWA BAN ON PACKER LIVESTOCK OWNERSHIP DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.....	4
A. Iowa Code § 9H.2 Does Not Have an Extraterritorial Reach and Is Not Discriminatory.	5
B. Even if Iowa Statute § 9H.2 Were Found to Discriminate Against Interstate Commerce, It Withstands Strict Scrutiny.	10
C. The Benefits of the Iowa Ban on Packer Ownership of Livestock Far Outweigh any Burden it Imposes on Interstate Commerce.	18
CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases

<i>Asbury Hospital v. Cass</i> , 326 U.S. 207 (1945).....	17
<i>Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County</i> , 115 F.3d 1372 (8th Cir. 1997).....	8, 9
<i>Bowman v. Chicago & Northwestern R. Co.</i> , 125 U.S. 465 (1888)	21
<i>Brown-Forman Distillers Corp v. New York State Liquor Auth.</i> , 476 U.S. 573 (1986)	4
<i>C & A Carbone, Inc. v. Town of Clarkson</i> , 511 U.S. 383 (1994).....	7, 10
<i>Campaign for Family Farms v. Glickman</i> , 200 F.3d 1180 (8th Cir. 2000).....	3
<i>Cotto Waxo Co. v. Williams</i> , 46 F.3d 790 (8th Cir. 1995).....	5, 6
<i>CTS Corp. v. Dynamics Corp. of Am.</i> , 481 U.S. 69 (1987).....	7, 9
<i>Exxon Corp. v. Governor of Maryland</i> , 437 U.S. 117 (1978)	7, 9
<i>Hall v. Progress Pig, Inc.</i> , 259 Neb. 407, 610 N.W.2d 420 (2000)	19
<i>Hampton Feedlot v. Nixon</i> , 249 F.3d 814 (8th Cir. 2001).....	6, 10, 18, 19
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229 (1984).....	17
<i>Healy v. Beer Inst.</i> , 491 U.S. 324 (1989).....	5
<i>Huron Cement Co. v. Detroit</i> , 362 U.S. 440 (1960).....	21
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	22
<i>Michigan Pork Producers v. Campaign for Family Farms</i> , 229 F.Supp.2d 772 (W.D. Mich. 2002)	3, 28
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	18, 22
<i>MSM Farms, Inc. v. Spire</i> , 927 F.2d 330 (8th Cir. 1991).....	19
<i>New Energy Co. of Ind. v. Limbach</i> , 486 U.S. 269 (1988)	4
<i>Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality</i> , 511 U.S. 93 (1994).....	5, 7

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<i>Parker v. Brown</i> , 317 U.S. 341 (1943)	20, 22
<i>Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978).....	21
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	5, 18
<i>Procter & Gamble Co. v. City of Chicago</i> , 509 F.2d 69 (7th Cir. 1975), <i>cert. denied</i> 421 U.S. 978 (1975).....	22
<i>Sligh v. Kirkwood</i> , 237 U.S. 52 (1915).....	19
<i>Southern Union Co. v. Missouri Public Service Comm’n</i> , 289 F.3d 503 (8th Cir. 2002).....	8
<i>State ex rel. Webster v. Lehdorff Geneva, Inc.</i> , 744 S.W.2d 801 (Mo. 1988).....	17, 18
<i>U & I Sanitation v. City of Columbus</i> , 205 F.3d 1063 (8th Cir. 2000).....	7
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Statutes

1975 Iowa Acts, ch. 133, § 2	21
7 U.S.C. §§ 181 <i>et seq.</i>	20
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U.S. Const. Art. I, § 8, cl. 3.....	4

Rules

7 C.F.R. pt. 759	20
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**STATEMENT OF IDENTITY OF *AMICI CURIAE*,
THEIR INTERESTS IN THE CASE,
AND SOURCE OF AUTHORITY**

As identified in the Motion, the *Amici Curiae* are as follows:

Iowa Citizens for Community Improvement (Iowa CCI) is a membership based, multi-issue community organization. Iowa CCI works in both rural and urban areas to achieve community improvement and work for social, economic and environmental justice. Iowa CCI has more than 1,800 members statewide including hundreds of members who are family farmers. The organization holds public and private institutions accountable by using community organizing strategies emphasizing empowerment, leadership development and issue development.

The Missouri Rural Crisis Center (MRCC) is a non-profit organization founded in 1985 by Missouri farmers and rural citizens with more than 5,500 member families statewide today. MRCC's mission is to preserve family farms, promote stewardship of the land and environmental integrity, and to strive for economic and social justice among diverse groups, both rural and urban.

The Land Stewardship Project (LSP) is a membership organization founded in 1982 and based in Minnesota whose mission is to foster an ethic of stewardship for farmland, promote sustainable agriculture, and develop sustainable communities. LSP seeks to develop and implement farm policies, farming practices, and marketing systems that help family farms and rural communities to

thrive. Hundreds of LSP's members are livestock producers, and raising livestock is an important element of the economies and environment of Minnesota's rural communities where these members live. Minnesota's corporate farming law, Minn. Stat. § 500.24, which prohibits non-family corporations from farming in Minnesota, is an important part of Minnesota policy that supports family farming and may be put in question by the ruling in this case.

The Illinois Stewardship Alliance (ISA) is a 28-year-old statewide membership organization founded in 1974 as the Illinois South Project. ISA is a citizens' organization that promotes a safe and nutritious food system, family farming, and healthy communities by advocating diverse, humane, socially just and ecologically sustainable production and marketing practices.

Founded in 1974, Citizens Action Coalition of Indiana (CAC) is a not-for-profit coalition of organizations and more than 250,000 individual members throughout the State of Indiana. For over two decades, CAC has worked to empower citizens and promote economic and environmental justice, including promotion of family farm-based agriculture.

The Campaign for Family Farms (CFF) is an unincorporated association of family farm and community membership organizations including Iowa CCI, MRCC, LSP, ISA, and CAC. CFF has worked to enact a federal ban on packer livestock ownership. Due in large part to CFF's efforts, a federal packer ban

amendment passed the United States Senate in 2001 with 51 votes and in 2002 with 53 votes. CFF also has sought to protect hog farmers who signed petitions calling for a referendum to end the mandatory pork checkoff program from having their names and addresses disclosed to corporate hog interests. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000). Finally, CFF, on behalf of independent hog farmers nationwide, has brought a constitutional claim to end the mandatory pork checkoff program. *See Michigan Pork Producers v. Campaign for Family Farms*, 229 F.Supp.2d 772 (W.D. Mich. 2002), appeal pending Nos. 02-2337, 02-2338 (6th Cir.).

The National Family Farm Coalition (NFFC) represents 35 grassroots farm and rural advocacy organizations in more than 30 states. Formed in 1986, the coalition coordinates the efforts of a growing network of grassroots organizations committed to preserving and enhancing a family farm food production system in the United States. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming.

Amici Curiae have an interest in this case because:

These organizations and their members believe in preserving the family farm system of agriculture. The district court's decision to strike down under the dormant Commerce Clause Iowa's law that restrict processors from owning or

controlling livestock undermines the family farm to the detriment of rural communities. If the district court’s decision is not reversed, it may open a floodgate of challenges to laws that restrict corporations from engaging in agriculture in eight other states. These organizations also are working at the federal level to enact legislation that restricts corporate ownership of livestock, a law that is crucial to maintaining independent family farmers in this country.

The source of authority for filing this Brief is Federal Rule of Appellate Procedure 29 and *Amici Curiae*’s interest in this case as set forth herein.

ARGUMENT

I. THE IOWA BAN ON PACKER LIVESTOCK OWNERSHIP DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The Iowa ban on packer livestock ownership, Iowa Code § 9H.2, does not violate the dormant Commerce Clause. The United States Constitution requires that “Congress shall have power. . . . To regulate commerce . . . among the several states.” U.S. Const. Art. I, § 8, cl. 3. The negative or dormant aspect of this clause “. . . prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988). Dormant Commerce Clause cases typically entail a two-step approach. *Brown-Forman Distillers Corp v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). First, if the statute is discriminatory or has an extraterritorial reach, the law must withstand strict

scrutiny. *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995). Second, even if the statute is not discriminatory or does not have an extraterritorial reach, then the statute must not impose burdens upon interstate commerce that outweigh the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). If a statute survives these two tests—as Iowa Code § 9H.2 does—then it does not offend the dormant Commerce Clause.

A. Iowa Code § 9H.2 Does Not Have an Extraterritorial Reach and Is Not Discriminatory.

In order to survive the first prong, the statute must not control conduct beyond a state's boundaries. *Cotto Waxo Co.*, 46 F.3d at 793 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). Iowa's statute satisfies that prong.

In *Cotto Waxo Co.*, this Court held a Minnesota statute prohibiting in-state sale of petroleum-based sweeping compounds does not suffer from an unconstitutional extraterritorial reach:

The Act does not, either by its terms or in practical effect, necessarily affect out-of-state commerce. The Act does not require Cotto Waxo to conduct its commerce according to Minnesota's terms. Clearly, the Act has affected Cotto Waxo's participation in interstate commerce. Nevertheless, the Act itself is indifferent to sales occurring out-of-state. Cotto Waxo is able to sell to out-of-state purchasers regardless of Cotto Waxo's relationship to Minnesota. We conclude that the Act does not suffer from an unconstitutional extraterritorial reach.

46 F.3d at 794.

This Court recently ruled that a Missouri statute prohibiting packers from discriminating in prices paid or offered to sellers of livestock in purchasing livestock within Missouri did not have an extraterritorial reach under the dormant Commerce Clause. *Hampton Feedlot v. Nixon*, 249 F.3d 814 (8th Cir. 2001). In *Hampton Feedlot*, this Court held that, unlike a South Dakota price discrimination statute that applied to livestock slaughtered in South Dakota, regardless of where it was sold (which resulted in the regulation of sales in other states):

The Missouri statute, on the other hand, only regulates the sale of livestock sold in Missouri. If enacted, it may have the effect of increasing the price that packers pay and producers receive for livestock fed in Missouri, but the extraterritorial reach that the district court found in the South Dakota statute does not exist in the application of the Missouri statute.

249 F.3d at 819. Citing *Cotto Waxo Co.*, the Eighth Circuit noted that “packers who do not wish to conduct business under the terms of [the Missouri price discrimination law] may purchase their livestock for slaughter from other states.”

Ibid.

In the same vein, Smithfield may own hogs in states outside Iowa and also is not prohibited from processing hogs in Iowa, so long as Smithfield does not own or control them in Iowa. Iowa’s ban on packer ownership does not have an extraterritorial reach because it does not regulate the conduct of companies in other states; it only restricts corporations from owning or controlling hogs and cattle in Iowa.

The Iowa statute in question also does not discriminate against interstate commerce. This Court has held that “if the law in question overtly discriminates against interstate commerce, then [a court] will strike the law unless the state or locality can demonstrate ‘under rigorous scrutiny that it has no other means to advance a legitimate local interest.’” *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000) (quoting *C & A Carbone, Inc. v. Town of Clarkson*, 511 U.S. 383, 392 (1994)). “For purposes of the dormant Commerce Clause, ‘discrimination’ means ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *U & I Sanitation*, 205 F.3d at 1067 (quoting *Oregon Waste Sys.*, 511 U.S. at 99). “The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978); see also *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (upholding an Indiana corporate takeover law that applied to all hostile tender offers even though its application would fall most often on out-of-state companies); *United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d 762, 767 (8th Cir. 1999) (“If taken to an extreme, every state regulation would have some minimal effect on interstate commerce.”).

In *Southern Union Co. v. Missouri Public Service Comm'n*, 289 F.3d 503 (8th Cir. 2002), Southern Union challenged a law that required public utilities conducting business in Missouri to obtain prior approval before purchasing stocks or bonds issued by another utility. Southern Union was denied its request for blanket approval to make non-controlling investments in utilities that did not operate in Missouri. This Court held that the Missouri law was not discriminatory under the Commerce Clause, noting: “All regulated utilities doing business in Missouri are subject to prior approval requirements of § 393.190.2, and Commission approval is required for purchases of stock issued by Missouri utilities as well as by out-of-state utilities. This is regulation of a local public utility for the protection of local Missouri ratepayers.” *Id.* at 508.

As this Court set out in *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), being an out-of-state corporation that is treated the same as an in-state corporation is not discrimination under the Commerce Clause:

A Delaware corporation doing business in Minnesota could not argue that it is discriminated against by Minnesota laws that apply equally to all businesses operating in the state. South Dakota companies may chose not to locate operations in Minnesota because of comparatively high state taxes that apply to all businesses, but this is not discrimination under the Commerce Clause. Like any other local market regulation, Ordinance 12 may or may not encourage companies from doing business in the state. But while this may be a relevant concern in forming economic policies, it is simply not the proper inquiry for considering discrimination under

the Commerce Clause. *Cf. CTS Corp.*, 481 U.S. at 93-94 (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (“We have rejected the ‘notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market.’”). Plaintiffs’ analysis would render virtually all local economic regulations “discriminatory” and subject them to “per se” invalidation. This would vastly expand the implications of the dormant Commerce Clause, and we decline to follow such a course.

Id. at 1386-87.

In this case, whether a processor is from Iowa, North Carolina, or somewhere else, it is not allowed to “own, control, or operate a swine operation” in Iowa. Iowa Code § 9H.2(1)(b)(1)(a). Since Iowa’s ban on packer ownership imposes similar restrictions upon both out-of-state and in-state livestock processors, the law does not overly discriminate against out-of-state interests.¹ Smithfield’s disagreement with Iowa’s policies is not enough to show discrimination, because all other processing companies—regardless of their location—must abide by the same law. *See Exxon Corp.*, 437 U.S. at 128 (“[T]he [Commerce] Clause protects the interstate market, not particular interstate firms,

¹ *Amici* do not address the issues of the severability of the exemption for cooperatives or whether that exemption violates the Commerce Clause, which were addressed by Appellant. However, we note that Smithfield, as well as other processors, could satisfy the current law simply by reorganizing its business enterprise in the cooperative form. Iowa’s law does not prevent Smithfield from operating in Iowa; it merely requires that it be conducted in a specified entity form with sufficient farmer ownership. *See Exxon Corp.*, 437 U.S. at 127 (“We cannot, however, accept appellants’ underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.”).

from prohibitive or burdensome regulations.”). Iowa’s law, like the Missouri livestock price discrimination law, may affect the flow of interstate commerce, “but it does not burden interstate commerce.” *Hampton Feedlots*, 249 F.3d at 819.

The district court in this case thus failed to follow this Court’s precedents when it ruled that Iowa Code § 9H.2 is discriminatory under the dormant Commerce Clause; its ruling therefore should be overturned. Because Iowa’s ban on packer ownership applies to all processing companies, not just out-of-state companies, it does not overtly discriminate against interstate commerce and does not violate the Commerce Clause.

B. Even if Iowa Statute § 9H.2 Were Found to Discriminate Against Interstate Commerce, It Withstands Strict Scrutiny.

Even if the Iowa packer ban were found to discriminate against interstate commerce, it should survive Smithfield’s challenge because the local interests served by the law are legitimate and there are no other means to accomplish them. *See C & A Carbone*, 511 U.S. at 392. The State of Iowa’s legitimate local interests include ensuring the continued vitality of Iowa’s family farms and livestock industry by maintaining competitive markets.²

² As the district court noted, Iowa is the number one pork producer in the country, with 26% of the nation’s hog inventory and 27% of all hogs slaughtered in the United States.

The hog industry is in the midst of a dramatic transformation. USDA statistics show the steady exit of independent hog farmers from the hog industry. In the mid-1980s, there were approximately 500,000 hog farms in the nation; as of year-end 2002, the number had shrunk to 75,350 hog operations. USDA National Agricultural Statistics Service, *Hogs and Pigs Report* (Dec. 30, 2002), available at <http://jan.mannlib.cornell.edu/reports/nassr/livestock/php-bb/2002/hgpg1202.txt>.

This transformation is being precipitated by large corporate interests replacing independent family hog farms. While the number of hog farms has declined, the total number of hogs produced has remained relatively stable, resulting in increasingly large hog operations.³ McBride and Key, *Economic and Structural Relationships in U.S. Hog Production-Report No. 818*, USDA Economic Research Service (Feb. 2003) at 5, available at <http://www.ers.usda.gov/publications/aer818/aer818.pdf>. According to USDA, operations with 2,000 or more hogs on hand accounted for 75% of the hog inventory in 2002, compared to 37% in 1994. *Ibid.* Operations with 5,000 or more hogs on hand accounted for 53% of the inventory in 2002, compared with about one-third in 1996. *Ibid.* Smithfield is the leader of these industrial operations and in

³ Hog farming in Iowa has followed this trend. The number of farmers raising hogs in Iowa dropped from 41,000 in 1988 to 10,000 in 1997, but the number of hogs remained relatively constant in that same period. USDA and Iowa Farm Bureau, *1998 Iowa Agricultural Statistics* (Aug. 1998) at 77, 78, 106.

2002 owned 744,341 sows. *See Successful Farming, Pork Powerhouses 2002* (Oct. 2002), *available at*

<http://www.agriculture.com/sfonline/sf/2002/october/porkpowerhouses2002.pdf>.

Another by-product of this consolidation is that those who do raise hogs are increasingly raising them not as independent farmers but on behalf of others. In 1992, only 5% of all hogs produced was through contracts, but by 1998 contracts accounted for 40% of total production. McBride and Key at 9. In addition, as of 1998 production contract operations accounted for 82% of feeder pigs and 63% of finished hogs. *Id.* at 25. A 2002 National Pork Board study shows that over 83% of hogs were committed to packers through ownership or contractual arrangements, up from 38% in 1994. University of Missouri and National Pork Board, *Hog Marketing Contract Study* (Jan. 2002), *available at*

<http://agebb.missouri.edu/mkt/vertstud.htm>.

The process of vertical integration in the livestock industry has escalated rapidly since the mid-to-late 1990s. In 2000, four firms controlled 81% of the beef processing industry and four firms controlled 56% of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001* (June 2002) at 18, 38, *available at*

<http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf>.

The shift toward vertical integration and corporate ownership of livestock has had devastating economic effects on independent family farmers and their rural communities. As packer ownership of hogs increases and the number of packers shrinks, hog farmers find themselves without a competitive market in which to sell their hogs. Packers that own their own hogs have no need of an independent farmer's small number of hogs, and independent hog farmers are unable to find buyers willing to pay a competitive price for their hogs.⁴ See, e.g., Land Stewardship Project, *Killing Competition With Captive Supplies* (April 1999) at 8, 10-14; Harl, *The Structural Transformation of Agriculture*, Iowa State University (March 20, 2003) at 4-5, available at <http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf>.

In 1998 and the beginning of 1999, hog prices hit a record low—below ten cents per pound, while the average break-even price in Iowa was 39 cents per pound. Becker, *Hog Prices: Questions and Answers*, Congressional Research Service (Dec. 15, 1999), available at <http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-68.cfm>. USDA

⁴ At least one study has shown that prices paid to independent hog producers decrease as packers' control of production increases. That study found that at the "10 percent level of integration, the price paid to independents declines by six percent. At 50 percent integration, the price declines by about 26 percent." Azzam and Wellman, *Packer Integration into Hog Production: Current Status and Likely*

statistics show that more than 15,000 hog farmers (about 14%) quit producing hogs in that time period. USDA National Agricultural Statistics Service, *Hogs and Pigs Report* (Dec. 28, 1999), available at

<http://jan.mannlib.cornell.edu/reports/nassr/livestock/php-bb/1999/hgpg1299.txt>.

While hog prices were at record lows, retail pork prices did not decline accordingly (see Becker⁵) and at the same time, Smithfield posted near-record profits.⁶ In addition, between 1997 and 2002, hog farmers' share of the retail pork dollar declined from 38.9% to 23.3%. USDA Economic Research Service, *Pork Value Spread* (April 16, 2003), available at

<http://www.ers.usda.gov/Briefing/FoodPriceSpreads/meatpricespreads/pork.htm>.

Impacts of Increased Vertical Control on Hog Prices and Quantities, University of Nebraska Agriculture Research Bulletin 315-F (1992).

⁵ In analyzing the 1998 hog price drop, the Congressional Research Service noted that, "Supermarket pork prices averaged about \$2.30 per pound in 1998, compared with about \$2.32 in 1997."

⁶ In Smithfield's annual report, Smithfield Chairman Luter made the following statement correlating Smithfield's 1999 profits and the historic low hog prices:

I am pleased to report that Smithfield Foods, Inc. reported net income of \$75 million, or \$1.52 per diluted share, for the year ended April 30, 2000. While we are disappointed that these earnings are down from the record earnings reported last fiscal year, they still represent the second-best performance in our history; second only to last year when hog prices reached their lowest level in five decades. *These unprecedented low prices resulted in very favorable fresh pork margins for a substantial portion of fiscal 1999 and were the driving force behind last year's results.*

See Joseph W. Luter, III, *To Our Shareholders*, Smithfield Foods, Inc. 2000 Annual Report (July 7, 2000), available at

<http://www.smithfieldfoods.com/invest/pdf/letter.pdf> (emphasis added).

The loss of independent family farmers has a ripple effect on rural economies that states such as Iowa, which are heavily dependent on their rural economy, must grapple. Studies have consistently shown that independent family farms contribute significantly more to a healthy rural economy than do corporate-owned farms. A study comparing agriculturally dependent counties in states with anti-corporate farming laws, such as Iowa, versus those without such laws found “the laws are likely to have been beneficial to rural communities. Agricultural dependent counties in states that restrict or regulate corporate agriculture are more likely to score higher on the measures of community well being than states without such laws.” Welsh and Lyon, *Anti-Corporate Farming Laws, the “Goldschmidt Hypothesis” and Rural Community Welfare* (2002) at 11, available at <http://www.i300.org/I-300%20report.PDF>. Another study concluded that large-scale hog farms displace about three times the number of independent hog farmers as they create in jobs. See Ikerd, *The Economic Impacts of Increased Contract Swine Production in Missouri: Another Viewpoint*, University of Missouri (1994), available at <http://www.ssu.missouri.edu/faculty/jikerd/papers/con-hog.htm>. A study sponsored by Carroll’s Foods, now a subsidiary of Smithfield, found that independent family farmers produce 10 percent more permanent jobs and generate 37 percent higher local per capita income than large-scale corporate farms. Thornsberry, *et al.*, *Economic Impact of a Swine Complex in Southside Virginia*

Virginia Tech University, Department of Agricultural and Applied Economics (1994).

Fewer family farms inevitably leaves rural communities with lower overall incomes and an increase in poverty. *See* Murdock, *et al.*, *Impacts of the Farm Financial Crisis of the 1980s on Resources and Poverty in Agriculturally Dependent Counties in the United States*, *Rural Poverty: Special Causes and Policy Reforms* (Roders and Weiher, eds., 1989) at 87; Flora, *The New Poor in Midwestern Farming Communities*, *Rural Poverty in America* (Duncan, ed., 1992) at 202. Lower incomes and an increase in poverty rates are of significant interest to the state, since they result in a decrease in state tax revenue and an increase in a state's burden to respond to its citizens living in poverty. Iowa thus has a significant and legitimate interest in ensuring that its rural communities remain economically vibrant by preserving the continued existence of independent family farmers.

The only way to prevent large corporate processors from developing a complete monopoly on the livestock markets and driving out the remaining independent family farmers is to prevent them from owning and raising hogs. That is the only link in the entire process of taking a pig from birth to market that corporate giants like Smithfield do not yet completely control. The district court's ruling must be reversed to allow Iowa to achieve its legitimate and compelling

state interest.⁷ See *Asbury Hospital v. Cass*, 326 U.S. 207, 214-215 (1945) (the State of North Dakota statute barring all corporations, except cooperatives, from owning farmland is an appropriation application of a state policy against the concentration of farming lands in corporate ownership); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) (“The Hawaii legislature enacted its Land

⁷ In *State ex rel. Webster v. Lehdorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988), the Missouri Supreme Court noted that Missouri’s restriction on corporate ownership of farmland serves a legitimate state interest, without the restriction, the legislature could not protect traditional farming communities:

The effect of the statute, which forms the rational basis for the classification established, is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of natural persons primarily engaged in farming. Thus, large publicly held corporations are prevented from acquiring and operating large tracts of farmland. The legislature apparently believed that the superior financial and other business resources of these corporations would have a detrimental effect on traditional farming entities. This is because the cyclical nature of the farming industry periodically causes depressed markets and losses which large, diversified corporations are better able to sustain. Thus the traditional farming entities would operate at a competitive disadvantage.

The statute also has the effect of prohibiting large corporations, already controlling much of the processing and distribution of agricultural commodities, from buying large tracts of land for production of the commodity in which they deal, so as to vertically integrate an industry to the competitive exclusion of traditional farming entities.

It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such statute is rationally related to a legitimate state interest.

Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentration property ownership in Hawaii—a legitimate public purpose.”).

C. The Benefits of the Iowa Ban on Packer Ownership of Livestock Far Outweigh any Burden it Imposes on Interstate Commerce.

Assuming that Iowa’s law meets the first prong of the dormant Commerce Clause, it is subject to the “balancing test” established by the Supreme Court in *Pike v. Bruce Church*, 397 U.S. 137 (1970). “If each act ‘regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *United Waste Systems of Iowa*, 189 F.3d at 767-68 (quoting *Pike*, 397 U.S. at 142). Under the *Pike* balancing test, Smithfield must prove that an actual burden exists upon interstate commerce and that burden outweighs any putative local benefit to Iowa family farmers. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). In *Hampton Feedlot*, this Court addressed the local benefits of Missouri’s livestock price discrimination law and concluded that “[t]he Missouri legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered

Id. at 805-06 (rejecting an Equal Protection Clause challenge).

the potential harms and benefits to all stakeholders in creating its price discrimination law.” 249 F.3d at 820.

Over the years courts have sustained a number of Commerce Clause challenges to agricultural and environmental statutes that provide local benefits.⁸ For example, in *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915), the Supreme Court upheld the State of Florida’s use of its police power to declare it a criminal offense to deliver for shipment in interstate commerce citrus fruits immature and unfit for consumption. In *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184 (1935), the Supreme Court upheld the State of Oregon’s administrative order regulating the use within the state of specified containers for strawberries and raspberries for later transportation and sale. In addressing the benefits to the state, the Supreme Court stated: “The power of a State to proscribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to

⁸ This Court has also denied an Equal Protection Clause challenge to Nebraska Initiative 300 that prohibited non-family farm corporations from owning and operating Nebraska farm and ranch land. *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991). This Court held that Nebraska’s Initiative 300 implemented a legitimate state interest because: “The people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment.” *Id.* at 335. *See also Hall v. Progress Pig, Inc.*, 259 Neb. 407, 417-421, 610 N.W.2d 420, 429-431 (2000) (rejecting an Equal Protection Clause challenge to Initiative 300 based on classifications of livestock industries).

protect buyers from deception, or to *prevent unfair competition* is conceded.” *Id.* at 181 (emphasis added).

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court upheld the State of California’s raisin marketing order over a Commerce Clause challenge “because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may be appropriately regulated in the interest of the safety, health and *well-being of local communities*, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.” *Id.* at 362-63 (emphasis added). In weighing local benefits of California’s raisin marketing order, the Supreme Court also relied on the fact that the federal government had recognized the distressed conditions of agricultural production in the United States. *Id.* at 367-68. Similarly for the hog industry, the United States Department of Agriculture (USDA) has taken action by providing direct payments to small- and medium-sized in response to historically low prices hog farmers faced in 1998 and 1999. *See* 7 C.F.R. pt. 759. Also, Congress recently extended protections from unfair practices under the Packers & Stockyards Act to farmers who raise hogs using production contracts. 7 U.S.C. §§ 181 *et seq.*⁹ The

⁹ The 2002 Farm Bill amends the Packers and Stockyards Act (PSA) by making any swine contractor, *i.e.* any person engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine of selling them for slaughter, subject to the jurisdiction of the PSA. Farm Security and

federal government's actions are in the same spirit as those recognized by the Supreme Court in *Parker*¹⁰ and provide evidence of the local benefits intended by Iowa's statute banning packer livestock ownership so as to maintain small- and medium-sized hog farmers through preserving competition. *See* 1975 Iowa Acts, ch. 133, § 2 (stating the reason behind Iowa Code § 9H.2 was to “preserve free enterprise, prevent monopoly and to protect consumers”).

Other examples in which courts have cited local benefits, such as health and safety concerns, over Commerce Clause challenges include: the banning of items that spread pestilence (*Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978) (quoting *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465, 489 (1888))); a municipal ordinance of vessels designed to maintain clean air within a city (*Huron Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960)); a statute banning the

Rural Investment Act of 2002, Pub. L. 107-171, 116 Stat. 134, § 10502 (May 13, 2002). This expanded jurisdiction to USDA was intended to ensure hog farmers with production contracts receive protections against unfair practices. *See* 148 Cong. Rec. S3979, S4049-50 (May 8, 2002) (statement of Sen. Harkin) (“We got country-of-origin labeling, as well a crucial amendment to the Packers and Stockyards Act that brought swine production contractors under the Packers and Stockyards Act. So now farmers who have swine production contracts have the same protections against unfair practices as poultry growers and livestock owners. This provision makes sure that the Packers and Stockyards Act evolves with the changing industry.”).

¹⁰ In comparing Congressional action and California's statute, the Supreme Court stated: “we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state

sale of retail milk in plastic, nonrefillable containers in order to conserve Minnesota's natural resources (*Clover Leaf Creamery Co.*, 449 U.S. at 473); a municipal ban on phosphates for the purpose of preventing nuisance algae (*Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69, 79-80 (7th Cir. 1975), *cert. denied* 421 U.S. 978 (1975)); and a state ban on the importation of live bait fish that would harm the state's wild fish population (*Maine v. Taylor*, 477 U.S. 131 (1986)).

In addition to the devastating economic effects described above, the transition from smaller, independent hog farms to larger integrated operations has changed the way hogs are raised. Instead of small herds being raised on beds of hay or straw with the freedom to move about, large operations typically keep the hogs confined in stalls, which the hogs rarely leave. These concentrated animal feeding operations (CAFOs) have had huge environmental consequences. Because factory farms confine thousands of animals on small parcels of land, they produce enormous amounts of manure that are difficult to store and dispose of in an environmentally sound manner. For instance, a hog produces two to four times the amount of waste a human produces. Frey and Hopper, *Spills & Kills: Manure Pollution and America's Livestock Feedlots* Clean Water Network (August 2000)

from this exercise of its reserved power to regulate domestic agricultural production.” *Parker*, 317 U.S. at 368.

at 10, *available at*

<http://www.cwn.org/docs/publications/spillkill/spillkillmain.htm>. Some of the largest hog operations with more than 50,000 hogs thus generate the same amount of waste as the City of Des Moines, the largest city in Iowa.

In an operation where a manageable number of hogs are raised on straw or hay, the soiled bedding and manure can be composted or spread out over cropland as fertilizer. When large numbers of animals are raised in concentrated numbers—as is the case when an absentee corporation owns livestock—the manure from those operations exceeds the amount necessary for the nutrient needs of the crops.

Halverson, *The Price We Pay for Corporate Hogs*, Institute for Agriculture and Trade Policy (July 2000) at 47, *available at*

<http://www.iatp.org/hogreport/indextoc.html>. The waste from a CAFO is generally liquefied when large quantities of water are used to flush the buildings in which the animals are housed. The liquefied manure is sometimes stored temporarily in cement pits under the slatted floors of the barn, or it is stored, untreated, in open earthen or clay-lined lagoons, creating huge environmental challenges. *Ibid.* The lagoons can crack or leak or the waste can seep through the lagoons into the soil beneath which, in turn, can leach into the groundwater. The liquefied manure contains nitrates, phosphorous and potassium, among other things. Strauch (Ed.), *Animal Production and Environmental Health*, Elsevier Science Publishing, Inc.

(1987). Animal waste also contains pathogens including Salmonella, E. coli, cryptosporidium, and fecal coliform. Hopper, *Going to Market: The Cost of Industrialized Agriculture*, Izaak Walton League (Jan. 2002), available at <http://www.iula.org/reports/market.pdf>.

A study commissioned by the Iowa State legislature in 1997 found that 72% of the approximately 40 earthen manure lagoons they studied in Iowa are leaking faster than Iowa standards allow and that pollution of the groundwater is “unavoidable” in CAFOs. Glover, *Study: Earthen Lagoons a Danger*, The Des Moines Register (Jan. 1, 1999). The study concluded that 76% of the sites studied posed a risk to water safety. Richard, *et al.*, *Management and Maintenance of Earthen Manure Structures: Implications and Opportunities for Water Quality Protection*, Iowa State Legislature (August 1999), available at http://www.ag.iastate.edu/iaexp/reports/ewss_management.pdf. A 1998 study for the federal Centers for Disease Control and Prevention that looked at nine Iowa hog factory operations with more than 1,000 hogs, found pathogens, including antibiotic-resistant bacterial pathogens, antibiotics commonly given to hogs, nitrates and parasites in the lagoons and surrounding wells, drainage ditches and underground water, as well as in drainage wells that empty into underground aquifers. Campagnolo, *et al.*, *Report to the State of Iowa Department of Public Health on the Investigation of the Chemical and Microbial Constituents of Ground*

and Surface Water Proximal to Large-Scale Swine Operations, October-December 1998, Final Draft, Centers for Disease Control and Prevention (Oct.-Dec. 1998), available at <http://www.factoryfarm.org/docs/CDCwaterqualityfinaldraft.doc>.

Drinking such tainted groundwater can cause a myriad of deleterious effects. For example, high nitrate content in drinking water can cause methemoglobinaemia (“blue-baby disease”), which can lead to developmental deficiencies or death.

Liebhardt and Tupin, *Nitrate and Ammonium Concentrations of Ground Water Resulting from Poultry Manure Applications*, *Journal of Environmental Quality* 8(2) (1979) at 211-215.

Spills from hog manure lagoons are catastrophic. In 1995, 25 million gallons of liquid manure spilled in North Carolina, killing 10,000,000 fish and closing 364,000 acres of coastal wetlands to shell fishing. Woolverton, *The Big Spill: Anniversary Marks State’s Hog-Farm Awakening*, *Fayetteville Observer-Times* (June 17, 1996). Four more significant spills occurred that year, resulting in the North Carolina legislature passing a moratorium on the construction of new hog farms and animal waste management systems for hog farms. 1997 N.C. Sess. Laws 458. The North Carolina legislature extended this moratorium twice and it currently expires on September 1, 2003. 2001 N.C. Sess. Laws 254. In 1999, a Murphy Farms site in North Carolina spilled more than one million gallons of manure into a creek and surrounding wetlands. Murphy Farms claimed the spill

was caused by vandals, but a state investigation found the spill was caused by a subcontractor and fined Murphy Farms \$40,650, the second largest fine against a livestock operation. Quillen, *Hog Operation Fined for 1.5 Million-Gallon-Spill*, *The News and Observer* (Aug. 20, 1999). Between 1995 and 1998, there were 92 feedlot manure spills in Iowa. Frey and Hopper at 30-31 (*citing* Iowa Department of Natural Resources fish kill and manure spill data).

In addition, gases emitted from large manure lagoons (which typically include methane, hydrogen sulfide, ammonia, and carbon dioxide) can affect the physical and mental health of the neighbors who live near them. Halverson at 29, 63 (*Citing* Fulhage, *Gases and Odors from Swine Wastes Publication G01880*, University of Missouri (1993)); *see also* Schiffman, *et al.*, *Mood Changes Experienced by Persons Living Near Commercial Swine Operations*, *Pigs, Profits, and Rural Communities* (Thu and Durrenberg Eds.), State University of New York Press (1998) at 84-102. A 1997 University of Iowa study found that residents living near a large hog factory reported a higher incidence of toxic or inflammatory effects on the respiratory tract. Thu, *et al.*, *A Control Study of the Physical and Mental Health of Residents Living Near a Large-Scale Swine Operation*, *Journal of Agricultural Safety and Health* (1997) at 3, 13-26. The smell from large manure lagoons permeates clothing, curtains, and building materials. A recent study shows that people living close to large swine operations and subjected to liquid manure

odors were significantly more angry, depressed, lethargic, and tense than people who did not live near the facility. Schiffman at 84-102. Neighbors have to keep their windows closed or line them, wear gas masks, or leave their homes. *Ibid.*; see also Barlett and Steele, *The Empire of Pigs*, Time (Nov. 30, 1998).

Those trying to address the effects of CAFOs often must do so through the court system. For example, the Minnesota Attorney General recently brought a nuisance lawsuit against ValAdCo, which maintained several large hog facilities in Minnesota, the largest of which held 15,000 hogs that produced up to 13 million gallons of manure. That facility had made life unbearable for the neighbors surrounding the facility. ValAdCo was fined \$125,000 and agreed to make significant changes to its facilities. Individuals who lived near the largest facilities also brought individual lawsuits; one family said that their 11-year old daughter suffered neurological damage from prolonged exposure to the hydrogen sulfide emitted by the facility. Busch, *State, others settle with ValAdCo*, New Ulm Journal (Jan. 5, 2003), available at <http://www.oweb.com/NewUlm/journal/stories/n010503.html>. Prestage Farms, the nation's fourth largest hog corporation, was sued by more than 500 neighbors of Prestage Farms hog factory farms, processing plants, and meat packers in Mississippi, claiming that the air pollution from those facilities has led to unusually

high levels of asthma, migraines, and other illnesses. Reuters News Service, *Mississippi Environmentalists Push Hog Farm Suit* (Feb. 7, 2000).

In contrast to the methods employed at corporate facilities, independent family farmers in general tend to use methods of farming that are far less harmful to the environment. They tend to raise livestock in less concentrated numbers and methods, and thus do not create the environmental problems caused by large manure lagoons that can wreak havoc on the surrounding community and the environment. *See, e.g., Michigan Pork Producers v. Campaign for Family Farms*, 229 F.Supp.2d 772, 776-77 (W.D. Mich. 2002); *Cf. Iowa State University and the University of Iowa Study Group, Iowa Concentrated Animal Feeding Operations Air Quality Study* (Feb. 2002) at 24, available at <http://www.public-health.uiowa.edu/ehsrc/CAFOstudy.htm>. The State of Iowa has a legitimate interest in fostering environmentally friendly farming practices.

The State of Iowa has a significant interest in maintaining the economic and environmental health and well-being of its family farmers and their rural communities. That interest is served by its ban on packer ownership and easily outweighs any burden placed on processing companies that do business in Iowa. Accordingly, the district court's decision holding Iowa Code § 9H.2 should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated: April 22, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief for the *Amici Curiae* complies with the type-volume requirements of Fed. R. App. P. 32(a)(7) in following manner: the Brief was prepared using Microsoft Word 2000. It is proportionally spaced in 14-point type and contains 6,754 words. The contents of the Brief of *Amici Curiae* in the above-captioned case is contained on the enclosed diskette. This diskette has been scanned by MacAfee Virus Scan and no viruses were found.

s/ David R. Moeller _____
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2003, I served the foregoing Brief of *Amici Curiae* Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Land Stewardship Project, Illinois Stewardship Alliance, Citizens Action Coalition of Indiana, Campaign for Family Farms, and National Family Farm Coalition upon counsel of record by causing two copies to be mailed to:

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