

THE FULL STORY BEHIND PROPOSITION 12: THE ORIGINS, THE CASE, AND THE PRECEDENT LEFT BEHIND

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ABSTRACT

In 2018, California voters approved Proposition 12, a ballot initiative that has sparked pervasive changes throughout the pork industry. Proposition 12 mandates minimum animal housing standards for all pork sold within the state, regardless of where it was produced. As a result, farmers across the nation must modify their farms to comport with California's animal welfare concerns. However, these regulations are contrary to established animal husbandry practices and prevailing industry standards. After years of litigation, the Supreme Court ultimately upheld the sale ban in a fractured opinion under the dormant Commerce Clause. The decision allows California to condition the sale of goods based on its own moral interests, even if that primarily impacts out-of-state producers. Other states are likely to follow suit by enacting laws promoting their citizens' interests, potentially to the detriment of other states. Indeed, Massachusetts voters have approved Question 3, establishing their own unique animal housing standards for pork sold into the state. Pork producers are left to wade through complicated, conflicting state regulations, all demanding changes small farmers and everyday consumers cannot afford. Such far-reaching production regulations began with the pork industry, but with the Supreme Court's approval, they are not likely to remain confined to pork for long. Several justices on the Supreme Court declared Proposition 12 presented a political issue best left to the people. Congress must take this cue and act to prevent such broad state overreach.

I. INTRODUCTION

Proposition 12 is a 2018 ballot initiative approved by 62.7% of the voters in California but affecting 100% of pork producers across the United States.¹ Proposition 12 requires breeding pigs to be provided a minimum amount of space, which is vastly different from current industry standards.² However, the law does not only apply to pigs raised in California, but to all breeding pigs that will produce products for sale into California.³ This provision has required producers all across

1. See CAL. SEC'Y OF STATE, INITIATIVES VOTED INTO LAW 5 (2024), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/approval-percentages-initiatives.pdf> [<https://perma.cc/XKT5-XDJ7>].

2. See CAL. HEALTH & SAFETY CODE § 25991(e)(3) (West 2024); *Why is a Farrowing Crate Used in Swine Production?*, UC DAVIS CLEAR CTR. (Feb. 7, 2023), <https://clear.ucdavis.edu/explainers/why-farrowing-crate-used-swine-production> [<https://perma.cc/7NBE-LVBA>].

3. CAL. HEALTH & SAFETY CODE § 25990(b)(2).

the country to spend millions retrofitting their facilities to serve the California market.⁴

The law has received no shortage of media attention and commentary both praising and condemning the purported effects of the law.⁵ This Note provides a comprehensive look into the Proposition 12 timeline, answering questions about the details often left unspoken. Part II provides a detailed look into the history of the Proposition 12 ballot initiative, including the measures which came before it. Part III discusses the arguments presented in *National Pork Producers Council v. Ross* and the resulting Supreme Court opinion. Part IV details the intricate requirements of Proposition 12. Finally, Part V contemplates the effects of the *Ross* decision, including the validity of Massachusetts Question 3, a similar state ballot initiative.

II. THE BACKGROUND OF PROPOSITION 12

A. The Ballot Initiative Process

Proposition 12 (Prop 12) was not a typical bill that was introduced in the legislature, debated in committee hearings, and passed by both houses. Instead, Prop 12 was a ballot initiative.⁶ California was one of the first states to adopt the initiative process, allowing their citizens to pass laws without the support of the state government.⁷ Getting an initiative on the ballot in California is fairly straightforward.⁸ First, the proponent of the proposed law must, of course, write its

4. See John McCracken & Ben Felder, *With California's Prop 12 Now Law, Pork Producers Adapt While Lobbying Groups Continue to Fight*, SUCCESSFUL FARMING (Mar. 11, 2024), <https://www.agriculture.com/with-california-s-prop-12-now-law-pork-producers-adapt-while-lobbying-groups-continue-to-fight-8607191> [<https://perma.cc/C5KZ-6YQB>].

5. See, e.g., Kitty Block & Sara Amundson, *Breaking: Supreme Court Upholds Strongest Farm Animal Protection Law in U.S.*, THE HUMANE SOC'Y OF THE U.S.: A HUMANE WORLD (May 11, 2023), <https://blog.humanesociety.org/2023/05/us-supreme-court-upholds-california-proposition-12> [<https://perma.cc/3G35-DYBC>]; Sarah Mikesell, *NPPC Comments on California Prop 12 Supreme Court Ruling*, THE PIG SITE (May 13, 2023), <https://www.thepigsite.com/articles/nppc-comments-on-california-prop-12-supreme-court-ruling> [<https://perma.cc/5JDA-DSS9>].

6. *Animal Care Program*, CAL. DEP'T OF FOOD & AGRIC. (June 22, 2024, 7:39 PM), <https://www.cdfa.ca.gov/AHFSS/AnimalCare/background.html> [<https://perma.cc/THK3-DF25>].

7. CAL. SEC'Y OF STATE, STATEWIDE INITIATIVE GUIDE i (2024), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/statewide-initiative-guide.pdf> [<https://perma.cc/DS54-F3QS>].

8. See generally *id.*

text.⁹ This can be done by the individual, by obtaining private counsel, or by requesting assistance from the Office of Legislative Counsel.¹⁰ Next, the proponent must submit the text of the law to the Attorney General (AG) along with a request that a title and summary be prepared, and a payment of \$2,000.¹¹ After this request is submitted, the AG's office will post the text on their website and accept public comment for 30 days.¹² After public review, the AG will prepare an official summary of the initiative, including estimated effects on state and local finances.¹³ This is then sent to the legislature who may conduct public hearings but cannot amend the initiative or keep it off the ballot.¹⁴

Proponents are allowed 180 days from the official summary date to collect the required signatures and file the petition, at which point the initiative is eligible for the next statewide general election.¹⁵ Supporters of the initiative must collect signatures equal to at least 5% of the votes cast for governor during the last election, which in 2018 was 365,880 signatures.¹⁶ After the signatures have been filed with the county election officials they are not open to the general public for inspection.¹⁷ Once 25% of the signatures are acquired, the proponents must certify them with the Secretary of State.¹⁸ The Secretary then provides the Legislature with a copy of the initiative and summary.¹⁹ Each house in the Legislature is required to assign the initiative to a committee and hold joint public hearings at least 131 days before the election.²⁰ An initiative becomes law if it receives a majority vote, and takes effect five days after the Secretary of State certifies the results, unless the petition provides otherwise.²¹

9. *Id.* at 1.

10. *Id.*

11. *Id.*

12. *Id.* at 2.

13. *Id.* at 3.

14. *Id.*

15. *Id.* at 7.

16. Press Release, Cal. Sec'y of State, New Measure Eligible for Cal.'s. November 2018 Ballot (June 22, 2018), <https://www.sos.ca.gov/administration/news-releases-and-advisories/2018-news-releases-and-advisories/new-measure-eligible-californias-november-2018-ballot5> [<https://perma.cc/82NK-2CZA>].

17. STATEWIDE INITIATIVE GUIDE, *supra* note 7, at 17.

18. *Id.* at 8.

19. *Id.*

20. *Id.*

21. *Id.* at 17.

B. The Origins of Proposition 12

Prop 12 became effective in 2018, but California's efforts to regulate animal housing dates back much further, most significantly to Proposition 2 (Prop 2) in 2008.²² Prop 2, entitled the Prevention of Farm Animal Cruelty Act, added provisions to California's Health and Safety Code.²³ By January 2015, the initiative required veal calves, egg-laying hens, and pregnant pigs in California be afforded enough space to "turn around freely, lie down, stand up, and fully extend their limbs."²⁴ The AG's fiscal effects report found the measure would increase production costs, cause some farmers to exit the market, and reduce state revenues by several million dollars annually.²⁵ Arguments in support of Prop 2 described the measure as a reasonable, common-sense reform to improve animal welfare, food safety, and the environment.²⁶ Arguments against Prop 2 defended modern housing systems, which reduce disease and injury from other animals, and warned consumers about increased food prices and the loss of family farms.²⁷ At this point the controversy largely revolved around hens, partly due to the small number of breeding hogs within California.²⁸ Ultimately, California voters approved the measure by a margin of 63.5%.²⁹

Shortly after Prop 2 was passed, California egg producers began raising concerns that they were at a competitive disadvantage compared to other states because they were forced to adopt expensive housing standards that are not required elsewhere.³⁰ This resulted in AB 1437, effectively a sale ban, making it a

22. See *Animal Care Program*, *supra* note 6.

23. CAL. SEC'Y OF STATE, CALIFORNIA VOTER INFORMATION GUIDE 82 (2008), <https://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop2> [<https://perma.cc/3WLX-ZZ4B>].

24. *Id.*

25. *California General Election, Prop 2 Analysis*, CAL. SEC'Y OF STATE (2008), <https://vigarchive.sos.ca.gov/2008/general/analysis/prop2-analysis.htm> [<https://perma.cc/WJ6Q-CMJF>].

26. *Id.*

27. *Id.*

28. See *California General Election, Prop 2 Arguments and Rebuttals*, CAL. SEC'Y OF STATE (2008), <https://vigarchive.sos.ca.gov/2008/general/argu-rebut/argu-rebutt2.htm> [<https://perma.cc/2FTN-YG26>]; CAL. DEP'T OF FOOD & AGRIC., INITIAL STATEMENT OF REASONS 8 (2021), https://www.cdfa.ca.gov/AHFSS/pdfs/Animal_Confinement_ISOR_05282021.pdf [<https://perma.cc/9QEV-WAFY>].

29. INITIATIVES VOTED INTO LAW, *supra* note 1.

30. Kristine A. Tidgren, *Ninth Circuit Affirms Dismissal of California Egg Lawsuit*, IOWA STATE UNIV. CTR. FOR AGRIC. L. & TAXATION (Nov. 18, 2016),

crime to sell eggs in California produced by hens raised in housing that does not comply with Prop 2.³¹ The necessary result of this law is that producers in every other state must comply with California law if they wish to sell to California consumers.³² Several AGs from egg-producing states sued, making constitutional claims that will be more fully fleshed out in *National Pork Producers Council v. Ross*, analyzed in a later section of this Note.³³ However, no egg producers joined as plaintiffs, largely due to fear of negative publicity, which led to a dismissal based on lack of standing.³⁴ The Supreme Court ultimately denied certiorari in May of 2017.³⁵

C. Enacting Proposition 12

Not satisfied with the changes they had made, animal welfare groups such as the Humane Society of the United States (HSUS) began working to revamp Prop 2 by introducing Prop 12 in 2018.³⁶ Prop 12 amended sections 25990 through 25994 of the California Health and Safety Code created by Prop 2.³⁷ However, Prop 12 goes exponentially further than Prop 2, making three important changes to the statute.³⁸ First, Prop 12 further defines the requirement that animals must be able to turn around freely by establishing minimum amounts of space for each animal.³⁹ Second, Prop 12 created the Animal Care Program within the Animal Health and Food Safety Services Division of the California Department of Food and Agriculture (CDFA) to enforce Prop 12, a mechanism not necessary for Prop 2.⁴⁰ Most significantly, Prop 12 contains a sale ban which prohibits California

<https://www.calt.iastate.edu/blogpost/ninth-circuit-affirms-dismissal-california-egg-lawsuit> [<https://perma.cc/VBB8-N677>].

31. *Id.*

32. *Id.*

33. *Id.*; see discussion *infra* Section III.D. for analysis of *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

34. *Ninth Circuit Affirms Dismissal of California Egg Lawsuit*, *supra* note 30; see *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651, 656 (9th Cir. 2017).

35. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017), *cert. denied*, 581 U.S. 1006 (2017).

36. See Jon Lovvorn, *Pigs' Day in (the Supreme) Court*, THE HUMANE SOC'Y OF THE U.S.: A HUMANE WORLD (Oct. 20, 2022), <https://www.humanesociety.org/blog/pigs-day-supreme-court> [<https://perma.cc/DAA7-73GS>].

37. *Animal Care Program*, *supra* note 6.

38. See *id.*

39. *Id.*

40. *Id.*

business owners from selling eggs, pork, or veal raised in a way that violates Prop 12, no matter where the goods are sourced from.⁴¹

The Joint Informational Hearing held in June of 2018 by the California legislature raised many questions regarding increased consumer prices, enforceability, and the far-reaching impacts of the initiative which are still being discussed more than five years later.⁴² Primarily, questions regarded the potential for increased costs to consumers at the grocery store, especially those of limited income.⁴³ Assembly members were also concerned that it is not practical for CDFA to ensure all meat entering California is Prop 12 compliant as it is a “preposterous” idea that California can mandate practices in another state.⁴⁴ Concerns were also raised that Prop 12 might be just one step in the animal welfare movement, such that new regulations are brewing for farmers after they spend millions to comply with current regulations.⁴⁵ Regardless of these criticisms, the hearing was simply informational as the final decision to adopt Prop 12 was made by the voters.⁴⁶

The information provided to Californians on Prop 12 was less than a model of clarity. The voter’s guide began by discussing the agriculture industry in California and past animal confinement laws like Prop 2 and AB 1437.⁴⁷ The fiscal effects analysis noted consumer prices were likely to increase as farmers worked to adopt expensive new housing requirements.⁴⁸ It then states that companies would adopt similar space requirements on their own, so increased production costs associated with Prop 12 would occur anyway.⁴⁹ This is a contested claim not of the neutral variety one would expect to see in a general voter’s guide.⁵⁰ As with

41. *Id.*

42. *See Initiative to Establish New Standards for Confinement of Certain Farm Animals; Bans Sale of Certain Non-Complying Products (#1823): J. Informational Hearing Before the S. Comm. on Agric. & Assemb. Comm. on Agric.*, 2017–18 Reg. Sess. (Cal. 2018), <https://archive.senate.ca.gov/sites/archive.senate.ca.gov/files/committees/2017-18/sagri.senate.ca.gov/sites/sagri.senate.ca.gov/files/Transcript%20FINAL%2c%20Initiative%20Confine%20Farm%20Animal%206-19-18.pdf> [<https://perma.cc/P62G-435Y>].

43. *Id.* at 20–21 (statement of Devon Mathis, Member, Assemb. Comm. on Agric.).

44. *Id.* at 11, 37 (statement of Devon Mathis, Member, Assemb. Comm. on Agric.).

45. *Id.* at 17 (statement of Cecilia Aguiar-Curry, Member, Assemb. Comm. on Agric.).

46. *Id.* at 1–2 (statement of Anna Caballero, Member, Assemb. Comm. on Agric.).

47. CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 68 (2018) [hereinafter 2018 OFFICIAL VOTER INFORMATION GUIDE], <https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf> [<https://perma.cc/Y6WD-EBF5>].

48. *Id.* at 69.

49. *Id.*

50. *See* Casey L. Bradley, *Sow Group Housing*, NAT’L HOG FARMER (Sept. 26, 2023), <https://www.nationalhogfarmer.com/livestock-management/sow-group-housing> [<https://perma.cc/F89W-U2JW>].

Prop 2, the AG noted some farmers would leave the industry, but new to Prop 12 is the enforcement cost estimated at \$10 million annually.⁵¹

The main proponents behind Prop 12 include HSUS, Farm Forward, and the Animal Society for the Prevention of Cruelty to Animals, who have broad arguments spanning from animal welfare and food safety to pollution and environmental concerns.⁵² Opponents include many agricultural organizations such as the National Pork Producers Council (NPPC) and the American Farm Bureau Federation (AFBF).⁵³ Surprisingly, People for the Ethical Treatment of Animals (PETA) and other animal rights groups were also opposed, fearing the law doesn't go far enough to protect animal welfare and criticizing HSUS for leading an act that doesn't call for cage free eggs.⁵⁴ Foreshadowing coming events, PETA suggested the provisions were constitutionally flawed and likely to face legal challenges.⁵⁵ Consequently, the voter's guide likely only led to confusion, pitting two large animal rights organizations against each other, and leaving voters unsure what to believe.⁵⁶

For voters who did not read the full voter's guide, the text of the ballot likely seemed vague, and did nothing to communicate the far-reaching effects of the initiative.⁵⁷ The ballot stated a "yes" vote would create "new minimum requirements on farmers to provide more space" for hens, pigs, and calves, and that nonconforming products could not be sold.⁵⁸ Without additional details or a farming background, of course more space for animals sounds like a good idea. The ballot did not communicate that a "yes" vote will also lead to increased prices at the grocery store.⁵⁹ Additionally, the voting material did not contain more than a passing reference to the impacts on other states or provide accounts from actual

51. 2018 OFFICIAL VOTER INFORMATION GUIDE, *supra* note 47, at 69.

52. *Id.* at 70.

53. Press Release, Am. Farm Bureau Fed'n, AFBF Asks Sup. Ct. to Take Cal. Prop 12 Case (Sept. 28, 2021), <https://www.fb.org/in-the-news/afbf-asks-supreme-court-to-take-california-prop-12-case> [<https://perma.cc/HK6F-GPK6>].

54. 2018 OFFICIAL VOTER INFORMATION GUIDE, *supra* note 47, at 71.

55. *Id.*

56. See Andrew O'Reilly, *California Ballot Measure on Cage-Free Rules Divides Activists, Farmers*, FOX NEWS (Oct. 22, 2018, 11:45 AM), <https://www.foxnews.com/politics/california-ballot-measure-seeks-to-define-what-it-means-to-be-cage-free> [<https://perma.cc/GM4D-9TZT>].

57. See *Proposition 12*, LEGIS. ANALYST'S OFF. (Nov. 6, 2018), <https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018> [<https://perma.cc/SV5F-R3BW>].

58. *Id.*

59. See *id.*

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farmers.⁶⁰ California voters were led to make a blind decision, resulting in 62.7% voting in favor of Prop 12.⁶¹

D. Early Implementation

The text of Prop 12 itself requires producers to provide minimum space requirements for veal calves, breeding sows, and egg-laying hens with two sets of compliance dates.⁶² By January 1, 2020, egg and veal producers had to meet minimum square footage requirements and stores could not sell noncompliant eggs or veal.⁶³ Further, by January 1, 2022, egg-laying hens had to be cage free, hog producers had to provide 24 square feet per pig, and stores could not sell noncompliant pork.⁶⁴ The law provides a good faith defense, allowing retailers to avoid liability if they obtain a written certification from the supplier that the product complies with Prop 12.⁶⁵ However, it leaves the details of the initiative up to CDFA and the Department of Public Health, who were to promulgate rules by September 1, 2019.⁶⁶ Those Departments missed that deadline by three years, failing to release even a draft of the regulations until May of 2021.⁶⁷ Regulations were not finalized until September 1, 2022.⁶⁸

CDFA's initial statement of reasons accompanying the regulations determined that the square footage requirement was not based on standards accepted in the scientific community to reduce the risk of food-borne illness, promote safety, or address environmental concerns; in fact the law was not even written with these concerns in mind.⁶⁹ The final statement of reasons attempts to soften this finding by describing the law as a precautionary measure to address potential health and safety threats.⁷⁰

60. See 2018 OFFICIAL VOTER INFORMATION GUIDE, *supra* note 47, at 68–71.

61. INITIATIVES VOTED INTO LAW, *supra* note 1.

62. CAL. HEALTH & SAFETY CODE §§ 25990–94 (West 2024).

63. *Id.* §§ 25990, 25991(e).

64. *Id.*

65. *Id.* § 25993.1.

66. *Id.* § 25993.

67. CAL. DEP'T OF FOOD & AGRIC., FINAL STATEMENT OF REASONS 2 (2022), https://www.cdfa.ca.gov/AHFSS/pdfs/FSOR_Final_8.30.22.pdf [<https://perma.cc/HGL5-GS4A>].

68. ANIMAL CARE, CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA PROPOSITION 12 (2018) QUESTIONS AND ANSWERS – JULY 1, 2023 UPDATE (2023) [hereinafter PROPOSITION 12 Q & A], https://www.cdfa.ca.gov/AHFSS/AnimalCare/docs/prop_12_faq.pdf [<https://perma.cc/R5HY-QW8Z>].

69. INITIAL STATEMENT OF REASONS, *supra* note 28, at 146–47.

70. FINAL STATEMENT OF REASONS, *supra* note 67, at 7.

Before the regulations were finalized, the California Hispanic Chamber of Commerce and other whole pork retailers filed an action in the Sacramento County Superior Court seeking a Writ of Mandate and Declaratory and Injunctive Relief.⁷¹ The retailers feared criminal penalties for unknowingly violating Prop 12 due to the lack of regulations, and claimed they should not be subject to penalties without the written certification system in place.⁷² Alternatively, the State argued final regulations were not a precondition to enforcement.⁷³ The court noted Prop 12 states CDFA *shall* promulgate regulations, a term which denotes a command.⁷⁴ Thus, the court barred enforcement of the prohibition on interstate sales of pork until 180 days after final regulations are enacted, providing producers at least some time to comply with the new law.⁷⁵ The injunction was later extended until July 1, 2023 to allow time for the Supreme Court to reach a decision in *National Pork Producers Council v. Ross*.⁷⁶

III. NATIONAL PORK PRODUCERS COUNCIL V. ROSS

As predicted, litigation against Prop 12 commenced immediately, with various parties challenging the constitutionality of the sale ban.⁷⁷ The legal challenge which finally achieved some clarity from the Supreme Court was *National Pork Producers Council v. Ross*.⁷⁸ The suit began in December of 2019 when NPPC and AFBF filed a complaint with the United States District Court for the Southern District of California.⁷⁹ The plaintiffs alleged that Prop 12 violates the dormant Commerce Clause, specifically that it impermissibly regulates extraterritorial conduct and places an excessive burden on interstate commerce.⁸⁰

71. Cal. Hosp. Chambers of Com. v. Ross, No. 34-2021-80003765, 2022 Cal. Super. LEXIS 8135, at *10 (Cal. App. Dep't Super. Ct. Jan. 21, 2022).

72. *Id.*

73. *Id.* at *7, *10.

74. *Id.* at *15.

75. *Id.* at *21–22.

76. Joint Stipulation of all Parties Requesting Modification of February 2, 2022 Judgment and Writ of Mandate Due to Changed Circumstances; Ord., Cal. Hosp. Chambers of Com. v. Ross, No. 34-2021-80003765, (Cal. App. Dep't Super. Ct. filed Nov. 28, 2022); see *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

77. See, e.g., *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014 (C.D. Cal. 2019), *aff'd*, 825 Fed. Appx. 518 (9th Cir. 2020); *Iowa Pork Producers Ass'n v. Bonta*, No. 2:21-cv-09940, 2022 WL 613736 (C.D. Cal. Feb. 28, 2022), *aff'd*, No. 22-55336, 2024 WL 3158532 (9th Cir. June 25, 2024).

78. See *Nat'l Pork Producers Council*, 598 U.S. 356.

79. *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020).

80. *Id.* at 1207–08.

To fully understand these arguments one must first understand the history of dormant Commerce Clause jurisprudence.⁸¹

A. The Dormant Commerce Clause

The Constitution gives Congress the power to “regulate commerce with foreign nations, and among the several States.”⁸² At the founding of the United States, federal regulation of commerce was nationally recognized as a necessity, so much so that state governments willingly relinquished any claim to its power.⁸³ This notion rests on the principle that the United States is one nation.⁸⁴ States may not use their police powers to protect the health and safety of their citizens in a way that ultimately protects in-state business from competition, thus isolating the state from the rest of the nation.⁸⁵ States may regulate commerce if Congress has not legislated in that area, but must do so within the bounds of the Commerce Clause.⁸⁶ The specific boundaries cannot be found in the constitution, but is a negative implication of the Commerce Clause developed through common law decisions of the Court.⁸⁷ This body of law, reflecting the extent to which states may interfere with interstate commerce, is known as the dormant Commerce Clause (DCC).⁸⁸

The Supreme Court utilizes a two-pronged approach to analyze state laws under the DCC.⁸⁹ A distinction emerged early on between protectionist laws, which directly interfere with interstate commerce, and those with only an incidental effect on commerce.⁹⁰ First, laws are *per se* invalid if they discriminate against interstate commerce or directly regulate interstate commerce.⁹¹ These concepts have been referred to as the “anti-discrimination principle” and “extraterritoriality branch” of the DCC, respectively.⁹² Second, if a law creates an indirect effect on interstate commerce, courts conduct a balancing test and strike

81. *See* U.S. CONST. art. I, § 8, cl. 3.

82. *Id.*

83. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949).

84. *Id.* at 537.

85. *Id.* at 538.

86. *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

87. *See id.*; *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337 (2008).

88. *Dep’t of Revenue*, 553 U.S. at 337–38.

89. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

90. *Shafer v. Farmers’ Grain Co.*, 268 U.S. 189, 199 (1925).

91. *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

92. Brannon P. Denning, *National Pork Producers Council v. Ross: Extraterritoriality is Dead, Long Live the Dormant Commerce Clause*, 2022–2023 CATO SUP. CT. REV. 23, 27, 29.

down laws only if the “burden on interstate commerce clearly exceeds the local benefits.”⁹³ This is referred to as “Pike balancing,” named after *Pike v. Bruce Church*, the case that created it.⁹⁴ While the differences in these prongs may seem clear, application has proved difficult as the line between them becomes increasingly thin.⁹⁵ A court’s main task is to evaluate the overall effect of the statute and distinguish between protectionist measures and those addressing legitimate local concerns.⁹⁶

B. Early Court Decisions

Applying these principles to Prop 12, the district court found NPPC’s case failed on both prongs.⁹⁷ First, the court found that Prop 12 does not regulate “wholly out-of-state conduct,” meaning it does not discriminate against or directly regulate interstate commerce, and therefore does not violate extraterritoriality.⁹⁸ Prop 12 regulates the conduct of pork producers in all 50 states, including California.⁹⁹ The court reasoned a statute cannot be targeted solely at out-of-state producers if it applies equally to California producers.¹⁰⁰ Second, the district court found NPPC did not establish that Prop 12 placed a substantial burden on interstate commerce.¹⁰¹ NPPC established a wide variety of negative consequences that will be felt by pork producers across the country.¹⁰² However, the court described those consequences as barriers to pork production, not barriers to interstate commerce.¹⁰³ It is not conclusory that Prop 12 will likely preclude the industry’s current method of production because the Commerce Clause “protects the interstate market, not particular interstate firms . . . from burdensome regulations.”¹⁰⁴ The court stated the economic injury caused by Prop 12 is a reflection of the intelligence of the

93. *Brown-Forman Distillers Corp.*, 476 U.S. at 579; see *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

94. See *Pike*, 397 U.S. 137; Denning, *supra* note 92, at 23.

95. *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *Shafer*, 268 U.S. at 199.

96. *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

97. *Nat’l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1208, 1210 (S.D. Cal. 2020).

98. *Id.* at 1207.

99. *Id.*

100. *Id.* at 1207–08.

101. *Id.* at 1210.

102. *Id.* at 1209.

103. *Id.*

104. *Id.* (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127–28 (1978)).

statute, not a substantial burden on interstate commerce.¹⁰⁵ For these reasons, the court granted the defendant's motion to dismiss for failure to state a claim.¹⁰⁶

NPPC and AFBF then appealed the case to the United States Court of Appeals for the Ninth Circuit.¹⁰⁷ The court agreed with the district court's extraterritoriality analysis.¹⁰⁸ It also discussed a variant of extraterritoriality where statutes violate the DCC because they pose "a risk of inconsistent regulations that undermine a 'compelling need for national uniformity in regulation.'"¹⁰⁹ This compelling need is often found in taxation or transportation, areas the Ninth Circuit deemed not analogous to pork production.¹¹⁰ Without that need for uniformity, even the threat of conflicting state regulations does not violate the DCC.¹¹¹ The court of appeals further reiterated the district court's finding that increased compliance costs and a nationwide rise in prices is not enough to show an impediment to the free flow of commerce.¹¹² The court declared the DCC is becoming a "dead letter."¹¹³ Even though NPPC "plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide," they did not allege a burden on interstate commerce.¹¹⁴

C. The Arguments

NPPC and AFBF immediately appealed to the Supreme Court, who granted certiorari on March 28, 2022.¹¹⁵ NPPC and California present polar opposite views on state authority and pork production practices in their briefs before the Court.¹¹⁶

105. *Id.* at 1210; *see* Exxon Corp. v. Governor of Md., 437 U.S. 117, 128 (1978).

106. Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201, 1204 (S.D. Cal. 2020).

107. Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1026 (9th Cir. 2021).

108. *Id.* at 1028.

109. *Id.* at 1031 (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n. 12 (1997)).

110. *Id.*

111. *Id.*

112. *Id.* at 1032–33.

113. *Id.* at 1033.

114. *Id.* at 1033–34.

115. Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022).

116. *See* Brief for the State Respondents, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468); Brief for Petitioners, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468).

1. *The Farm Organization Petitioners*

NPPC and AFBF argued Prop 12 violates both the extraterritoriality principle and the *Pike* balancing test.¹¹⁷ First, they propose an extension of the *per se* extraterritoriality rule where “state laws that have the practical effect of controlling commerce outside the state” would automatically be deemed invalid.¹¹⁸ They argue that Prop 12 does regulate conduct occurring wholly outside of California.¹¹⁹ California imports 99.87% of the pork it consumes, making up 13% of the United States pork market.¹²⁰ It takes an annual 673,000 sows to provide for the California market, only 1,500 of which are found in California.¹²¹ Thus, the vast majority of farms that Prop 12 regulates are located in other states, 72% of which choose to use gestation crates to provide sows access to food and water without competition, provide individualized veterinary care, and prevent fighting among sows.¹²²

Producers who “wish” to comply with Prop 12 will either need to reduce herd size or build an expensive new facility to comply with the square footage requirements, changes that are estimated to cost \$13 per pig, which is a 9.2% increase above current costs.¹²³ Not all producers will be able to afford such a large increase in production costs, putting smaller family farms out of business and leading to industry consolidation.¹²⁴ These costs will not stay with producers, but travel with every cut of pork no matter where it is sold and increase grocery store prices for consumers with no connection to California.¹²⁵

Realistically, all pork producers will be forced to comply with Prop 12.¹²⁶ The pork industry is segmented; pigs travel to different facilities adapted for different stages of their life.¹²⁷ Sow farmers typically sell piglets, then have little control over ultimate marketing decisions.¹²⁸ Tracing the offspring of an individual sow would be no easy task even for large vertically integrated companies who own

117. Brief for Petitioners, *supra* note 116, at 19.

118. *See id.*

119. *Id.* at 27.

120. *Id.* at 3.

121. *Id.* at 45.

122. *Id.* at 9–10.

123. *Id.* at 5, 15.

124. *Id.* at 15.

125. *Id.* at 15–16.

126. *Id.* at 45–46.

127. *Id.*

128. *Id.* at 45.

the pigs throughout their lifecycle.¹²⁹ Even with improved traceability, it would still be challenging to segregate these hogs at the packing plant as packers receive pork from many different locations, some up to 10,000 hogs a day from different finishing farms, and then ship them all over the country.¹³⁰ Indeed, packers have told farmers they will not buy pork that does not comply with Prop 12.¹³¹ Prop 12 also has the potential to open the door to an inconsistent patchwork of state laws should other states adopt their own production requirements.¹³²

Next, NPPC argues Prop 12 violates the *Pike* balancing test as the burdens described above are significant, and any local benefits illusory.¹³³ California has put forth two local interests they find legitimate: preventing animal cruelty and protecting consumers from foodborne illness.¹³⁴ NPPC asserts that moral considerations cannot be a legitimate purpose and California has since admitted they have no science-backed health concerns.¹³⁵ If moral considerations are a factor, Prop 12 contributes to animal cruelty as sows in group pens fight for dominance leading to fatalities, stress, and reduced feed intake.¹³⁶ Arguments about the risk of foodborne illness are also baseless as no evidence presented has shown that 24 square feet of space instead of the traditional 16–18 will have any effect on human health.¹³⁷ Additionally, Prop 12 only addresses sow housing practices, after which offspring are separated for five months before entering the market, when any infections from birth and nursing would no longer be found.¹³⁸

2. California Respondents

Alternatively, the California state respondents argue that Prop 12 violates neither the extraterritoriality doctrine, nor the *Pike* balancing test.¹³⁹ Ultimately, they argue that Prop 12 is a policy decision; if Congress shares NPPC's concern about the law's effects on commerce, it is free to write its own law regulating pork in interstate commerce which may preempt Prop 12.¹⁴⁰

129. *Id.* at 11–12.

130. *Id.* at 16–17 n. 7.

131. *Id.* at 29.

132. *Id.* at 30–31.

133. *Id.* at 44.

134. *Id.* at 7.

135. *Id.* at 4–5.

136. *See id.* at 47.

137. *Id.* at 42.

138. *Id.*

139. Brief for the State Respondents, *supra* note 116, at 2.

140. *Id.* at 2–3.

First, Prop 12 does not violate extraterritoriality because it only regulates products sold in California, not pork sold in other states.¹⁴¹ Allowing an extraterritorial effects analysis to consider the practical effect on commerce outside the state threatens state sovereign authority.¹⁴² Unless Congress or the Constitution says otherwise, states have broad power to regulate their own markets.¹⁴³ Even if such a *per se* rule is adopted, it should only apply to laws which control activity wholly outside a state's borders.¹⁴⁴ Prop 12 only applies to producers who choose compliance if they find it economically advantageous.¹⁴⁵ Further, the market is capable of segregating those who comply and those who do not.¹⁴⁶ USDA already operates specialized supply chains for specialty pork products.¹⁴⁷

Additionally, Prop 12 does not fail under a *Pike* balancing test.¹⁴⁸ California argues that not all burdens are sufficient to prompt *Pike* balancing.¹⁴⁹ To prevent unnecessary judicial scrutiny into state policy decisions, a court should only inquire into the benefits of a law after the petitioner alleges a burden offensive to the commerce clause.¹⁵⁰ This, California asserts, NPPC has failed to do.¹⁵¹ Any price increase will not interfere with the channels of interstate commerce.¹⁵² As segregation is possible, this price increase will be felt solely in California, and higher prices selected by a state's own residents cannot be a burden on interstate commerce.¹⁵³ Even if the Court finds that NPPC has alleged a burden, the burden is warranted in light of Prop 12's local benefits.¹⁵⁴ Californians have an interest in ensuring their local grocery stores do not engage in immoral practices, as past sale bans on the in-state sale of horse meat have proven.¹⁵⁵ Further, citizens may enact precautionary measures to protect themselves from unknown foodborne illnesses before the scientific community is able to come to a consensus.¹⁵⁶ In short, this

141. *Id.* at 18.

142. *Id.* at 22.

143. *Id.* at 24.

144. *Id.* at 28.

145. *Id.*

146. *Id.* at 30–31.

147. *Id.* at 29.

148. *Id.* at 36.

149. *Id.* at 37.

150. *Id.* at 37–40.

151. *Id.* at 41.

152. *Id.* at 43.

153. *Id.*

154. *Id.* at 44.

155. *Id.* at 45.

156. *Id.* at 47.

type of judicial second guessing invades the realm of California's traditional political authority.¹⁵⁷

3. *Amicus Curiae*

Several noteworthy parties also filed amicus briefs before the Court. For example, the United States, the Canadian Pork Producers Council, the American Association of Swine Veterinarians and 26 states wrote for the petitioners.¹⁵⁸ Exemplars of briefs for the state respondents include the American Society for the Prevention of Cruelty to Animals, the Animal Protection and Rescue League, and 14 states and D.C.¹⁵⁹

D. *The Opinion*

On May 23, 2023, the Supreme Court upheld Prop 12 in a 5-4 ruling producing seven different opinions which leave one wondering why Prop 12 was truly upheld.¹⁶⁰ Justices Gorsuch, Thomas, Sotomayor, Kagan, and Barrett held the case should be dismissed, while Justices Roberts, Alito, Kavanaugh, and Jackson would have remanded the case for additional proceedings under *Pike*.¹⁶¹ A majority of the Court agreed with NPPC that Prop 12 will cause significant harm to the pork industry and interstate commerce, however, several justices also agreed this was a decision best left to the political branches.¹⁶²

The Supreme Court viewed *Pike* as the heart of NPPC's case and unanimously rejected the petitioners' *per se* rule against statutes with extraterritorial effects.¹⁶³ Writing for the majority of the Court, Justice Gorsuch explained that past cases which analyzed the "practical effect" of state laws were concerned with protectionist policies like depriving other states of a competitive advantage.¹⁶⁴ Upon application, the test would lead to strange results as many state

157. *Id.* at 48.

158. National Pork Producers Council v. Ross, SCOTUSBLOG (May 31, 2024, 11:08 PM), <https://www.scotusblog.com/case-files/cases/national-pork-producers-council-v-ross/> [<https://perma.cc/3C3J-9KUX>].

159. *Id.*

160. See Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

161. Kristine A. Tidgren, *California's Proposition 12 Survives Supreme Court Challenge*, IOWA STATE UNIV. CTR. FOR AGRIC. LAW AND TAXATION (May 19, 2023), <https://www.calt.iastate.edu/blogpost/californias-proposition-12-survives-supreme-court-challenge> [<https://perma.cc/4K4A-6ZWC>].

162. *Nat'l Pork Producers Council*, 598 U.S. at 402 (Roberts, C.J., concurring in part and dissenting in part); Mikesell, *supra* note 5.

163. *Nat'l Pork Producers Council*, 598 U.S. at 389 n. 4 (plurality opinion).

164. *Id.* at 371–72.

laws control out-of-state behavior.¹⁶⁵ For example, tax laws and environmental laws are often decisive when determining where to locate business operations.¹⁶⁶ There are limits to a state's ability to project legislation outside of its borders, but those are found in other parts of the Constitution.¹⁶⁷ Essentially, the Court recharacterized past extraterritoriality cases as anti-discrimination cases, a scenario simply not present here.¹⁶⁸

Next, the Court considered NPPC's claim that under *Pike*, the burdens of Prop 12 on interstate commerce outweigh its local benefits.¹⁶⁹ A majority of the Court noted that the heart of *Pike* is discovering the discriminatory nature of a state law.¹⁷⁰ NPPC did not suggest that the practical effects of Prop 12 would reveal purposeful discrimination; while genuinely neutral laws still fall under *Pike*, they are outside of its heartland.¹⁷¹ Five justices found NPPC's *Pike* claim failed, but they diverged on the reasoning.¹⁷²

Justices Gorsuch, Thomas, and Barrett found the balancing test was best left to the political branches, and were skeptical of using their own cost/benefit assessment to strike down ordinary state laws.¹⁷³ In their view, a neutral legal principle is not capable of weighing the economic costs alleged by NPPC against the noneconomic moral and health benefits claimed by California.¹⁷⁴ They disagreed with NPPC that the benefits of Prop 12 should be disregarded.¹⁷⁵ States may and have banned the sale of products they deem unethical, such as goods produced with child labor, and states may act in the face of unknown health risks.¹⁷⁶ NPPC argues the burdens alleged are particularly substantial because of California's large market share, but by this logic smaller states would have more authority to regulate sales than larger states, defeating the principle of equal sovereignty.¹⁷⁷ However, even accepting everything alleged, this job does not belong to a court.¹⁷⁸ In a democracy, it is the people who must make such a policy

165. *Id.* at 374.

166. *Id.*

167. *Id.* at 375–76.

168. Denning, *supra* note 92, at 29, 31.

169. *Nat'l Pork Producers Council*, 598 U.S. at 377.

170. *Id.*

171. *Id.* at 379–80.

172. *Id.* at 389 n. 4 (plurality opinion).

173. *Id.* at 380.

174. *Id.* at 380–81.

175. *Id.* at 381.

176. *Id.*

177. *Id.* at 382.

178. *Id.*

choice—if a uniform nationwide rule is necessary NPPC may ask Congress to intervene.¹⁷⁹

Four justices (Gorsuch, Thomas, Sotomayor, and Kagan) then agreed with California’s theory that a plaintiff must allege facts establishing a substantial burden on interstate commerce before a court can evaluate the benefits of the law or conduct the balancing test.¹⁸⁰ The DCC protects interstate commerce, not a particular way of doing business.¹⁸¹ These justices held that the harm to interstate commerce itself is only speculative.¹⁸² While some business may be unwilling or unable to comply, it has not been suggested that others will not fill that void.¹⁸³ Finally, higher prices for those who voted for the law does not offend the DCC.¹⁸⁴

Justices Sotomayor and Kagan wrote separately to express their agreement with Chief Justice Robert’s dissent that courts are perfectly capable of weighing economic burdens against noneconomic benefits.¹⁸⁵ They also stress that lack of discrimination does not settle the *Pike* claim.¹⁸⁶ In their view, the complaint simply does not allege a sufficient burden on interstate commerce.¹⁸⁷

Justice Barrett wrote separately to argue NPPC did allege a substantial burden on interstate commerce, namely that the costs of Prop 12 are “pervasive, burdensome, and will be felt primarily . . . outside of California.”¹⁸⁸ However, she agreed with Justice Gorsuch that the burdens and benefits in this specific case are not capable of judicial balancing.¹⁸⁹

Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson dissented as to the *Pike* claim, finding NPPC did allege a substantial burden on interstate commerce, thus the case should be remanded to determine if that burden outweighs local interests.¹⁹⁰ The justices defending *Pike* as more than a tool to discover protectionism but also a method to protect free trade.¹⁹¹ The Ninth Circuit held Prop 12 only resulted in increased compliance costs, however, NPPC alleged

179. *Id.*

180. *Id.* at 383 (plurality opinion).

181. *Id.* at 384.

182. *Id.* at 387.

183. *Id.* at 385.

184. *Id.* at 386.

185. *Id.* at 392–93 (Sotomayor, J., concurring in part).

186. *Id.*

187. *Id.* at 393.

188. *Id.* at 394 (Barrett, J., concurring in part).

189. *Id.*

190. *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part).

191. Denning, *supra* note 92, at 39.

much broader, “market-wide *consequences* of compliance.”¹⁹² Producers nationwide will be forced to comply with Prop 12 even though most of the pork they raise will not be sold in California.¹⁹³ NPPC also articulates harm to animal welfare and production practices that go beyond the cost of compliance.¹⁹⁴ Generations of animal husbandry have shown that group housing increases sow stress, injury, and disease.¹⁹⁵ The justices viewed allegations that Prop 12 “will force compliance on farmers who do not wish to sell into the California market, exacerbate health issues in the national pig population, and undercut established operational practices,” as economic harms against the interstate market itself, not just against a particular firm or way of doing business.¹⁹⁶

Justice Kavanaugh wrote separately to describe how the Constitution was written to overcome state restrictions on trade and to suggest that regulations like Prop 12 may raise questions under other provisions of the Constitution such as the “Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.”¹⁹⁷ He also pointed out additional burdens to interstate commerce including the expense and impracticality of segregating individual pigs, the infeasibility of exiting the California market, and a nationwide pork price increase.¹⁹⁸ Finally, Prop 12 undermines federalism and may open a new era where states can force their moral considerations on businesses in other states, a situation that might not be confined to the pork industry in the future.¹⁹⁹

Overall, *Ross* disavows the extraterritoriality branch and confirms the importance of *Pike* balancing as an independent branch of the DCC to review neutral, burdensome laws impacting interstate commerce.²⁰⁰ However, the Court never engaged in *Pike* balancing, allowing Prop 12 to stand with ironically limited detailed judicial scrutiny.²⁰¹ Despite the 72-page complaint with detailed producer

192. *Nat’l Pork Producers Council*, 598 U.S. at 397 (Roberts, C.J., concurring in part and dissenting in part) (emphasis in original).

193. *Id.* at 399–400.

194. *Id.* at 400.

195. *Id.* at 400–01.

196. *Id.* at 401.

197. *Id.* at 403–04 (Kavanaugh, J., concurring in part and dissenting in part).

198. *Id.* at 405–06.

199. *Id.* at 407.

200. Denning, *supra* note 92, at 23, 40.

201. *See Nat’l Pork Producers Council*, 598 U.S. at 382 (2023) (plurality opinion).

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declarations and market studies, the Court dismissed NPPC's complaint for failure to state a claim.²⁰²

E. Stakeholder Response

NPPC was obviously disappointed in the ruling, noting the harms discussed throughout their brief, the lack of science behind the minimum square footage requirements, and the burden placed on California's consumers.²⁰³ The National Federation of Independent Business (NFIB), who filed an amicus brief in opposition to the law, also expressed their disappointment stating that the decision not only affects family farms, but changes how states can impose regulatory burdens on out-of-state businesses.²⁰⁴ NFIB's executive director notes the decision will "set a dangerous precedent, and small businesses will bear the consequences."²⁰⁵ HSUS praised the decision, interpreting it as a "green light" to continue pushing animal welfare laws.²⁰⁶

IV. THE REQUIREMENTS OF PROPOSITION 12 REGULATIONS

Moving forward, it will be important for pork producers and business owners to understand the new regulations and how they can come into compliance. CDFA's new Animal Care Division has released several documents to assist in this process.

A. Pork Producers

All producers raising breeding pigs for sale in California, with the purpose of producing whole pork meat from that pig or its immediate offspring, must comply with Prop 12 regulations.²⁰⁷ Whole pork meat is defined as uncooked cuts of pork that does not include ground products or combination food products like

202. *Id.* at 364 (majority opinion); see *Complaint for Declaratory and Injunctive Relief, Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-CV-2324).

203. Mikesell, *supra* note 5.

204. *Supreme Court Ruling in National Pork Producers Council v. Ross Places Further Burdens on Small Businesses Nationwide*, NFIB (May 11, 2023), <https://www.nfib.com/content/press-release/homepage/supreme-court-ruling-in-national-pork-producers-council-v-ross-places-further-burdens-on-small-businesses-nationwide/> [<https://perma.cc/98HA-JYGN>].

205. *Id.*

206. Block & Amundson, *supra* note 5.

207. ANIMAL CARE, CAL. DEP'T OF FOOD & AGRIC., GUIDANCE: PORK PRODUCERS (2023), https://www.cdfa.ca.gov/AHFSS/AnimalCare/docs/Animal_Care_Producer_Pork.pdf [<https://perma.cc/R5HY-QW8Z>].

pizza, hot dogs, or sausage.²⁰⁸ Generally, a pork producer must meet the minimum confinement requirements, obtain a certificate of compliance for each farm, and renew the certificate annually.²⁰⁹ Except for a few narrow exceptions, breeding pigs must be provided with 24 square feet of floor space.²¹⁰ One notable exception is that the space requirements do not apply for five days before the expected farrowing date or when the sow is nursing piglets.²¹¹ While Prop 12 does not mandate group housing, most producers find this a more economical option than providing each sow with that much space.²¹²

Since January 1, 2024, a certificate of compliance has been required for each farm wishing to sell pork in California.²¹³ CDFA's initial statement of reasons found only 1.6% of the pork Californians consume is raised in California, combined with limited egg and veal production, this means California will need to certify approximately 12,750 out-of-state farms to maintain their citizen's current egg, pork, and veal consumption.²¹⁴ Certificates can be issued from an accredited third-party agency, CDFA themselves, or another governmental entity.²¹⁵ To obtain a certificate, producers must submit an application, pass an on-site inspection, and maintain records documenting compliance for two years.²¹⁶ During the inspection the producer must allow the agent onto all areas of production and into operation offices to copy the required records.²¹⁷ The producer must submit renewal information and comply with an on-site inspection at least once a year.²¹⁸

208. CAL. HEALTH & SAFETY CODE § 25991(u) (West 2024); CAL. CODE REGS. tit. 3, § 1322(k) (2024).

209. GUIDANCE: PORK PRODUCERS, *supra* note 207.

210. CAL. HEALTH & SAFETY CODE §§ 25991(e)(3), 25992.

211. *Id.* § 25992(f).

212. ANIMAL CARE, CAL. DEP'T OF FOOD & AGRIC., PROP 12 – SOW HOUSING GUIDE (2023), https://www.cdfa.ca.gov/AHFSS/AnimalCare/docs/sow_housing_guide.pdf [<https://perma.cc/C3NS-FHTU>]; Mikesell, *supra* note 5.

213. GUIDANCE: PORK PRODUCERS, *supra* note 207.

214. INITIAL STATEMENT OF REASONS, *supra* note 28, at 8–9.

215. GUIDANCE: PORK PRODUCERS, *supra* note 207.

216. *Id.*

217. ANIMAL CARE, CAL. DEP'T OF FOOD & AGRIC., GUIDANCE: PORK PRODUCER ON-SITE INSPECTION FOR PURPOSE OF CERTIFICATION 2 (2023), https://www.cdfa.ca.gov/AHFSS/AnimalCare/docs/prop12_porkproducer_onsiteinspection.pdf [<https://perma.cc/UTX2-VSY7>].

218. GUIDANCE: PORK PRODUCERS, *supra* note 207.

B. Business Owners

Retailers and distributors in California are prohibited from knowingly engaging in the sale of a covered product that was not raised in compliance with Prop 12.²¹⁹ Distributor registration has been required since January 1, 2023, and must also be renewed annually.²²⁰ Since January 1, 2024, distributors must also submit third-party verification documentation.²²¹ Individual retailers do not have to register but instead benefit from the good faith reliance rule, allowing them to defend any enforcement action by showing a written certificate of compliance from their distributor.²²² Important exemptions include products moving through the state for export purposes that will not be further processed in the state, and products sold at an establishment inspected under federal law.²²³ Products shipped into or through California must be labeled to specify whether they comply with Prop 12.²²⁴

C. Enforcement

Prop 12 carries civil and criminal penalties which can be enforced against the producer or business owner.²²⁵ Specifically, business owners who violate Prop 12 will be deemed to have engaged in unfair competition and can be punished under the Business Code.²²⁶

The injunction granted in *California Hispanic Chambers of Commerce v. Ross* expired on July 1, 2023, except for meat already in the supply chain as of that time, which had until December 31, 2023, to be sold in California.²²⁷ CDFA described these six months as a transition period to allow current stock of noncompliant pork to be cleared from stores.²²⁸ After December 31, 2023, noncompliant whole pork meat could not be sold into California, regardless of when physical possession occurred.²²⁹ Therefore, Prop 12 regulations became fully enforceable on January 1, 2024.²³⁰

219. CAL. HEALTH & SAFETY CODE § 25990(b) (West 2024).

220. PROPOSITION 12 Q & A, *supra* note 68.

221. *Id.*

222. *Id.*

223. CAL. CODE REGS. tit. 3. § 1322(f)(1)-(2) (2024).

224. *Id.* § 1322.4(a).

225. CAL. HEALTH & SAFETY CODE § 25993(b) (West 2024).

226. *Id.*

227. PROPOSITION 12 Q & A, *supra* note 68.

228. *Id.*

229. *Id.*

230. *Id.*

Overall, large producers are adapting to Prop 12 requirements, though not without complaining about the expense and hurdles they have had to overcome.²³¹ The effect on smaller producers and consumer prices is less clear, with some studies estimating the price of pork in California will increase upwards of 25 cents per pound.²³² This is an increase 37% of Californians did not ask for, and many more did not understand what they were approving.²³³

V. LOOKING BEYOND *ROSS*

Perhaps the most unknown and concerning effect of Prop 12 and the *Ross* precedent is the potential for conflicting or retaliatory regulations which may extend beyond the pork industry. During oral argument the justices presented several hypotheticals asking what might occur if states are allowed to condition sales on its moral or political views.²³⁴ For example, Justice Kagan suggested a state may prohibit the sale of goods based on the workers' union affiliation and Justice Barrett questioned if a state could require workers to be afforded certain healthcare benefits.²³⁵ Justice Kavanaugh asked if a state could prohibit the sale of fruit picked by individuals in the country illegally and Justice Alito wondered if a pork-producing state could retaliate by prohibiting the sale of almonds produced with excessive water.²³⁶ The Deputy Solicitor General of the United States as amicus curiae for the petitioners argued that this precedent would be hard to contain and lead to balkanization among the states.²³⁷

Closer to the issue at hand here, it seems clear that a state could pass a law like Prop 12, but require 26 square feet of space, requiring pork producers to retrofit their facilities yet again.²³⁸ At the very least, the law surrounding sale bans is unclear, requiring lower courts to sort out the details. This situation is not speculative as Massachusetts already has its own regiment for pork sales in place.²³⁹

231. McCracken & Felder, *supra* note 4.

232. *Id.*

233. See INITIATIVES VOTED INTO LAW, *supra* note 1.

234. See, e.g., Transcript of Oral Argument at 94–96, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468).

235. *Id.* at 95, 98–99.

236. *Id.* at 100, 116.

237. *Id.* at 83–84.

238. *Id.* at 6.

239. See 2016 Mass. Acts ch. 333.

A. Massachusetts Question 3

While Prop 12 received the majority of media attention, it was not the first state to enact a sale ban on pork not raised in compliance with citizen standards.²⁴⁰ A ballot initiative in Massachusetts titled Question 3 passed in 2016, carrying 77% of the popular vote.²⁴¹ The core language of Prop 12 and Question 3 is the same. Like Prop 12, Question 3 prohibits confining “a breeding pig in a manner that prevents the animal from lying down, standing up, fully extending the animal’s limbs or turning around freely,” as well as selling any whole pork meat raised in violation of these standards.²⁴² The law originally had an effective date of January 1, 2022, giving producers approximately five years to come into compliance.²⁴³ A compromise measure was later reached, extending the implementation date until August 15, 2022.²⁴⁴ As one might expect in light of the currently pending Prop 12 litigation, the Massachusetts Restaurant Association and NPPC filed a complaint alleging the sale ban violated the DCC and should not go into effect until after the Supreme Court decided *National Pork Producers Council v. Ross*.²⁴⁵ In response, the parties entered a joint stay on August 10, 2022, which was later extended until August 23, 2023.²⁴⁶ So, the sale ban for whole pork sold into Massachusetts went into effect on August 24, 2023.²⁴⁷

1. Comparing Proposition 12 and Question 3

While the Massachusetts and California ballot initiatives are very similar, important differences exist. First, Massachusetts does not include a minimum

240. *See id.*

241. *Elections*, SEC’Y OF THE COMMONWEALTH OF MASS. (June 9, 2024, 12:03 PM), https://electionstats.state.ma.us/ballot_questions/search/year_from:1972/year_to:2016 [<https://perma.cc/X9M7-K5ZB>].

242. MASS. GEN. LAWS ANN. ch. 129 app., §§ 1–5, 1–3(c) (West 2024); *see* CAL. HEALTH & SAFETY CODE § 25991(e)(1) (West 2024).

243. 2016 Mass. Acts ch. 333; WILLIAM FRANCIS GALVIN, SEC’Y OF THE COMMONWEALTH, MASSACHUSETTS INFORMATION FOR VOTERS 8 (2016), https://www.sec.state.ma.us/divisions/elections/download/information-for-voters/IFV_2016-English.pdf [<https://perma.cc/W2PM-GY54>].

244. 2021 Mass. Acts ch. 108; Press Release, Nat’l Pork Producers Council, Massachusetts Delays Effective Date of Question 3 (Dec. 22, 2021), <https://nppc.org/press-releases/massachusetts-delays-effective-date-of-question-3/> [<https://perma.cc/PAX4-VNEZ>].

245. Status Rep. and Joint Motion to Further Extend Stay of Proc. Pending Regul. Proposal at 2, Mass. Rest. Ass’n v. Healey, No. 4:22-CV-11245 (D. Mass. filed Feb. 7, 2024).

246. *Id.*

247. *Id.* at 3.

square footage requirement, while California requires 24 square feet.²⁴⁸ Second, the enforcement mechanisms are different. Violating the Prop 12 sale ban may constitute a criminal offense and lead to civil penalties in the form of unfair competition, which can be enforced through a citizen suit.²⁴⁹ Question 3 is only enforceable through a civil fine by the AG, and unlike California, no new department was created to assist with implementation.²⁵⁰ Third, Question 3 allows farms to self-certify that the products they sell meet minimum space requirements, a much less invasive option than Prop 12, which forces farmers to comply with an outside agent's inspection.²⁵¹ Fourth, Question 3 applies to ground pork products, which are exempt under Prop 12.²⁵² So, while sausage and other processed foods are still exempt under Question 3, pork burgers are not.²⁵³

The most important difference, however, is that Question 3 proposes to subject transshipped pork meat to its regulations.²⁵⁴ Prop 12 specifically defines "commercial sale" to exempt pork produced outside of California that enters and exists California with no further processing or packaging, i.e., meat that only travels through California for export purposes.²⁵⁵ As this meat has zero connection with California consumers, California's moral choices should not apply to those products. Massachusetts, however, disagrees.²⁵⁶ The only way to avoid Question 3 requirements is if a company takes possession of the pork outside of Massachusetts, brings it through their own distribution hub in Massachusetts, then sells the pork in another state.²⁵⁷ Any pork sold in Massachusetts must be in compliance, even if the pork will not be consumed in-state.²⁵⁸ NPPC estimates this

248. Compare MASS. GEN. LAWS ANN. ch. 129 app., § 1–5 (West 2024), with CAL. HEALTH & SAFETY CODE § 25991(e)(3) (West 2024).

249. CAL. HEALTH & SAFETY CODE § 25993; Jennifer Shike, *Massachusetts Question 3: What's Next for Pork Producers*, FARM J. PORK (July 11, 2023), <https://www.porkbusiness.com/news/ag-policy/massachusetts-question-3-whats-next-pork-producers> [<https://perma.cc/U6KU-8WU6>].

250. See MASS. GEN. LAWS ANN. ch. 129 app., § 1–6 (West 2024); *Animal Care Program*, *supra* note 6.

251. Compare 330 MASS. CODE REGS. 35.05 (2024) with CAL. CODE REGS. tit. 3, § 1326.1(a) (2024).

252. See MASS. DEP'T OF AGRIC. RES., 330 CMR 35.00 – FAQ (2023), <https://www.mass.gov/doc/330-cmr-3500-faq/download> [<https://perma.cc/42D5-6P3M>]; CAL. CODE REGS. tit. 3, § 1322(k).

253. MASS. DEP'T OF AGRIC. RES., *supra* note 252.

254. *Id.*

255. CAL. CODE REGS. tit. 3, § 1322(f)(1).

256. MASS. DEP'T OF AGRIC. RES., *supra* note 252.

257. *Id.*

258. *Id.*; MASS. GEN. LAWS ANN. ch. 129 app., §§ 1–5, 1–3(c) (West 2024).

will jeopardize \$2 billion worth of pork that is shipped into neighboring states.²⁵⁹ Massachusetts is currently in the process of promulgating regulations regarding the details of transshipped pork meat, thus the Massachusetts district court issued a stay on enforcement of Question 3 against transshipped pork until after the regulations are published.²⁶⁰ At that point, any remaining legal issues will be addressed.²⁶¹

2. The Validity of Question 3

An additional lawsuit is also sparking attention from the industry. In July 2023, Triumph Foods (Triumph), a large pork processor from St. Joseph, Missouri, and several Midwest pork producers filed a lawsuit challenging the constitutionality of Question 3.²⁶² Triumph took the advice of Justice Kavanaugh and brought claims not only under the DCC, but also the Privileges and Immunity Clause, the Full Faith and Credit Clause, and the Import-Export Clause.²⁶³ Unfortunately, the court entered a text-only entry in the docket granting Massachusetts's motion to dismiss these additional claims without analysis.²⁶⁴

However, Triumph presented a new argument under the DCC.²⁶⁵ Both Question 3 and Prop 12 exempt sales undertaken at a plant inspected under the Federal Meat Inspection Act (i.e., USDA inspected plants).²⁶⁶ Sale is defined as

259. Press Release, Nat'l Pork Producers Council, Mass. State Law Delay Keeps Breakfast on the Table (Aug. 11, 2022), <https://nppc.org/press-releases/massachusetts-state-law-delay-keeps-breakfast-on-the-table/> [<https://perma.cc/75EF-ZVUV>].

260. Status Rep. and Joint Motion to Further Extend Stay of Proc. Pending Regul. Proposal, *supra* note 245, at 4.

261. *Id.* at 4–5.

262. Nora Rouse, *Triumph Foods, Midwest Farmers Challenge Constitutionality of Massachusetts Question 3*, TRIUMPH FOODS (July 26, 2023), <https://www.triumphfoods.com/news/triumph-foods-midwest-farmers-challengeconstitutionality-of-massachusetts-question-3/> [<https://perma.cc/XS67-BGNL>].

263. Dave Dickey, *Big Meat Rooting for Triumph Foods to Torpedo Massachusetts Question 3*, INVESTIGATE MIDWEST (Sept. 6, 2023), <https://investigatamidwest.org/2023/09/06/big-meat-rooting-for-triumph-foods-to-torpedo-massachusetts-question-3/> [<https://perma.cc/64CP-YRQ9>].

264. *Triumph Foods, LLC v. Campbell*, No. 23-11671, 2024 WL 421994, at *1 (D. Mass. Feb. 5, 2024); *see* U.S. DIST. CT. DIST. OF MASS., CASE MANAGEMENT/ELECTRONIC CASE FILES ADMINISTRATIVE PROCEDURES 16 (2011), <https://www.mad.uscourts.gov/caseinfo/pdf/ECFadminProc.pdf> [<https://perma.cc/UF4C-XM7W>].

265. *See Triumph Foods, LLC*, 2024 WL 421994, at *1.

266. MASS. GEN. LAWS ANN. ch. 129 app., § 1–5 (West 2024); CAL. HEALTH & SAFETY CODE § 25991(o) (West 2024); *see Triumph Foods, LLC*, 2024 WL 421994, at *3.

the location where the buyer takes physical possession of the pork.²⁶⁷ Thus, the exemption only applies to sales made *on the premises* of a USDA inspected plant.²⁶⁸ So, a USDA-inspected Massachusetts processor may sell noncompliant pork on-site directly to the consumer.²⁶⁹ This may be a single family, a hospital or a prison serving hundreds of individuals.²⁷⁰ Grocery stores could not take advantage of this exemption in order to purchase and resell noncompliant pork because the subsequent sale at the grocery store must comply with Question 3.²⁷¹

Essentially, a processor must own a facility in the state of Massachusetts to take advantage of the exemption, leaving out-of-state entities no choice but to build a plant in Massachusetts if they wish to sell cheaper, noncompliant pork to Massachusetts consumers.²⁷² Triumph's only alternative is to sell compliant pork at a higher cost than in-state processors.²⁷³ The court held these additional burdens have a discriminatory effect.²⁷⁴ Discriminatory laws are struck down unless they further a legitimate local purpose that cannot be served in a nondiscriminatory way.²⁷⁵ Because the purpose of Question 3 is to prevent the sale of noncompliant pork into Massachusetts, and the exemption does the opposite, it does not further a local purpose and thus violates the DCC.²⁷⁶ Ultimately, the court found the exemption severable from the rest of Question 3, so it struck down the exemption but left the heart of the Act in force.²⁷⁷

However, Triumph quickly moved for summary judgment, arguing that without the exemption, Question 3 is preempted by the Federal Meat Inspection Act (FMIA).²⁷⁸ FMIA states that requirements with respect to operations of any USDA inspected plant "which are in addition to, or different than those made under this chapter may not be imposed by any State."²⁷⁹ Prohibiting the sale of Question

267. MASS. GEN. LAWS ANN. ch. 129 app., § 1–5.

268. *Triumph Foods, LLC*, 2024 WL 421994, at *3.

269. *Id.*

270. *Id.* at *3–5.

271. *Id.*

272. *Id.* at *5–6.

273. *Id.* at *6.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at *7.

278. Plaintiffs' Memorandum of Reasons in Support of Plaintiffs' Motion for Summary Judgment at 12, *Triumph Foods, LLC v. Campbell*, No. 23-11671 (D. Mass. filed March 6, 2024).

279. 21 U.S.C. § 678.

3 noncompliant hogs, which would otherwise pass USDA inspection, is a different requirement than that imposed by FMIA.²⁸⁰

Unfortunately, the court did not agree and instead granted summary judgment for Massachusetts.²⁸¹ The court determined Question 3 is not preempted by FMIA because it requires no changes in operations for meatpackers—they simply must segregate pork if they wish to sell to Massachusetts as they already do for other specialty products.²⁸² Additionally, Question 3 does not interfere with FMIA’s health and safety purpose because it has “no effect on health and safety in the Commonwealth,” but is instead an animal cruelty measure.²⁸³ Triumph has appealed this decision to the First Circuit which will consider preemption in determining Question 3’s continuing validity.²⁸⁴ The court’s ruling will be sure to spark attention in California given Prop 12’s identical exemption.²⁸⁵

B. Call for Legislative Action

Given the apparent constitutionality of states dictating the farm production practices of out-of-state farmers, other states are sure to follow California’s lead and pass legislation furthering its citizen’s moral interests.²⁸⁶ Added clarity is necessary before producers are faced with 50 different regulations in 50 different states.²⁸⁷ Several justices of the Supreme Court essentially passed off this responsibility to Congress, who must take the cue and act to protect the national marketplace.²⁸⁸

The governors of 11 states who produce 54% of the nation’s pork also wrote a letter to Congress asking them to take action.²⁸⁹ The governors explained that the way pork is raised in their states is drastically different than the requirements of

280. Plaintiffs’ Memorandum of Reasons in Support of Plaintiffs’ Motion for Summary Judgment, *supra* note 278, at 16.

281. Memorandum and Order, *Triumph Foods, LLC v. Campbell*, No. 23-11671 (D. Mass. July 22, 2024).

282. *Id.* at 14–15.

283. *Id.* at 16.

284. *Triumph Foods, LLC v. Campbell*, No. 23-cv-11671 (11th Cir. 2024).

285. See CAL. HEALTH & SAFETY CODE § 25991(o) (West 2024).

286. Chris Clayton, *Risks and Complication of Prop 12*, PROGRESSIVE FARMER (Feb. 16, 2024), <https://www.dtnpf.com/agriculture/web/ag/news/article/2024/02/14/vilsack-sees-chaos-marketplace-prop> [<https://perma.cc/MGS6-5NNY>].

287. McCracken & Felder, *supra* note 4.

288. Mikesell, *supra* note 5.

289. Letter from the Governors of 11 States to Cong. (June 13, 2023), <https://governor.iowa.gov/media/209/download?inline> [<https://perma.cc/5TK8-D5E9>].

Prop 12.²⁹⁰ Pork production is nationally integrated—a single state should not have the power to “radically disrupt” that system.²⁹¹ While federalism allows states to experiment with legislation, because of the profound consequences at hand, this is the rare scenario where federal legislation is necessary.²⁹²

Tom Vilsack, the United States Secretary of Agriculture, has also told Congress it is time for it to address the impacts of Prop 12, explaining that “if we don’t take this seriously, we’re going to have chaos in the marketplace . . . because there’s nothing preventing any state from doing what California did.”²⁹³ He acknowledged the difficulty in passing legislation in this area without impacting other social issues, but argued if Congress does not “figure it out, there’s going to be chaos.”²⁹⁴ Further, the Biden administration supported NPPC at the Supreme Court, expressing its concerns about the far reaching effects of allowing states to control conduct in other states.²⁹⁵

Allowing states to control conduct outside of their borders also has the potential to allow states to control conduct outside of the country.²⁹⁶ Canada has expressed concerns it may not be able to export into the United States if farmers do not comply with Prop 12, presenting interesting questions regarding the effect on foreign trade.²⁹⁷ Indeed, California has suggested CDFA will need to certify farms outside of the country.²⁹⁸ This presents yet another unknown, and a strong reason for the federal government to get involved to protect the North American pork industry.²⁹⁹

With Supreme Court justices, several states, and the federal government in agreement, the most efficient solution is clear—Congress must act to provide

290. *Id.*

291. *Id.*

292. *Id.*

293. Clayton, *supra* note 286.

294. *Id.*

295. Press Release, Nat’l Pork Producers Council, NPPC Praises Biden Admin. for Standing Up for Consumer Choice and Am. Farmers (July 21, 2022), <https://nppc.org/press-releases/nppc-praises-biden-administration-for-standing-up-for-consumer-choice-and-american-farmers/> [<https://perma.cc/W9KL-L5C4>].

296. Geralyn Wichers, *California Animal Housing Law Spells Trouble for Local Trade*, MANITOBA CO-OPERATOR (June 3, 2023), <https://www.manitobacooperator.ca/news-opinion/news/california-animal-housing-law-spells-trouble-for-local-trade/> [<https://perma.cc/5WRL-X5Z3>].

297. *Id.*

298. INITIAL STATEMENT OF REASONS, *supra* note 28, at 9.

299. Wichers, *supra* note 296.

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clarity to all producers potentially subject to sale bans in the future.³⁰⁰ Until this occurs, each new proposal is almost certain to face expensive, time-consuming legal challenges.

VI. CONCLUSION

Proposition 12 has presented interesting questions about state sovereignty and the role moral considerations have to play in the national marketplace. The *Ross* decision presents a sweeping view of these issues creating a precedent that will be difficult to contain. Pork producers may have been the first to become subjected to such laws, but few can argue they will be the last. Only time will tell how the predicted costs of Proposition 12 will play out in the national pork market and on the grocery store shelves. In the meantime, pork producers are left to comply with complicated new regulations altering the very philosophy upon which they care for their sows.

300. See Dickey, *supra* note 263.