

BEYOND THE BACON: PROPOSITION 12'S IMPACT ON THE UNITED  
STATES PORK INDUSTRY

ABSTRACT

*California's 2018 enactment of Proposition 12 has had major implications on pork producers across the nation. The legislation now prohibits the sale of pork into California if it is the product of a breeding pig that was confined in a space that doesn't meet certain space requirements. Though it may seem feasible at first glance, the majority of hogs are not raised in this manner and California imports nearly all of its pork consumption. Retrofitting hog barns to become compliant has significant costs. These costs include not only the massive facility renovation costs, but also physical "costs" that the sows are exposed to due to various risks associated with group housing such as injuries, illness, and stress, which have been overlooked by the courts that have heard the issue.*

*Proposition 12's far-reaching effects raise questions about the current state of the dormant Commerce Clause in areas of modern life, including the livestock industries. The litigation that has ensued has thus far upheld the*

*legislation as a valid exercise of California's state power. The courts have decided that the ability of a state to project power extraterritorially does not yield to a per se rule under the dormant Commerce Clause and have also found themselves unable to weigh the economic costs against the noneconomic benefits that Californians sought.*

*There is a strong chance that Proposition 12's fate will be decided by Congress in the Farm Bill set to be voted on in 2025. If Proposition 12 survives, there may be other states that implement similar legislation, which will have an even larger impact on the U.S. pork industry. In the aftermath of Proposition 12, pork producers must choose whether to make very large investments into their facilities to be able to sell into California or to maintain their status quo without the ability to sell to the nation's top pork consuming state. This note explores the recent court opinions that have protected Proposition 12, surveys the varying responses from pork producers since Proposition 12's implementation, and suggests that the courts have missed important consequences that the legislation has on the pork industry which should have changed the outcome.*

## I. INTRODUCTION

News of California's ballot initiative in November 2018, now known as Proposition 12, sent the agriculture industry scrambling. The uncertainty and fear of what the pork industry would look like loomed heavy across the nation. What has ensued since is important litigation which appears to protect a state's ability to control the quality of products entering its borders and a mixed reaction from pork producers, some of which are eager to comply and others completely refusing to change their animal husbandry practices for California legislators.

Proposition 12 amended the California Health and Safety Code with regard to pork, veal, and eggs.<sup>1</sup> This article will focus solely on the pork implications of the enacted legislation. Specifically, the legislation enacted in the code provides that,

No person shall knowingly engage in a commercial sale within the state of whole pork meat for human food if the whole pork meat is the product of a

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<sup>1</sup> CAL. CODE REGS. tit 3, § 1322.1 (2022).

breeding pig... that was confined at any time... in an enclosure that fails to comply with the following standards: (1) An enclosure shall allow the breeding pig to lie down, stand up, fully extend limbs, and turn around freely. (2) An enclosure shall provide a minimum of 24 square feet of usable floorspace per breeding pig.<sup>2</sup>

This requirement has come to be known as the stand up-turn around requirement; it is contrary to a common type of housing used for pregnant sows during the duration of their gestation, which is 2.5 X 6.5 foot (16 square feet) individual gestation stalls.<sup>3</sup> In addition, any pork entering California must be labeled either “Pork CA Prop 12 Compliant” or “Not Prop 12 Compliant”, distributors must be

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<sup>2</sup> *Id.*

<sup>3</sup> U.S. International Trade Commission, *Proposition 12 and U.S. Pork:*

*Implications for the U.S. Industry and Trade* (2023),

[https://www.usitc.gov/publications/332/executive\\_briefings/ebot\\_proposition\\_12\\_and\\_us\\_pork\\_industry.pdf](https://www.usitc.gov/publications/332/executive_briefings/ebot_proposition_12_and_us_pork_industry.pdf)

certified, and pork producers must have their facility inspected by the California Department of Food and Agriculture or another certifying agent for an initial on-site inspection and annual inspections to become and remain certified according to Proposition 12 standards.<sup>4</sup> California’s asserted purpose for Proposition 12 is to prevent animal cruelty by “phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers....”<sup>5</sup>

While this article will examine the consequences of a state sales ban such as this one, advocates of Proposition 12 allege that existing animal welfare laws are

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<sup>4</sup> CAL. CODE REGS. tit. 3 § 1322.4 (2022); PORK BUSINESS, *Prop 12: What to*

*Expect During an On-Site Inspection* (Sept. 26, 2023)

<https://www.porkbusiness.com/news/ag-policy/prop-12-what-expect-during-site-inspection#:~:text=The%20pork%20producer%20must%20allow,includin%20th e%20inspection%20of%20all.>

<sup>5</sup> National Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (2021).

ineffective due to gaps and exemptions; specifically, animal husbandry practices are commonly exempted in animal welfare laws, and even the federal Animal Welfare Act does not include livestock and research animals in its animal cruelty regulation.<sup>6</sup> Thus, advocates argue that pork production requirements for confinements in the form of state sales bans are essential to achieve desirable livestock treatment.<sup>7</sup> Troublesome, however, is that states that have implemented similar legislation have applied it only to in-state producers.<sup>8</sup> Proposition 12, in

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<sup>6</sup> Dakota Hamko, *Regulate Commerce, Not Cruelty: Will the Dormant Commerce Clause Shield States That Want to Protect Pigs*, 101 DENV. L. REV. FORUM 1, 18 (2024).

<sup>7</sup> Taylor Bushelle, *Counting the Cost of California's Proposition 12 Post-Ross*, 69 S.D. L. Rev 96, 99 (2024).

<sup>8</sup> *Id.*

contrast, applies to any out-of-state producer selling their pork within the state of California.<sup>9</sup>

The result of this legislation and litigation is specifically important not only because it is one of the first of its kind, but also because of the massive impact of California’s pork consumption on the national pork industry.<sup>10</sup>

California consists of approximately 13% of the national pork market, making it the largest pork-consuming state, and needs the offspring of an estimated 673,000 sows to meet its demand.<sup>11</sup> Importantly, California imports 99.8% of the pork it consumes from outside the state.<sup>12</sup> Thus, it is “reasonable to conclude that a

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<sup>9</sup> CAL. CODE REGS. tit 3, § 1322.1 (2022)

<sup>10</sup> National Pork Producers Council v. Ross, F. Supp. 3d 1201, 1205 (2020).

<sup>11</sup> *Id.*

<sup>12</sup> *Proposition 12 and U.S. Pork: Implications for the U.S. Industry and Trade*, *supra* note 3.

majority of the transactions controlled by Proposition 12 occur outside of the state.”<sup>13</sup>

## II. COMMERCE CLAUSE AND DORMANT COMMERCE CLAUSE

Because Proposition 12 largely impacts out-of-state pork producers, the analysis on the validity of the legislation begins with the Commerce Clause and the dormant Commerce Clause. Were the legislation only to apply to California pork producers, the analysis would not be necessary.

The Commerce Clause of the United States Constitution grants Congress the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>14</sup> The meaning of the term commerce, which has been the subject of much litigation, is “the exchange of one thing for another;

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<sup>13</sup> Taylor Bushelle, *Counting the Cost of California’s Proposition 12 Post-Ross*, 69 S.D. L. Rev 96, 99 (2024).

<sup>14</sup> U.S. CONST. art. I, § 8, cl. 3.

the interchange of commodities; trade or traffic.”<sup>15</sup> The purpose of the Commerce Clause was to prevent the consequences of differing legislation from many different states, a so-called “patchwork” of legislation.<sup>16</sup>

In areas where there is no existing federal regulation, there is generally concurrent state regulatory authority for those areas that are seemingly local.<sup>17</sup> There are limits to this state regulatory authority, which is where the dormant Commerce Clause surfaces.<sup>18</sup> The dormant Commerce Clause protects the commerce of other states from one state’s regulation that amounts to economic isolation and protectionism, while still allowing for inevitable burdens on interstate commerce.<sup>19</sup> Where a state law intentionally blocks the flow of

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<sup>15</sup> *Gibbons v. Ogdon*, 22 U.S. 1, 89 (1824).

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

<sup>18</sup> *See id.* at 623-24.

<sup>19</sup> *Id.*

interstate commerce at its border, courts will hold the statute is facially discriminatory and thus violates the dormant Commerce Clause.<sup>20</sup> Also, facially neutral laws may be found to violate the dormant Commerce Clause if the burden imposed on commerce “is clearly excessive in relation to the putative local benefits.”<sup>21</sup> Courts weigh the local purpose of the statute against the burden on out-of-state commerce and examine any less burdensome alternatives.<sup>22</sup>

Importantly, courts look at whether the statute is protectionist in nature or whether it serves a legitimate state interest with only an incidental burden on out-of-state commerce.<sup>23</sup> Summed up well, *Iowa Pork Producers Ass’n v. Bonta* describes “[i]f a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it ‘serves a

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<sup>20</sup> *Id.*

<sup>21</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>22</sup> *Id.*

<sup>23</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.”<sup>24</sup>

### III. PROPOSITION 12 LITIGATION OVERVIEW

Though the Commerce Clause and its dormant counterpart are not typically thought of as to apply to livestock, the dormant Commerce Clause has become massively important in the Proposition 12 litigation that has ensued since its enactment. Although the legislation is relatively new, the pork industry has received some guidance from two decisions, *National Pork Producers Council v.*

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<sup>24</sup> No. 22-55336, 2024 WL 3158532, at \*1 (9th Cir. June 25, 2024) (citing *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1987 (9th Cir. 2013)).

*Ross* and *Iowa Pork Producers Association v. Bonta*, both of which found Proposition 12 to be a valid use of state power.<sup>25</sup>

A. *National Pork Producers Council v. Ross*

The National Pork Producers Council (NPRC) filed this suit to challenge the constitutionality of Proposition 12, arguing that it impermissibly burdens interstate commerce.<sup>26</sup> Because Congress has not adopted any statute regarding pork production that may implicate the Commerce Clause, NPRC relied on the dormant Commerce Clause.<sup>27</sup> Petitioners conceded that the same burdens are imposed on California pork producers as out-of-state producers.<sup>28</sup> The Court says

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<sup>25</sup> *See generally* *National Pork Producers v. Ross*, 598 U.S. 356 (2023); *Iowa Pork Producers Ass’n v. Bonta*, No. 22-55336, 2024 WL 3158532 (9th Cir. June 25, 2024).

<sup>26</sup> *See generally* *National Pork Producers v. Ross*, 598 U.S. 356 (2023).

<sup>27</sup> *Id.* at 368.

<sup>28</sup> *See id.* at 371.

that petitioners “begin in a tough spot” because they are not alleging that Proposition 12 is seeking to advantage in-state producers or disadvantage out-of-state producers, thus removing any obvious economic protectionism that is the heart of the dormant Commerce Clause.<sup>29</sup>

1. *Extraterritoriality Doctrine Argument*

Without the antidiscrimination principle, petitioners had two major arguments by the time this case made its way to the United States Supreme Court.<sup>30</sup> The first argument is what petitioners called the “extraterritoriality doctrine,” meaning the law should be forbidden for having the “practical effect of controlling commerce outside the State” despite the absence of purposeful out-of-state discrimination—this argument amounts to an almost *per se* rule against such state laws.<sup>31</sup> The Court rejects this argument, finding that the cases relied upon to

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<sup>29</sup> *Id.* at 370.

<sup>30</sup> *See generally* National Pork Producers v. Ross, 598 U.S. 356 (2023).

<sup>31</sup> *Id.* at 371.

support a nearly *per se* rule addressed price control or price affirmation statutes, which are not the same as the state sales ban at issue.<sup>32</sup>

Rather, the Court decided it has never concluded “that *any* question about the ability of a State to project its power extraterritorially must yield to an ‘almost *per se*’ rule under the dormant Commerce Clause.”<sup>33</sup> The Court looked to other examples where a state law had the effect of controlling extraterritorial behavior, such as state environmental laws affecting where businesses operate and state tax laws causing companies to relocate.<sup>34</sup> By rejecting NRPC’s near *per se* rule, the Court seems to preserve other valid exercises of states’ power that have extraterritorial effects, such as the environmental laws and tax laws previously mentioned.<sup>35</sup>

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<sup>32</sup> *Id.* at 374.

<sup>33</sup> *Id.* at 376.

<sup>34</sup> *Id.* at 374.

<sup>35</sup> *See id.* at 375.

2. *Excessive Burden Argument*

Their second argument is that the Court must prohibit a state law's enforcement when its burdens are "clearly excessive in relation to the putative local benefits," relying on *Pike v. Bruce Church, Inc.*<sup>36</sup> The *Pike* line of cases described in NPRC highlights the alternative side of the dormant Commerce Clause's more common case of facial discrimination, which is when the effects of a law reveal a discriminatory purpose.<sup>37</sup> In other words, there can be discrimination in practice.<sup>38</sup>

In *Pike*, petitioners challenged the Arizona Fruit and Vegetable Standardization Act, which, in part, required all cantaloupes grown in Arizona for sale to be packed in an approved manner, the goal of which was to prohibit

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<sup>36</sup> 397 U.S. 137, 142 (1993); *Ross*, 598 U.S. at 377.

<sup>37</sup> *Ross*, 598 U.S. at 377.

<sup>38</sup> *See id.*

deceptive packaging.<sup>39</sup> In effect, the appellee was prohibited from transporting its harvested cantaloupes from Arizona to a nearby California city for packing.<sup>40</sup> The Court decided that the state's interest in having the identification of the produce displaying its Arizona origin did not justify the necessary \$200,000 packing plant that was to be built in Arizona to become compliant.<sup>41</sup> Though Arizona had a legitimate state interest, the burden on commerce in effect proved to be too high for the legislation to be upheld.<sup>42</sup>

However, the *Ross* Court also rejects this argument, finding that petitioners did not “suggest that an examination of Proposition 12's practical effects in operation would disclose purposeful discrimination against out-of-state

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<sup>39</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138 (1993).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 145.

<sup>42</sup> *Id.*

businesses.”<sup>43</sup> The Court claims that the petitioner’s interpretation of *Pike* is merely an assessment of the law’s costs and benefits, and they find it impossible to weigh the economic costs incurred by out-of-state producers against noneconomic benefits of health and safety that Californians sought.<sup>44</sup>

Even if the petitioner’s *Pike* assessment was correct, the Court finds that they failed to meet the threshold required to prove Proposition 12 imposed a substantial burden on interstate commerce—specifically, the Court rejects the idea that a change in market structure, namely the facility alterations required to become compliant, rises to the level of burdening interstate commerce because the dormant Commerce Clause “does not protect... particular structures or methods of operation.”<sup>45</sup> The Court thought this issue should instead be handled by elected

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<sup>43</sup> *Ross*, 598 U.S. at 379.

<sup>44</sup> *Id.* at 380-81.

<sup>45</sup> *Id.* at 384.

representatives and reminded petitioners that they could petition Congress if they so choose.<sup>46</sup>

B. *Iowa Pork Producers Association v. Bonta (IPPA)*

A similar case was decided by the Ninth Circuit Court of Appeals in 2024.<sup>47</sup>

Iowa Pork Producers Association (IPPA) challenged the constitutionality of Proposition 12 and sought to prevent its enforcement, to which their preliminary injunction was denied by the district court.<sup>48</sup>

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<sup>46</sup> *Id.* at 382.

<sup>47</sup> *See generally* Iowa Pork Producers Ass’n v. Bonta, No. 22-55336, 2024 WL 3158532 (9th Cir. June 25, 2024).

<sup>48</sup> Iowa Pork Producers Ass’n v. Bonta, No. 2:21-cv-09940-CAS (AFMx), 2022 WL 613736, at \*1, \*16 (C.D. Cal. Feb. 28, 2022).

1. *Discrimination Argument*

The first of IPPA’s two arguments is that Proposition 12 “discriminates against interstate commerce in violation of the dormant Commerce Clause. If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it ‘serves a legitimate local purpose....’”<sup>49</sup> Because the sales ban of Proposition 12 applies regardless of the location, it applies to California pork producers as well and thus does not contain facial discrimination.<sup>50</sup> The Ninth Circuit decided there was no discriminatory purpose because California enacted it to prevent animal cruelty, not to discriminate against out-of-state producers.<sup>51</sup>

As for the discriminatory effects component, the last of the three potential sources for a finding of discrimination, IPPA argued that California producers

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<sup>49</sup> *Bonta*, 2024 WL 3158532, at \*1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

benefited from Proposition 12 because Proposition 2 had been enacted in 2008, which prohibited gestation stalls for all breeding pigs in California, regardless of where they would be sold.<sup>52</sup> Additionally, Proposition 2 gave producers six years to become compliant, a luxury not afforded by Proposition 12.<sup>53</sup> Thus, the crux of the argument is that because California producers had already become compliant with the stand up-turn around requirements of Proposition 2, Proposition 12 discriminated against out-of-state producers in effect.<sup>54</sup> The court rejected this argument, noting that Proposition 12 was not merely an extension of Proposition 2, and that Proposition 2 regulated the breeding conditions of sows whereas Proposition 12 requires the *sale* of pork to meet regulations.<sup>55</sup> The court stated that although “in-state producers may have felt less impact from Proposition 12

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<sup>52</sup> *Id.* at \*2.

<sup>53</sup> *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *Id.*

because they were already subject to the turnaround provisions of Proposition 2, that does not demonstrate that Proposition 12 discriminates against out-of-state producers.”<sup>56</sup> Thus, the court decided there was no discrimination in any of its facets under the dormant Commerce Clause.<sup>57</sup>

## 2. *Excessive Burden Argument*

The second and final argument presented, that Proposition 12’s excessive burden on interstate commerce is a violation of the dormant Commerce Clause, was also rejected.<sup>58</sup> IPPA pointed to the large costs that flow directly from alterations to infrastructure and new training.<sup>59</sup> Finding *National Pork Producers Council* controlling, the Ninth Circuit agreed that the “fact that a firm engaged in interstate commerce will face increased costs as a result of complying with state

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at \*2-3.

<sup>59</sup> *Id.* at \*3.

regulations does not, on its own, suffice to establish a substantial burden on interstate commerce.”<sup>60</sup> Thus, the consensus seems to be that compliance costs alone will not suffice to show an excessive burden.<sup>61</sup>

#### IV. WHERE THE COURTS WENT WRONG

##### A. *Factors That Should’ve Been Considered Which Support the Conclusion of an Excessive Burden on Interstate Commerce*

Chief Justice Roberts provided valuable insight in the dissenting opinion of *National Pork Producers v. Ross*, in which he concluded that petitioners did indeed “plausibly allege[] a substantial burden against interstate commerce...”<sup>62</sup> Unlike the majority who seemed to shy away from weighing the costs and benefits of Proposition 12, Chief Justice Roberts thinks the Court should be up for

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 598 U.S. 356, 395 (2023) (Roberts, C.J., dissenting).

the task and recognize the “market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce.”<sup>63</sup> The compliance costs alone are significant; Professor Brian Buhr estimates a sum of over \$730,000 to convert a 2,400-head sow barn with gestation stalls to become Proposition 12-compliant.<sup>64</sup> Though the estimates vary depending on the condition of the barn, the estimates do not even take into consideration the fact that farmers will have to expand their facilities to maintain their current sow population while meeting the square footage requirements of Proposition 12.<sup>65</sup>

As Chief Justice Roberts pointed out, not only will compliance result in a 9.2% cost increase for farmers, but there are also negative health implications on

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<sup>63</sup> *Id.*

<sup>64</sup> Taylor Bushelle, *Counting the Cost of California’s Proposition 12 Post-Ross*, 69 S.D. L. Rev 96, 112 (2024).

<sup>65</sup> *Id.*

the hogs themselves with the Proposition 12 requirements; specifically, there is potential for the spread of diseases among sows, risks of sow injuries, and an increase in stress attributable to group housing meeting the square footage requirements.<sup>66</sup> The increase in aggression exhibited in group housing has been found to result in a decrease in conception rates due to the loss of embryos.<sup>67</sup> In contrast, there presents the ability to reduce all of those consequences with the use of individual sow stalls.<sup>68</sup> The gestation stalls sought to be eliminated in husbandry practices by Proposition 12 have been found to have several benefits

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<sup>66</sup> See *Ross*, 598 U.S. at 399-401 (Roberts, C.J., dissenting); *Proposition 12 and U.S. Pork: Implications for the U.S. Industry and Trade*, *supra* note 3.

<sup>67</sup> Yuzhi Li, *Research on Group Housing for Sows*, UNIV. MINN: W. CENT. RSCH. & OUTREACH CTR.,

[https://drive.google.com/file/d/1fYsQh7UHAq0PoacvFcp\\_V1ks6TkpijtH/view](https://drive.google.com/file/d/1fYsQh7UHAq0PoacvFcp_V1ks6TkpijtH/view).

<sup>68</sup> See *Ross*, 598 U.S. at 399-401 (Roberts, C.J., dissenting); *Proposition 12 and U.S. Pork: Implications for the U.S. Industry and Trade*, *supra* note 3.

such as minimizing sow aggression, reducing injuries, preventing stress and the spread of diseases, and facilitating individual care and feeding.<sup>69</sup> Sow feed intake is especially important due to its correlation with body condition and sow longevity in breeding.<sup>70</sup>

In addition, the facility inspections required to become compliant pose a devastating risk of spreading disease as inspectors travel between facility sites.<sup>71</sup>

Sherrie Webb, Director of Animal Welfare for the National Pork Board has

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<sup>69</sup> *Proposition 12 and U.S. Pork: Implications for the U.S. Industry and Trade*, *supra* note 3.

<sup>70</sup> Yuzhi Li, *Research on Group Housing for Sows*, UNIV. MINN: W. CENT. RSCH. & OUTREACH CTR.,

[https://drive.google.com/file/d/1fYsQh7UHAq0PoacvFcp\\_V1ks6TkpijtH/view](https://drive.google.com/file/d/1fYsQh7UHAq0PoacvFcp_V1ks6TkpijtH/view).

<sup>71</sup> Gary Baise, *California's new pig rule will wreak havoc with pork producers* (2022), <https://www.farmprogress.com/commentary/california-s-new-pig-rule-will-wreak-havoc-with-pork-producers#>.

expressed the concern that “[a]ny introduction of a foreign animal disease into a pig herd would be economically devastating for all of agriculture.”<sup>72</sup> Another factor that has yet to be considered by a court is that the several months constituting the renovation period of hog facilities will require the complete depopulation of the hogs.<sup>73</sup> This renovation and depopulation period will result in lost profits from the lack of production in addition to the large sums from compliance costs already discussed.<sup>74</sup>

Chief Justice Roberts found persuasive precedent that separately analyzed the economic impact on the market apart from the compliance costs.<sup>75</sup> Following such

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<sup>72</sup> *Id.*

<sup>73</sup> Taylor Bushelle, *Counting the Cost of California’s Proposition 12 Post-Ross*, 69 S.D. L. Rev 96, 113 (2024).

<sup>74</sup> *Id.*

<sup>75</sup> *National Pork Producers Council v. Ross*, 598 U.S. 356, 398-99 (2023) (Roberts, C.J., dissenting).

precedent, the consequences such the disease spread, injuries, and stress should not be overlooked simply as a byproduct of compliance costs.<sup>76</sup>

B. *Interconnected Nature of the Pork Industry Lends in Favor of the Extraterritoriality Doctrine*

Not only was the substantial burden argument supported by Chief Justice Roberts, but he also approved the petitioners' extraterritorial effects argument that was rejected by the majority.<sup>77</sup> He found weight in the fact that the pork industry is so interconnected across state lines that Proposition 12 "carr[ies] implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California," and may undercut established animal husbandry practices.<sup>78</sup> Though still rejecting the *per se* extraterritoriality rule with mere cross-border effects, as did the majority, Chief Justice Roberts supports a finding of interstate

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<sup>76</sup> *Id.* at 399-401.

<sup>77</sup> *Id.* at 399-400.

<sup>78</sup> *Id.*

burden where there is a broad impact requiring “compliance even by producers who do not wish to sell in the regulated market.”<sup>79</sup> Thus, the sweeping extraterritorial effects that Chief Justice Roberts recognizes are sufficient to find a substantial burden on commerce.<sup>80</sup>

The 7<sup>th</sup> Circuit recognized a similar case regarding a state law burden on out-of-state commerce when Indiana passed a statute in 2015 regarding the production and sale of e-liquid solutions used for e-vapor devices and accepted the so-called extraterritorial doctrine presented by petitioners in *Ross* and *IPPA*.<sup>81</sup> Though passed for public health purposes, the act examined in *Legato Vapors, LLC v. Cook* required production methods far beyond the first-glance child-proof packaging and labeling requirements; it also required manufacturers to contract with independent security firms and engage in specific cleaning operations for

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<sup>79</sup> *Id.* at 402.

<sup>80</sup> *Id.*

<sup>81</sup> 847 F.3d 825, 827 (2017).

mixing and bottling.<sup>82</sup> Out-of-state manufacturers filed suit, claiming that the statute violated the dormant Commerce Clause by regulating out-of-state commercial activity.<sup>83</sup> Like in *Ross*, plaintiffs did not claim that the e-liquid act discriminated against out-of-state commerce, but instead that the practical effect of the law supported the extraterritorial doctrine.<sup>84</sup> The court found that the act violated the dormant Commerce Clause because it regulated extraterritorially, with the requirements effectively telling out-of-state manufacturers how to run their business and production processes.<sup>85</sup> Like Indiana was “impermissibl[y]

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<sup>82</sup> *Id.* at 828.

<sup>83</sup> *Id.* at 830.

<sup>84</sup> *Id.*; *Ross*, 598 U.S. at 371.

<sup>85</sup> *Legato Vapors*, 847 F.3d at 833-34.

‘attempt[ing] to regulate activities in other states,’” so too is California attempting to regulate the animal husbandry practices of out-of-state pork producers.<sup>86</sup>

C. *Proposition 12 Should’ve Been Analyzed Under the Pike Standard*

Because Proposition 12 is facially neutral, as the majority agrees, it should be analyzed under the *Pike* standard: “Where the statute 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.”<sup>87</sup> Statutes with few to no benefits and the availability of a nondiscriminatory alternative to

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<sup>86</sup> *Legato Vapors*, 847 F.3d at 836; *See Ross*, 598 U.S. at 402 (Roberts, C.J., dissenting).

<sup>87</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

achieve its purpose, to be discussed later, may result in the statute being overturned.<sup>88</sup>

Like the Arizona legislation in *Pike* did not necessarily further the state interest of preventing deceptive packaging but instead aimed to promote the state's own goodwill, there is also a lack of justification for the 24-square-foot group housing requirement of Proposition 12.<sup>89</sup> Though courts and Californians boast that the legislation helps eliminate unethical animal husbandry practices, research performed by the University of Minnesota has shown “no differences in production or animal welfare for sows provided sixteen square feet per sow and twenty-two square feet per sow.”<sup>90</sup> Researchers tested the relationship between floor space and sow productivity and welfare, measuring factors such as the sows’

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<sup>88</sup> Taylor Bushelle, *Counting the Cost of California’s Proposition 12 Post-Ross*, 69

S.D. L. Rev 96, 114 (2024).

<sup>89</sup>*See id.* at 110-11.

<sup>90</sup> *Id.*

weight, feed intake, litter size, mortality, skin lesions, lameness, etc.<sup>91</sup> The research showed that increasing pen space from 16 to 22 square feet (note: 22 square feet is even less than the 24 square feet required by Proposition 12) did not impact the sows' welfare.<sup>92</sup>

Thus, under the *Pike* standard, it is reasonable to conclude that Proposition 12's burden "is clearly excessive in relation to the putative local benefits" due to the combination of high compliance costs and the compilation of other consequences the majority did not weigh, the interconnected nature of the U.S. pork industry which Chief Justice Roberts recognized, and the few found benefits

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<sup>91</sup> *How Much Floor Space do Group Housed Sows Need?*, NATIONAL HOG FARMER (December 27, 2017), <https://www.nationalhogfarmer.com/livestock-management/how-much-floor-space-do-group-housed-sows-need->.

<sup>92</sup> *Id.*

of group housing.<sup>93</sup> Had the Court undertaken the *Pike* balancing analysis as Chief Justice Roberts suggested, the outcome of the Proposition 12 litigation could've instead invalidated the legislation.<sup>94</sup>

V. IMPLICATIONS ON THE PORK INDUSTRY, SPECIFICALLY OUT-OF-STATE PORK PRODUCERS

A. *California's Pork Market Versus the Remainder of the Nation*

As previously stated, Proposition 12 has massive implications for out-of-state pork producers because California imports 99.8% of its pork, nearly the entirety of the pork it consumes.<sup>95</sup> The impact will be experienced heavily in Iowa;

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<sup>93</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *See National Pork*

*Producers Council v. Ross*, 598 U.S. 356, 397 (2023) (Roberts, C.J., dissenting).

<sup>94</sup> *See Pike*, 397 U.S. at 137; *Ross*, 598 U.S. at 397 (Roberts, C.J., dissenting).

<sup>95</sup> *Proposition 12 and U.S. Pork: Implications for the U.S. Industry and Trade*, *supra* note 3.

specifically, in 2018—the year of the Proposition 12 initiative—Iowa was the top pork producing state with 33% of the national inventory and was the top pork exporting state.<sup>96</sup>

In addition to the hog production itself, Proposition 12’s requirements for labeling and distribution fall on out-of-state entities.<sup>97</sup> For example, nearly 60% of the nation’s hogs are slaughtered in only 15 slaughter plants, and none of those plants are located in California.<sup>98</sup> These plants will bear the burden of having to

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<sup>96</sup> *2020 Iowa Pork Industry Facts*, IOWA PORK PRODUCERS ASSOCIATION,

<https://www.iowapork.org/newsroom/facts-about-iowa-pork-production>; *2020*

*Iowa Pork Industry Report* 52-53 (May 2020),

[https://www.iowapork.org/filesimages/Documents/Full\\_Iowa-Pork-Industry-](https://www.iowapork.org/filesimages/Documents/Full_Iowa-Pork-Industry-Report.pdf)

[Report.pdf](https://www.iowapork.org/filesimages/Documents/Full_Iowa-Pork-Industry-Report.pdf).

<sup>97</sup> Taylor Bushelle, *Counting the Cost of California’s Proposition 12 Post-Ross*, 69

S.D. L. Rev 96, 109 (2024).

<sup>98</sup> *Id.*

pack, track, document, and label pork that is sold in California according to Proposition 12 standards.<sup>99</sup>

B. *Varying Responses in the Pork Industry*

Pork producers across the nation are divided on their responses to Proposition 12. Many share the opinion of AV Roth, a Wisconsin hog farmer and Vice President of the Wisconsin Pork Association, who now refuses to sell his hogs into California and expressed frustration by stating, “I don’t like California telling me (that) to be able to sell in this state, I have to raise these pigs this way.”<sup>100</sup>

Other farmers with shared resistance to Proposition 12 are especially opposed to

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<sup>99</sup> *Id.* at 113.

<sup>100</sup> John McCracken & Ben Felder, *With California’s Prop 12 now law, pork producers adapt while lobbying groups continue to fight* (2024),

<https://investigatamidwest.org/2024/03/06/with-californias-prop-12-now-law-pork-producers-adapt-while-lobbying-groups-continue-to-fight/>.

having the practices that shape their livelihood be dictated by Californians who may have never been on a hog farm.<sup>101</sup>

On the other hand, many large pork producers have decided to adapt to Proposition 12 requirements so they can continue to sell into California.<sup>102</sup>

Smithfield Foods, the largest pork producer in the nation, has been converting by transitioning away from gestational stalls for several years.<sup>103</sup>

With the nation's largest pork-consuming state adopting a sales ban regarding livestock husbandry practices, the agriculture industry anticipates other states implementing similar legislation to eliminate gestational stalls in the future.<sup>104</sup>

Former U.S. Department of Agriculture Secretary Tom Vilsack is concerned about

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<sup>101</sup> *See id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *See Proposition 12 and U.S. Pork: Implications for the U.S. Industry and*

*Trade, supra* note 3.

a patchwork of legislation if other states adopt legislation with animal husbandry requirements.<sup>105</sup> Specifically, Vilsack says “Farmers don’t need the chaos[.] They need clarity and certainty.”<sup>106</sup> Pork industry members fear a patchwork of state sales bans will make it difficult to efficiently produce livestock.<sup>107</sup> The 7<sup>th</sup> Circuit in *Legato Vapor* shared a similar concern regarding e-vapor local and state laws in the absence of federal laws.<sup>108</sup> They expected more state laws to be enacted in the e-vapor sphere, expressing their concern of “the obvious risk of inconsistent regulation....”<sup>109</sup> Members of respective state farm bureaus who oppose Proposition 12 are pushing for their farm bureaus to do the same, and have even participated in lobbying efforts for a federal law to prohibit confinement

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<sup>105</sup> McCracken & Felder, *supra* note 99.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See Legato Vapors, LLC v. Cook*, 847 F.3d 825, 834 (2017).

<sup>109</sup> *Id.*

requirements at the state level.<sup>110</sup> There are similar concerns that Proposition 12 may become a “template” for other agriculture areas, such as standards for labor rates, crop inputs, or production methods.<sup>111</sup>

On the other side of this issue, Proposition 12 supporters instead believe lawmakers should find ways to help farmers become compliant in their facilities, such as Minnesota’s representative Angie Craig who began an agenda to find federal grants to help farmers retrofit their facilities.<sup>112</sup> Oklahoma has a similar

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<sup>110</sup> McCracken & Felder, *supra* note 99.

<sup>111</sup> Brian Duncan, *Full Repeal of Prop 12 ‘Urgently Needed’*, FARMWEEK NOW (Feb. 24, 2024), [https://www.farmweeknow.com/opinion/perspectives/full-repeal-of-prop-12-urgently-needed/article\\_09b67288-d1b5-11ee-bb27-97e2f8616c1a.html](https://www.farmweeknow.com/opinion/perspectives/full-repeal-of-prop-12-urgently-needed/article_09b67288-d1b5-11ee-bb27-97e2f8616c1a.html).

<sup>112</sup> McCracken & Felder, *supra* note 99.

bill to create a fund with the purpose of removing gestational crates and building Proposition 12-compliant facilities.<sup>113</sup>

As many expected, California consumers are bearing the brunt of increased pork costs.<sup>114</sup> Specifically, Latino businesses and families, 33% of which are already food insecure, are seeing the consequences firsthand of pork prices that are 20-41% higher than the rest of the United States.<sup>115</sup> In addition to the price hike, studies by the USDA are showing that California's pork consumption has

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<sup>113</sup> *Id.*

<sup>114</sup> Jennifer Shike, *Has Prop 12 Created a Crisis in California?*, PORK BUSINESS (Jan. 9, 2025), <https://www.porkbusiness.com/ag-policy/has-prop-12-created-crisis-california>.

<sup>115</sup> *Id.*; Jennifer Shrike, *No Surprise: Prop 12 Raises Prices for Pork in California*, PORK BUSINESS (March 25, 2024), <https://www.porkbusiness.com/news/ag-policy/no-surprise-prop-12-raises-prices-pork-california>.

dropped since the implementation of Proposition 12, a likely result of increased pork costs.<sup>116</sup> The decreased pork consumption that has been and may continue to be seen in California only damages the pork industry further.<sup>117</sup>

C. *Foreign Source of Pork May Be a Likely Result*

With many pork producers like AV Roth refusing to sell pork into California and other potential states implementing similar pork sales bans, the United States may have to turn to other countries to supply its legislation-compliant pork demands if the domestic pork market cannot adequately supply the demand of

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<sup>116</sup> *See Pork Prices Spike 20% in California After Prop 12 Implementation*, NORTHERN AG NETWORK (March 30, 2024), <https://www.northernag.net/pork-prices-spike-20-in-california-after-prop-12-implementation/#:~:text=Pork%20Prices%20Spike%2020%25%20in%20California%20After%20Prop%2012%20Implementation,-by%20Colter%20Brown&text=LINCOLN%2C%20Neb.,1%2C%202024.>

<sup>117</sup> *See id.*

compliant pork.<sup>118</sup> A likely option is Canada, which decided in 2014 to phase out gestation stalls like California by 2029.<sup>119</sup> Although only 30% of Canadian hogs were compliant as of 2023, a high percentage of current U.S. pork imports are already sourced from Canada, making it a likely choice for the United States to turn to in the future.<sup>120</sup>

## VI. ALTERNATIVE SOLUTION—LABELING

The most likely alternative solution that will still accomplish California’s aim of phasing out animal cruelty, but in a less burdensome manner, is through

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<sup>118</sup> *Proposition 12 and U.S. Pork: Implications for the U.S. Industry and Trade*, *supra* note 3.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

labeling requirements that would display the treatment of the breeding sows.<sup>121</sup>

There are several advantages, the main one being that it is less expensive for pork producers than Proposition 12 is for those who do not wish to comply.<sup>122</sup> Another advantage is that it will allow Proposition 12 advocates to pay for the pork that was raised in a way that they consider non-cruel without having the compliance costs and other impacts on out-of-state producers who do not wish to comply with Proposition 12.<sup>123</sup> Those who propose this labeling alternative have described how Proposition 12 advocates can “put their money where their mouth is” by purchasing premium-priced pork which is labeled as humanely bred.<sup>124</sup>

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<sup>121</sup> Jack Goldsmith and Alan Sykes, *The California Effect, Process-Based*

*Regulation, and the Future of Pike Balancing*, 2023 Sup. Ct. Rev. 125, 171-72

(2023).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

Iowa has chosen to adopt a similar labeling requirement for cell-cultured meat, meaning lab-grown or plant-based meats.<sup>125</sup> Unlike Florida and Alabama which completely banned the sale and distribution of cell-cultured meat, Iowa prohibits producers of lab-grown meat from mislabeling the product for sale with an “identifying meat term” (for example, “hamburger”) unless a qualifying term such as cell-cultured, lab-grown, plant-based, or vegan accompanies the meat term.<sup>126</sup> Governor Kim Reynolds says that the act is about transparency and the prevention of consumers being misled about the origin of products they buy.<sup>127</sup> A

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<sup>125</sup> S. File 2391, 90th Gen. Assemb. (Ia. 2024).

<sup>126</sup> *Id.*; Emily Stone, *Cell-Cultured Meat Updates: State Bans, Labeling Requirements, and Regulatory Clarifications*, THE NATIONAL AGRICULTURAL LAW CENTER (June 6, 2024), <https://nationalaglawcenter.org/cell-cultured-meat-updates-state-bans-labeling-requirements-and-regulatory-clarifications/>.

<sup>127</sup> Maggie Malson, *Iowa Third State to Create Legislation Regarding Lab-Grown Meat*, FARM JOURNAL’S PORK (May 21, 2024), <https://www.porkbusiness.com/ag->



such as the high compliance costs and significant consequences on out-of-state pork producers, entities in the pork industry, and the hogs themselves.<sup>130</sup> Until *Ross* is overturned or Proposition 12 is repealed, those who become compliant with Proposition 12 will have a competitive advantage over those who refuse to comply because they will be able to sell into the nation's highest pork-consuming state.<sup>131</sup> The decision to become or refrain from becoming compliant will be even more difficult if other states begin to implement similar legislation, such as Massachusetts.<sup>132</sup> Massachusetts' ballot measure, Question 3, went into effect after

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<sup>130</sup> *Id.*

<sup>131</sup> McCracken & Felder, *supra* note 99.

<sup>132</sup> *See Court Upholds Massachusetts Farm Animal Protection Law*, THE HUMANE

SOCIETY OF THE UNITED STATES (July 22, 2024),

<https://www.humanesociety.org/news/court-upholds-massachusetts-farm-animal-protection->



There is a high chance that the fate of Proposition 12 will be decided in 2025 in Congress.<sup>135</sup> Republicans attempted to have Proposition 12 repealed through the EATS Act, which would've prohibited states from “imposing regulations on the sale of agricultural products produced in other states,” thus invalidating Proposition 12 and preventing any similar future legislation.<sup>136</sup>

Though the EATS Act died in Congress, Republicans' draft of the Farm Bill, which governs a variety of agricultural programs and is renewed every five years, included language that would have the same effect as the EATS Act—it would

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<sup>135</sup> Seth Millstein, *Is Prop 12 Under Threat With Republicans in Control?*,

SENTIENT MEDIA (January 2, 2025), <https://sentientmedia.org/prop-12-under-threat-republicans/>.

<sup>136</sup> *Id.*; Brittany Michelson, *Victory! Dangerous EATS Act, Farm Bill, and Nonprofit Killer Bill Fail in Congress*, IN DEFENSE OF ANIMALS (January 3, 2025), <https://www.idausa.org/campaign/farmed-animal/latest-news/victory-dangerous-eats-act-farm-bill-and-nonprofit-killer-bill-fail-in-congress/>.

prohibit states from restricting the sale of livestock products produced out of state “based on the conditions in which the animals were raised”, which is exactly what Proposition 12 does.<sup>137</sup> Congress was unable to agree on the Farm Bill and instead voted to extend the Farm Bill for one year for deliberation in 2025.<sup>138</sup>

With Republicans controlling Congress, there is potential for Proposition 12 to be repealed through a policy like the EATS Act or the inclusion of similar language in the Farm Bill extension.<sup>139</sup> However, many conservatives in Congress actually do not support repealing the legislation.<sup>140</sup> Though conservatives say that they don’t

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<sup>137</sup> Millstein, *supra* note 134.

<sup>138</sup> Rachel Cramer, *Congress Passes a Year-Long Farm Bill Extension, Reactions are Mixed*, IOWA PUBLIC RADIO (December 23, 2024),

<https://www.iowapublicradio.org/ipr-news/2024-12-23/congress-passes-farm-bill-extension-iowa>; Millstein, *supra* note 134.

<sup>139</sup> Millstein, *supra* note 134.

<sup>140</sup> *Id.*

agree with Proposition 12 itself, they oppose repealing it to preserve states' rights, viewing the EATS Act as "a massive overreach of federal power."<sup>141</sup> There are fears that the EATS Act or similar policy "would have really damaging implications on states' rights, the regulation of animal products, pesticides, and so forth."<sup>142</sup>

Pork producers, legislators, lobbyists, and consumers are all stakeholders with important interests to consider. The outcome of Proposition 12 and other legislation dictating confinement spaces and pork sales will prove to be very influential in this uncertain area of the pork industry, and likely in other areas of our Nation with regard to the dormant Commerce Clause and states' rights.

*Brooke De Noble\**

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*