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COUNTING THE COST OF CALIFORNIA'S PROPOSITION 12 POST-ROSS

TAYLOR BUSHELLE†

*Animal activists have continually criticized animal confinement throughout the United States. These criticisms have led to States implementing regulations relating to animal care, handling, research, and slaughter. State regulations were limited in scope and only affected in-state producers. This all changed, however, when California voters passed Proposition 12, which regulates animal confinement for any piece of pork sold within California's borders. Furthermore, Proposition 12 requires any piece of pork traveling through California to be labeled indicating whether the pork is compliant or not. By requiring out-of-state producers to comply with the California production requirements, Proposition 12 regulates beyond the state's borders. The Supreme Court in *National Pork Producers Council v. Ross* upheld the constitutionality of Proposition 12, allowing its regulations to take effect. This paper analyzes the Supreme Court's decision and discusses the effects Proposition 12 will have on the United States pork industry.*

I. INTRODUCTION

The Constitution limits states from regulating outside their borders by long-established precedent in the United States.¹ Furthermore, the Constitution gives Congress the power to regulate interstate commerce.² California's recently issued regulations have tested these limits and the Supreme Court has signaled its willingness to look the other way.³ In *National Pork Producers Council v. Ross*,⁴

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1. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (holding state law that requires rear fender mudguards on trucks and trailers unconstitutionally burdens interstate commerce); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (holding Arizona enforcement of a state statute prohibiting transportation of uncrated cantaloupes across state lines to a California packing facility as an unconstitutional burden upon interstate commerce); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding New Jersey statute prohibiting importation of out-of-state waste as an unconstitutional violation of the Commerce Clause).

2. U.S. CONST. art. I, § 8, cl. 3.

3. See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (upholding California's animal confinement regulations); see generally CAL. CODE REGS. tit. 3, § 1322.1 (2022) (regulating in- and out-of-state pork producers that sell pork products within the state of California).

4. 598 U.S. 356 (2023).

the Court held that California can essentially regulate animal confinement beyond its borders, costing pork producers hundreds of millions of dollars.⁵

Congress has yet to act in the field of production animal confinement and welfare.⁶ Due to the absence of federal regulations, several states have implemented their own laws regarding animal production and welfare.⁷ Yet California's actions are different; even prior to Proposition 12's passage, California has been known for implementing a variety of regulations.⁸ Many of California's regulations affect California-based companies and constituents, having little impact on out-of-state production.⁹ Out-of-state companies have seen some regulatory effects, such as label requirements, but nothing substantially affecting the production of products.¹⁰ California's recent implementation of Proposition 12 goes even further—it aims to regulate animal confinement standards for meat sold within California's borders.¹¹ However, in practice, Proposition 12 regulates beyond California's borders by requiring in- and out-of-state pork producers to comply.¹² Not only does Proposition 12 have national and global effects, but it constrains out-of-state production by regulating animal confinement in all states.¹³ The Supreme Court's decision upholding Proposition 12 allows California to regulate out-of-state producers by requiring them to follow California's confinement regulations.¹⁴

5. See generally *Nat'l Pork Producers Council*, 598 U.S. 356 (2023) (holding the dormant Commerce Clause does not have a per se rule against enforcement of state laws that inadvertently discriminate against out-of-state economic interests).

6. Craig Herbst, *Reform the Animal Welfare Act: Recognize Animal Sentience and Protect All Animals Who Think, Feel, and Suffer*, 62 WASHBURN L.J. 61, 94-95 (2022).

7. See generally *States' Animal Cruelty Statutes*, THE NATIONAL AGRICULTURAL LAW CENTER, <https://perma.cc/8C6J-S2HL> (last visited Dec. 10, 2022) (providing each states' respective animal welfare laws).

8. See Jonathan K. London et al., *Problems, Promise, Progress, and Perils: Critical Reflections on Environmental Justice Policy Implementation in California*, 26 UCLA J. ENVT. 255, 260 (2008) ("California has been a major leader in the national environmental justice movement through its potent environmental justice activism, its far-reaching environmental justice legislation, and its early implementation of environmental justice policies throughout its state agencies."); Dyann Heward-Mills & Helga Turku, *California and the European Union Take the Lead in Data Protection*, 43 HASTINGS INT'L & COMP. L. REV. 319, 322 (2020) ("Just as California often leads the way in legislative matters, its CCPA, which came into effect in January 2020, may well set the standard for data protection in the country.").

9. *Id.*; see, e.g., CAL. CODE REGS. tit. 13, § 290.00 (requiring in-state vehicle manufacturers to maintain a suitable sized site for "manufacture, assembly, reconstruction, or reconfiguration"). "It is not necessary for a vehicle manufacturer to obtain licenses for branch manufacturing sites located outside of this state, provided the principal site is licensed with the department." *Id.*

10. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (requiring businesses to label hazardous chemicals through the enactment of California's Proposition 65 ballot initiative).

11. See generally CAL. CODE REGS. tit. 3, § 1322.1 (2022) (requiring all pork being sold in California to comply with Proposition 12, which essentially requires all pork producers to comply with the confinement regulations).

12. See *id.*

13. See *infra* Part V (explaining that Proposition 12 will affect producers in all states); Brief of the Canadian Pork Council, Opormex, and the Illinois Pork Producers Association as Amici Curiae in Support of Petitioners at 3, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468) ("First, Proposition 12 regulates commerce occurring wholly in Canada and Mexico.").

14. *Nat'l Pork Producers Council*, 598 U.S. 356 (2023).

This article analyzes California's Proposition 12 as it regulates pork production and the effects of these regulations.¹⁵ Part II lays out the history of animal confinement regulations and provides background information about the implementation of Proposition 12.¹⁶ Part III provides constitutional background on the dormant Commerce Clause and the extraterritoriality doctrine.¹⁷ Part IV outlines the factual and procedural history of Proposition 12 in relation to the dormant Commerce Clause and highlights the recent Supreme Court decision in *National Pork Producers*.¹⁸ Part V articulates the consequences of Proposition 12 on the pork industry in both California and other states.¹⁹ Finally, Part VI proposes alternative solutions that may help achieve the overall goal of Proposition 12.²⁰ This article ultimately concludes that Proposition 12 violates the dormant Commerce Clause by regulating beyond state borders and substantially burdening interstate commerce.²¹

II. BACKGROUND

Due to the complexity of the California regulations and their interaction with federal law, Section II.A addresses federal animal confinement regulations along with the evolution and implementation of Proposition 12.²² To better understand the controversy surrounding Proposition 12, Section II.B discusses the history and implementation of Proposition 12.²³

A. HISTORY OF LAWS REGULATING ANIMALS

Few federal regulations pertaining to farm animal welfare exist in the United States.²⁴ In 1873, Congress passed the Twenty-Eight Hour Law, prohibiting animal confinement for more than twenty-eight hours during transportation without unloading, feeding, watering, and rest.²⁵ In 1958, Congress passed the Humane Slaughter Act, regulating the treatment of animals in slaughter plants and mandating that animals generally be slaughtered in United States Department of Agriculture ("USDA") inspected plants.²⁶ Congress enacted the Animal Welfare

15. See *infra* Parts III-VIII

16. See *infra* Part III (providing background information as to the implementation of Proposition 12 and the history of animal welfare laws in the United States).

17. See *infra* Part III (providing constitutional background on the dormant Commerce Clause and the extraterritoriality doctrine).

18. See *infra* Part IV (providing background information about Proposition 12).

19. See *infra* Part V (discussing the effects of Proposition 12 and whether it violates the dormant Commerce Clause).

20. See *infra* Part VI (proposing alternative solutions that can be implemented rather than Proposition 12).

21. See *infra* Part VII (concluding that Proposition 12 should not have been upheld by the Court).

22. See *infra* Section A (providing the history of animal confinement regulations and how the lack of regulations lead to the implementation of Proposition 12).

23. See *infra* Section B (providing the history and evolution of Proposition 12).

24. *Laws That Protect Animals*, ANIMAL LEGAL DEFENSE FUND, <https://perma.cc/X9DL-ATR3> (last visited Dec. 20, 2023) [hereinafter ANIMAL LEGAL DEFENSE FUND].

25. 49 U.S.C. § 80502.

26. 7 U.S.C. Ch. 48; 9 C.F.R. § 302.1 (2023).

Act (AWA) in 1966.²⁷ The AWA takes some steps to regulate animal treatment on a nationwide basis, including research, testing, and transportation.²⁸ But critics of the AWA have taken issue with the lack of AWA enforcement on the federal level.²⁹ Lack of enforcement has led many states to adopt their own animal welfare regulations.³⁰ Another major criticism of the AWA is that it fails to regulate the confinement of livestock—specifically pigs.³¹ In response, multiple states have adopted specific pork production requirements.³² Most often these regulations set pig welfare requirements focusing on breeding and farrowing confinement.³³ Typically, these regulations only pertain to the state's pork farmers, not out-of-state pork farmers.³⁴ Prior to Proposition 12, California implemented multiple animal welfare regulations, and in the years leading up to Proposition 12, the state became more interested in regulating animal welfare in pork production.³⁵

B. CALIFORNIA'S PROPOSITION 12

In 2008, California enacted Proposition 2, the Farm Animal Cruelty Act, which implemented confinement regulations for pigs, poultry, and veal raised within the State of California.³⁶ Proposition 2 was passed by voters in 2008, leaving California businesses until 2015 to conform with the regulations.³⁷ Then in 2018, California voters passed Proposition 12, also known as the Farm Animal Confinement Initiative.³⁸ Proposition 12 expanded animal confinement laws, requiring both in- and out-of-state businesses to comply with the animal cruelty regulations.³⁹ Specifically, Proposition 12 requires “a minimum of 24 square feet

27. Animal Welfare Act of 1966, H.R. 13881, 89th Cong. (1966).

28. *Id.*

29. See Joyce Tischler et al., *Animal Welfare Act: Related Litigation and Other Efforts*, 25 ANIMAL L. REV. 225, 242-43 (2019) (criticizing the AWA and the lack of enforcement by regulators).

Despite that laudable goal, as you've heard over the last couple of days, the Act has fallen very short of accomplishing that very important goal. One glaring reason for that is that unlike most of the environmental laws and other laws, there is no citizen suit provision in the AWA. What that means is the only entity that can enforce the AWA is the U.S. Department of Agriculture (USDA).

Id. at 242.

30. THE NATIONAL AGRICULTURAL LAW CENTER, *supra* note 7.

31. *Id.*

32. *Id.*

33. *Id.*

34. See, e.g., FLA. CONST. art. X, § 21 (describing Florida's constitutional amendment banning the use of gestation crates on farms within the state); 302 KY. ADMIN. REGS. 21:030 (2021) (applying the animal welfare regulations to on-farm livestock and poultry in Kentucky).

35. See generally *California Statutes*, ANIMAL LEGAL & HISTORICAL CENTER, <https://perma.cc/3L35-WDPB> (last visited Dec. 20, 2023) (listing California's animal welfare regulations over time).

36. Melia Wong, *Proposition 12: Farm Animal Confinement*, ROSE INST. OF STATE AND LOC. GOV'T, <https://perma.cc/N9NJ-7ZLA> (last visited Dec. 20, 2023).

37. *Id.*

38. *Animal Care Program*, CAL. DEP'T OF FOOD & AGRIC., <https://perma.cc/4SCZ-ZHEF> (last visited Dec. 20, 2023) [hereinafter *Animal Care Program*].

39. *Id.*

of usable floor space per breeding pig.”⁴⁰ Starting December 31, 2021, any cut of pork sold within California must have been raised in compliance with these confinement regulations.⁴¹ The statute provides an exception for pork transported through California for export, along with the sale of pork to federal agencies and on tribal lands.⁴² Even with these exceptions, all pork is still regulated to some extent.⁴³ Upon entering California, all pork must be labeled indicating compliance or noncompliance with Proposition 12; distributors must be correctly certified; and proper documentation must be provided.⁴⁴

To understand the impact of Proposition 12, it is critical to know how the pork industry works.⁴⁵ The pork industry refers to the different stages of a pig’s life cycle using the following terms: gestation,⁴⁶ farrowing,⁴⁷ nursery,⁴⁸ growing, and finishing.⁴⁹ Proposition 12 directly regulates gestation and the methods of housing a sow during the gestation period.⁵⁰ Sows are adult female pigs that have farrowed at least one litter of piglets.⁵¹ Pig farmers utilize a variety of production systems.⁵² The most common systems include (1) farrow to finish, (2) farrow to nursery, (3) farrow to wean, (4) wean to finish, and (5) finishing.⁵³ Proposition 12 regulates the housing methods used during the gestation cycles, which in turn, affects any barn that participates in farrowing.⁵⁴ Common methods used for housing sows include the use of gestation stalls or group housing.⁵⁵ Gestation stalls are individual stalls that provide enough room for the sow to stand up and lie down.⁵⁶ A group housing system uses group pens providing each sow a

40. *Id.*; CAL. CODE REGS. tit. 3, § 1322.1 (2022) (Breeding Pig Confinement).

41. *Animal Care Program*, *supra* note 38; CAL. CODE REGS. tit. 3, § 1322.1 (2022) (the date has been updated to implement regulations on out-of-state producers starting January 1, 2024).

42. CAL. CODE REGS. tit. 3, § 1322.4 (2022).

43. *Id.*

44. *Id.*

45. *See generally infra* Part V (explaining how the effects of Proposition 12 are unavoidable due to the industry’s structure and practices).

46. The pregnancy stage consists of about 114 days. *Life Cycle of a Market Pig*, PORK CHECKOFF, <https://perma.cc/9P53-UKGM> (last visited Dec. 20, 2023).

47. Birth of piglets to weaning of piglets from their mothers consists of about twenty-one days. *Id.*

48. After weaning, piglets are moved to another barn where they are housed. *Id.* The nursery stage lasts between forty-two and fifty-six days where the piglets typically reach fifty to sixty pounds. *Id.*

49. Growing and finishing is the final stage of a production pig’s life lasting about 115-120 days or until the pig reaches a weight of about 280 pounds. *Id.*

50. CAL. CODE REGS. tit. 3, § 1322.1 (2022) (law regulating confinement of breeding sows during gestation and their lifetime requiring twenty-four square feet per sow).

51. PORK CHECKOFF, *supra* note 46.

52. *Our Farms*, WE CARE, <https://perma.cc/42NF-YTLY> (last visited Dec. 20, 2023) [hereinafter *We Care*]; *Sector at a Glance*, USDA ECON. RSCH. SERV., <https://perma.cc/LEJ8-TJ7P> (last visited Dec. 20, 2023) [hereinafter *Sector at a Glance*].

53. WE CARE, *supra* note 52

54. CAL. CODE REGS. tit. 3, § 1322.1 (2022) Proposition 12 requires twenty-four square feet per sow with no carve outs for any period during the sow’s life, ultimately eliminating farrowing and gestation crates. *Id.*

55. Jay D. Harmon & Donald G. Levis, *Sow Housing Options for Gestation*, PORK INFORMATION GATEWAY (June 3, 2006), <https://perma.cc/8AHV-HWV9>.

56. *Id.*

specific number of square feet.⁵⁷ Unlike gestation stalls, which keep the sows separate from one another, group housing allows for the sows to be housed together in small groups.⁵⁸ Sows in the United States today are primarily housed in gestation stalls.⁵⁹ Proposition 12 now requires farmers to house their sows in group housing systems that provide a minimum of twenty-four square feet per sow.⁶⁰

Following Proposition 12's passing, several states and organizations brought legal action against the State of California, questioning the constitutionality of Proposition 12.⁶¹ The most important case was *National Pork Producers Council v. Ross*.⁶² To better understand *Ross*, it is necessary to understand the dormant Commerce Clause and its history.⁶³

III. CONSTITUTIONAL BACKGROUND

A. THE DORMANT COMMERCE CLAUSE

Article 1, Section 8 of the United States Constitution, known as the Commerce Clause, gives Congress the power to regulate commerce among the states.⁶⁴ The Commerce Clause allows Congress to regulate both interstate and intrastate commerce to promote the flow of trade.⁶⁵ However, the Commerce Clause also implies a restriction on the states from discriminating against or interfering with interstate commerce.⁶⁶ This restrictive aspect of the Commerce Clause is known as the dormant Commerce Clause doctrine.⁶⁷ Case law has shaped criteria for determining when state regulations violate the dormant Commerce Clause.⁶⁸ States generally have the power to regulate commerce

57. *Id.*

58. *Id.*

59. Geoffrey C. Evans, *To What Extent Does Wealth Maximization Benefit Farmed Animals? A Law and Economics Approach to A Ban on Gestation Crates in Pig Production*, 13 ANIMAL L. 167, 188 (2006) (estimating between 60-70% of sows in the U.S. are housed in gestation stalls).

60. CAL. CODE REGS. tit. 3, § 1322.1 (2022).

61. *See, e.g., Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020); *Iowa Pork Producers Ass'n v. Bonta*, No. 2:21-cv-09940-CAS (AFMx), 2022 WL 613736 (C.D. Cal. Feb. 28, 2022).

62. *See generally infra* Part V (explaining the history and the Supreme Court's decision in *National Pork Producers*).

63. *See discussion infra* Parts III-IV (discussing the constitutional limits on State laws affecting interstate commerce).

64. U.S. CONST. art. I, § 8, cl. 3.

65. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 860-61 (2002) (explaining that Congress has the power to regulate all interstate commerce and may regulate intrastate commerce when it interferes with interstate and foreign commerce).

66. *See Or. Waste Sys., Inc. v. Or. Dep't of Env't. Quality*, 511 U.S. 93, 98 (1994) ("the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce").

67. *Id.*

68. *Id.*; *see also* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 499 (2016) (discussing the relevance and history of the Commerce Clause, extraterritoriality doctrine, and the dormant Commerce Clause).

within their own borders, but the dormant Commerce Clause limits the states' ability to regulate interstate commerce, regardless of whether Congress has exercised its power to regulate the area.⁶⁹

Early on, the Supreme Court presumed that federal and state powers were separate spheres that did not overlap.⁷⁰ Later in 1933, the New Deal Court began to expand the authority of both the federal and state governments, creating concurrent powers.⁷¹ With these concurrent powers, the dormant Commerce Clause doctrine began to modernize, establishing two tracks in determining the validity of state regulations.⁷² One track is laid out by the Court in *Pike v. Bruce Church, Inc.*,⁷³ which found that:

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.⁷⁴

Therefore, laws that are neutral in nature, applying to both in- and out-of-state actors, will be analyzed through a balancing test.⁷⁵ This balancing test examines the burden imposed on interstate commerce and the statute's relation to state interests.⁷⁶ Later, in *Philadelphia v. New Jersey*,⁷⁷ the Court determined that when a state law is discriminatory on its face it will be analyzed under strict scrutiny.⁷⁸ State laws that are facially discriminatory regulate in- and out-of-state actors differently, discriminating against out-of-state actors.⁷⁹ Typically, facially

69. Martin, *supra* note 68, at 525-26.

70. See Eugene Boyd, *American Federalism, 1776 to 1997: Significant Events*, <https://perma.cc/Q62P-TY7Z> (last visited Dec. 20, 2023) (explaining the evolution of federalism over time and describing dual federalism, which treated state and federal governments as separate spheres).

71. *Id.*

72. "Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *South Dakota v. Wayfair, Inc.*, 585 U.S. 2080, 2090-91 (2018).

73. The Court determined the constitutionality of the Arizona Fruit and Vegetable Standardization Act which prohibited cantaloupes from being shipped interstate without proper packaging. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138 (1970). The Court found that the Arizona act was unconstitutional because, although it was nondiscriminatory, its burden on commerce was substantial compared to the state interest it achieved. *Id.* at 146.

74. *Id.* at 142.

75. *Id.*

76. *Id.*

77. The Court determined the constitutionality of a New Jersey statute that prohibited the importation of waste collected outside the state's borders. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 617 (1978). The Court held that the statute was discriminatory towards out-of-state waste and therefore violated the dormant Commerce Clause. *Id.* at 628-29.

78. "A discriminatory law is 'virtually per se invalid' . . . and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008) (citing *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994) and *City of Philadelphia v. New Jersey*, 437 U.S. at 624.)

79. *City of Philadelphia v. New Jersey*, 437 U.S. at 629 (describing how discriminating against out-of-state waste, yet allowing in-state waste, is impermissibly discriminatory).

discriminatory statutes are found to violate the dormant Commerce Clause.⁸⁰ Conversely, neutral statutes analyzed under the balancing test are usually not found to violate the dormant Commerce Clause.⁸¹

Traditionally, the Court has upheld state laws analyzed under the balancing test.⁸² However, the Court has found a handful of neutral state laws to be unconstitutional.⁸³ In *Bibb v. Navajo Freight Lines, Inc.*,⁸⁴ the Court overturned an Illinois statute regulating rear mudguards on trucks and trailers operating on roadways within the state.⁸⁵ The Court found that the statute placed a substantial burden on interstate commerce and provided no actual benefit over alternative mudguards.⁸⁶ There have been several cases where the Court has found state statutes to be unconstitutional when they place a substantial burden on interstate transportation without proof of public interest.⁸⁷

While the Court has never created criteria for determining exactly what an “undue burden” is, the Court has emphasized upholding statutes that have a legitimate state interest.⁸⁸

Unless we can conclude on the whole record that “the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it” . . . we must uphold the statute.⁸⁹

If the Court has concluded that there is a state interest, then it must determine the extent of the burden that will be tolerated.⁹⁰ In determining this burden, the

80. “[A] discriminatory law is ‘virtually per se invalid’ . . . and will survive only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives’” *Dep’t of Revenue of Ky.*, 553 U.S. at 338 (citing *Or. Waste Sys., Inc.*, 511 U.S. at 99 and *City of Philadelphia v. New Jersey*, 437 U.S. at 624).

81. *Pike*, 397 U.S. at 142.

82. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (finding that the Minnesota statute did not impose a burden on interstate commerce as the statute’s effect did not advantage in-state firms over out-of-state firms); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (finding that the state law does not impose a substantial burden; rather, it shifted production from one manufacturer to another). “Generally, a law will survive [rational-basis] scrutiny if the distinction it makes rationally furthers a legitimate state purpose.” *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

83. *See, e.g.*, *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333 (1977) (striking down a North Carolina law requiring all apples sold in the state to be labeled with a United States Department of Agriculture grade); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (finding that a New York statute setting maximum liquor prices for distillers and producers according to what they charged across the U.S. violated the dormant Commerce Clause).

84. 359 U.S. 520 (1959).

85. *Id.* at 530.

86. *Id.* at 525, 529.

87. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (striking down a Wisconsin law that regulated truck and trailer configuration for any vehicle that operated in Wisconsin); *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981) (finding an Iowa law unconstitutional for banning sixty-five-foot trailers from operating within the state); *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761 (1945) (concluding that Arizona’s railcar regulations were unconstitutional because the state’s interest was outweighed by the national interest of preserving an adequate and efficient transportation service).

88. *Raymond Motor Transp., Inc.*, 434 U.S. at 443 (1978).

89. *Id.* at 443 (quoting *Bibb*, 359 U.S. at 524).

90. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Court considers the nature of the interest and whether there are alternative methods of achieving the interest without impacting interstate commerce.⁹¹

B. EXTRATERRITORIALITY

The National Pork Producers Council (“NPPC”) focused much of its argument on the extraterritoriality doctrine.⁹² The extraterritoriality doctrine was thought to be one of three strands of the dormant Commerce Clause jurisprudence.⁹³ However, the Court in *Ross* determined that the extraterritoriality doctrine is not a part of the dormant Commerce Clause.⁹⁴ When states attempt to regulate transactions that are wholly outside its borders, the extraterritoriality doctrine applies, regardless of whether the transaction affects commerce within that state.⁹⁵ The following principles underlie the extraterritoriality doctrine:

- (1) A state statute may not apply to commerce wholly outside the state even if the commerce has effects within the state;
- (2) A state statute that regulates commerce wholly outside the state’s borders is unconstitutional even if the legislature did not intend for the statute to apply extraterritorially; and
- (3) A state statute must be evaluated by considering how it would interact with legitimate regulation in other states, and what would happen if another state or every state enacted similar laws.⁹⁶

Much of the extraterritoriality doctrine hinges on “wholly” out-of-state transactions whereas the *Pike* balancing test hinges more on discrimination against out-of-staters.⁹⁷ Scholars have noted that the extraterritoriality doctrine is the least understood strand of the dormant Commerce Clause.⁹⁸ Although the NPPC emphasized the extraterritoriality doctrine in its argument, the Court has rarely overturned legislation based on the extraterritoriality doctrine.⁹⁹

IV. NATIONAL PORK PRODUCERS COUNCIL V. ROSS

In December 2019, the NPPC filed an action against California on the ground that Proposition 12 was unconstitutional.¹⁰⁰ The NPPC “allege[d] Proposition 12

91. See, e.g., *S. Pac. Co.*, 325 U.S. at 761 (weighing Arizona’s safety interest in limiting railcar length against national interests of preserving an adequate and efficient transportation service); *Pike*, 397 U.S. at 137 (weighing Arizona’s economic interest of keeping work in the state against the substantial burden statute imposes on commerce).

92. Reply Brief for Petitioner, *Nat’l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 21-468) WL 4136607 [hereinafter Reply Brief for Petitioner].

93. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015).

94. *Nat’l Pork Producers Council*, 598 U.S. at 375-76.

95. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

96. Lorde Martin, *supra* note 68, at 505 (2016).

97. *Id.* at 500, 505, 523.

98. *Id.* at 523; *Energy & Env’t Legal Inst.*, 793 F.3d at 1172; Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 979 (2013).

99. See Reply Brief for Petitioner, *supra* note 92, at 2-12; see generally *Energy & Env’t Legal Inst.*, 793 F.3d at 1172 (noting that a Supreme Court majority has only used the extraterritorial doctrine to strike down legislation three times).

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

violates the Commerce Clause of the U.S. Constitution because it reaches extraterritorially and imposes substantial burdens on interstate commerce.”¹⁰¹ There were two separate legal arguments that boiled down to the same issue: that the implementation of Proposition 12 would interfere with pork production across the nation by forcing out-of-state pork producers to comply with the regulation.¹⁰² In making this argument, the NPPC highlighted that California is a large consumer of pork but only produces about one percent of pork in the United States.¹⁰³ Because the pork production chain is segmented,¹⁰⁴ the NPPC explained that Proposition 12 would affect the entire pork industry, requiring nearly all farms to comply.¹⁰⁵ Farms would be required to conform, even if most of the farm’s pork was not destined for California.¹⁰⁶

In January 2020, the defendant filed a motion to dismiss for failure to state a claim and a motion for judgment on the pleadings.¹⁰⁷ The district court relied on prior case law to analyze the statute and its effects.¹⁰⁸ The court determined that Proposition 12 equally affects both in- and out-of-state producers, making the law nondiscriminatory.¹⁰⁹ Next, because the NPPC had failed to show a substantial burden on interstate commerce, the court held that Proposition 12 survived the *Pike* balancing test and granted California’s motions.¹¹⁰

The NPPC appealed the decision to the Ninth Circuit Court of Appeals.¹¹¹ The Ninth Circuit affirmed the decision for similar reasons.¹¹² Additionally, the Ninth Circuit found that the increased compliance costs do not alone constitute a significant burden on interstate commerce.¹¹³ After the Ninth Circuit decision, the NPPC filed a petition for certiorari to the United States Supreme Court.¹¹⁴ The Court granted the petition in March of 2022 and heard oral arguments in October 2022.¹¹⁵

In May 2023, the Supreme Court released a 5-4 decision upholding Proposition 12, further affirming the lower courts’ findings; but its justification for the holding was fractured.¹¹⁶ Justice Neil Gorsuch wrote for the majority upholding Proposition 12, yet key parts of the opinion—IV–B, IV–C, and IV–D—

101. *Id.*

102. *Id.* at 1205.

103. *Id.* at 1204-05.

104. *See generally* WE CARE, *supra* note 52 (explaining segmentation in the industry as it lays out the different stages of production).

105. *Nat'l Pork Producers Council*, 456 F. Supp. 3d at 1205.

106. *Id.*

107. *Id.* at 1204.

108. *Id.* at 1207, 1210.

109. *Id.* at 1207.

110. *Id.* at 1210.

111. *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021,1025 (9th Cir. 2021).

112. *Id.* at 1034.

113. *Id.* at 1032.

114. *Nat'l Pork Producers Council v. Ross*, 142 S. Ct. 1413 (2022).

115. A SUPREME COURT OF THE UNITED STATES GRANTED & NOTED LIST: OCTOBER TERM 2022 CASES FOR ARGUMENT, (Apr. 14, 2023) <https://perma.cc/H4HY-2X2L>.

116. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 391 (2023).

were only supported by a plurality.¹¹⁷ Justices Clarence Thomas, Sonia Sotomayor, Elena Kagan, and Amy Coney Barrett joined Justice Gorsuch's opinion with respect to Parts I, II, III, IV–A, and V.¹¹⁸

All nine justices denied the NPPC's extraterritoriality doctrine argument, stating that "petitioners read too much into too little."¹¹⁹ The NPPC relied on language from *Healy v. Beer Institute, Inc.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, and *Baldwin v. G.A.F. Selig, Inc.*¹²⁰ to argue that Proposition 12 violated the extraterritoriality doctrine.¹²¹ The NPPC focused its extraterritoriality argument on essentially a per se rule, stating that "[a] state law that has the practical effect of regulating wholly out-of-state commerce is invalid, regardless of whether it also regulates in-state commerce."¹²² The Court criticized the use of this language, noting that the cases the NPPC alluded to specifically addressed price control statutes.¹²³ Accordingly, the majority and the dissenters alike "declined" to adopt the NPPC's proposed per se rule.¹²⁴

After rejecting the NPPC's extraterritoriality theory, the opinion analyzed its *Pike* balancing test argument.¹²⁵ The majority refused to apply the dormant Commerce Clause in striking down Proposition 12.¹²⁶ Justice Gorsuch stated:

Not only is the task petitioners propose one the Commerce Clause does not authorize judges to undertake. This Court has also recognized that judges often are "not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy [the] *Pike*" test as petitioners conceive it.¹²⁷

Looking at the *Pike* line of cases, the Court found that the *Pike* test has primarily struck down statutes that have a discriminatory purpose.¹²⁸ While the *Pike* test has, on occasion, struck down genuinely nondiscriminatory state laws, many of them related to interstate transportation, and the majority found that the NPPC's claim fell outside of this purview.¹²⁹ The NPPC acknowledged Proposition 12 has no discriminatory purpose, and therefore, the Court refused to declare the law unconstitutional under *Pike*.¹³⁰ In applying the *Pike* balancing test, Justice Gorsuch's plurality considered the burden to be economic and the benefits to be noneconomic.¹³¹ He found that it was impossible to weigh the

117. *Id.* at 362.

118. *Id.* at 356.

119. *Id.* at 373.

120. 294 U.S. 511 (1935).

121. Reply Brief for Petitioner, *supra* note 92, at 3; *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

122. Reply Brief for Petitioner, *supra* note 92, at 3 (citing *Healy*, 491 U.S. at 336).

123. *Nat'l Pork Producers Council*, 598 U.S. at 370-76.

124. *Id.*

125. *Id.* at 377.

126. *Id.* at 380.

127. *Id.*

128. *Id.* at 377-79.

129. *Id.* at 379-80.

130. *Id.* at 379.

131. *Id.* at 380-81.

burdens against the benefits, stating, “[r]eally, the task is like being asked to decide ‘whether a particular line is longer than a particular rock is heavy.’”¹³² Justice Gorsuch’s opinion on weighing competing factors was not supported by a majority vote.¹³³

Joining all but Part IV-B and IV-D, Justice Sotomayor wrote a concurrence determining that the NPPC’s *Pike* claim failed to establish a substantial burden.¹³⁴ Justice Sotomayor disagreed with Justice Gorsuch’s argument that it is impossible to weigh the competing interests, but ultimately determined that, regardless, the NPPC did not establish a burden large enough to meet the *Pike* balancing test.¹³⁵ Justice Barrett also wrote a concurrence determining that the NPPC did establish a substantial burden; however, she agreed with Justice Gorsuch that it was impossible to weigh economic and noneconomic interests against one another.¹³⁶ Chief Justice John Roberts, joined by Justices Samuel Alito, Brett Kavanaugh, and Ketanji Brown Jackson, wrote a concurrence in part and a dissent in part.¹³⁷ Chief Justice Roberts’s dissent recognized that the NPPC’s complaint alleged harms that are not merely the cost of compliance.¹³⁸ While Chief Justice Roberts acknowledged that the cost of compliance would be great enough to establish a substantial burden, he also observed that Proposition 12 has sweeping effects that will force producers to adopt new housing methods, create new health issues, and upend decades of knowledge and training.¹³⁹

Writing separately, Justice Kavanaugh’s dissent found that Proposition 12 creates a substantial burden.¹⁴⁰ “In short, through Proposition 12, California is forcing massive changes to pig-farming and pork-production practices throughout the United States. Proposition 12 therefore substantially burdens the interstate pork market.”¹⁴¹ Justice Kavanaugh criticized the implementation of Proposition 12, stating that the state is pushing a “California knows best” philosophy.¹⁴² In his discussion of Proposition 12, Justice Kavanaugh noted that the Court’s decision will allow states to impose neutral laws on other states based solely on their own moral values.¹⁴³ Justice Kavanaugh ended his dissent by outlining additional clauses that would make Proposition 12 unconstitutional, including the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.¹⁴⁴

132. *Id.* at 381 (citing *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U. S. 888, 897 (1988) (Scalia, J., concurring in judgment)).

133. *Nat’l Pork Producers Council*, 598 U.S. 356 (2023) (Part IV-B is only supported by a plurality opinion).

134. *Id.* at 391-93 (Sotomayor, J., concurring).

135. *Id.*

136. *Id.* at 393-94 (Barrett, J., concurring).

137. *Id.* at 394 (Roberts, C. J., concurring in part and dissenting in part).

138. *Id.* at 399-402 (Roberts, C. J., concurring in part and dissenting in part).

139. *Id.*

140. *Id.* at 403-06 (Kavanaugh, J., concurring in part and dissenting in part).

141. *Id.* at 406 (Kavanaugh, J., concurring in part and dissenting in part).

142. *Id.* at 406-07 (Kavanaugh, J., concurring in part and dissenting in part).

143. *Id.* at 407 (Kavanaugh, J., concurring in part and dissenting in part).

144. *Id.* at 408-410 (Kavanaugh, J., concurring in part and dissenting in part).

While Justice Gorsuch’s opinion concluded that the NPPC’s dormant Commerce Clause claim failed, much of his reasoning was only supported by a plurality.¹⁴⁵ It is important to note that a majority of the Court did not adopt Justice Gorsuch’s narrow interpretation of *Pike*.¹⁴⁶ The majority agreed that *Pike* extends to issues beyond transportation and allows the balancing of incommensurable values.¹⁴⁷ A majority of the Court—Justices Roberts, Alito, Kavanaugh, Jackson, and Sotomayor—found that economic and noneconomic factors can be weighed against one another.¹⁴⁸ Along with this, a majority of the Court—Justices Roberts, Alito, Kavanaugh, Jackson, and Barrett—found that Proposition 12 creates a substantial burden.¹⁴⁹ The following section analyzes the majority’s findings and considers the costs of Proposition 12 to determine whether the Court’s decision to uphold the law was correct.¹⁵⁰

V. THE COSTS OF PROPOSITION 12

Considering the requirements of Proposition 12, it is reasonable to conclude that a majority of the transactions controlled by Proposition 12 occur outside of the state.¹⁵¹ California produces less than one percent of pork in the United States.¹⁵² That means ninety-nine percent of pork is produced in other states which will now be controlled by Proposition 12 regulations.¹⁵³ Not only are most pigs raised outside of California, the vast majority are slaughtered in other states as well.¹⁵⁴ Around fifty-nine percent of all pigs in the United States are slaughtered in just fifteen different slaughter plants, none of which are located in California.¹⁵⁵ More recently, in July of 2022, Smithfield shut down its California-based slaughter plant, pushing even more of the pork market outside California’s borders.¹⁵⁶ Considering that most of the pork production and slaughter occurs outside of California, Proposition 12 is mandating confinement requirements for pigs being raised outside of California.¹⁵⁷ These mandates ultimately regulate

145. *Id.* at 356 (Gorsuch J. opinion) (Part IV-B is only supported by a plurality opinion).

146. *Id.*

147. *Id.* at 395-96 (Roberts, C. J., concurring in part and dissenting in part).

148. *See id.* at 392-93, 395-96 (Sotomayor, J., concurring and Roberts, C. J., concurring in part and dissenting in part).

149. *See id.* at 394-403 (Barrett, J., concurring and Roberts, C. J., opinion).

150. *See generally infra* Part V (discussing the arguments in favor of the NPPC and analyzing the costs of Proposition 12).

151. Reply Brief for Petitioner, *supra* note 92, at 2-5.

152. *Commodity Fact Sheet*, CALIFORNIA PORK PRODUCERS ASSOCIATION (APR. 2020), <https://perma.cc/P36F-ZEMU>.

153. *Id.*

154. Jayson Lusk, *These 15 Plants Slaughter 59% of All Hogs in the US*, <https://perma.cc/VC5V-FGMU> (last visited Dec. 20, 2023).

155. *Id.*

156. Almira Tanner, *The Largest Pig Slaughterhouse in California is Shutting Down*, DIRECT ACTION EVERYWHERE (July 2, 2022), <https://perma.cc/ADH2-SXYZ>.

157. *See generally* CAL. CODE REGS. tit. 3, § 1322.1 (2022) (requiring all pork cuts sold in the state to comply with the regulations). Since most of the pork is raised and slaughtered outside of California, Proposition 12 is affecting production that occurs wholly outside of the state. *See Commodity Fact Sheet*, *supra* note 152.

transactions wholly out-of-state, including transactions between producers and slaughter plants.¹⁵⁸

On its face, Proposition 12 is not discriminatory because it regulates both in- and out-of-state producers equally.¹⁵⁹ Therefore, Proposition 12 should not be analyzed under strict scrutiny.¹⁶⁰ The law was not enacted for protectionist purposes, since it does not protect in-state producers over out-of-state producers.¹⁶¹ Instead, Proposition 12 should be considered a neutral law analyzed under the balancing test set forth in *Pike*:

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.¹⁶²

The balancing test first considers legitimate public interest.¹⁶³ California argued that Proposition 12 promotes animal welfare as well as health, safety, and moral considerations.¹⁶⁴ Much of California's argument is based on the fact that voters enacted Proposition 12 to eliminate the sale of "immorally" produced pork products within the state.¹⁶⁵ In the opinion, Justice Gorsuch accepts the idea that Proposition 12 creates some benefits by acknowledging that voters approved its enactment.¹⁶⁶ Justice Gorsuch argued that "states may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made."¹⁶⁷ In making this argument, Justice Gorsuch used the example of goods manufactured by child labor.¹⁶⁸ However, the argument fails to recognize that a legitimate public interest exists regarding child labor regulations, and that Congress has acted on the issue.¹⁶⁹ In his plurality opinion, Justice Gorsuch compared Proposition 12 to states outlawing the sale of horsemeat for human consumption.¹⁷⁰ This argument is also flawed as it does not

158. See Reply Brief for Petitioner, *supra* note 92, at 10-11 (arguing that Proposition 12 will require farmers comply or withdraw from the market).

159. See CAL. CODE REGS. tit. 3, § 1322.1 (2022) (regulating any pork products being sold in the State regardless of whether it was produced by California producers or out-of-state producers).

160. *Id.*; see also *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (finding that discriminatory laws are analyzed with strict scrutiny).

161. CAL. CODE REGS. tit. 3, § 1322.1 (2022). *But see City of Philadelphia*, 437 U.S. at 617-29 (determining that New Jersey's state law was protectionist because it discriminated against other states in order to protect New Jersey).

162. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

163. *Id.*; see also *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (considering Wisconsin's interest in regulating truck and trailer configurations, ultimately finding that state interest was limited and did not warrant placing a burden on interstate commerce).

164. Brief in Opposition at 22-24, *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 21-468).

165. *Id.*

166. *Nat'l Pork Producers Council*, 598 U.S. at 381.

167. *Id.*

168. *Id.*

169. See also 29 U.S.C. § 212 (outlining child labor regulations in the United States).

170. *Nat'l Pork Producers Council*, 598 U.S. at 387-88.

acknowledge that the federal government stopped inspecting horse slaughter plants prior to states enacting these laws.¹⁷¹ By refusing to inspect these plants, the federal government established a health and safety concern for states to prohibit the sale of horsemeat for human consumption.¹⁷² Justice Gorsuch improperly compares statutes promoting two widely accepted public interests: the protection of children and food safety.¹⁷³ Whether Proposition 12 has a legitimate public interest continues to be disputed.¹⁷⁴

Proposition 12 requires farmers to use a group housing method instead of gestation stalls when housing sows.¹⁷⁵ As discussed in Chief Justice Roberts' dissent, this will completely change the industry's husbandry practices.¹⁷⁶ Gestation stalls keep the sows separate from one another during the gestation period, while group housing allows the sows to interact with one another in a larger pen.¹⁷⁷ Both of these systems have benefits and drawbacks; however, research has not concluded that one system is superior to the other.¹⁷⁸ "In contrast with housing sows in individual crates, group housing allows the animals to express normal activity and behavior. However, group housing, as such, does not automatically imply better animal welfare."¹⁷⁹ Group housing may lead to more instances of lameness, aggression, disease, and stress on the animal which can cause a loss of welfare and production.¹⁸⁰ The industry standard requires a sixteen square foot minimum per sow for group housing.¹⁸¹ As of 2013, most group housing operations offer sixteen to twenty square feet per sow.¹⁸² This is substantially less than the twenty-four square feet required by Proposition 12.¹⁸³ The State of California provided no evidence demonstrating why twenty-four square feet is the desired square footage.¹⁸⁴ In 2017, the University of Minnesota performed research on the effects of group housing floor space.¹⁸⁵ This research determined that there were no differences in production or animal welfare for sows

171. Nancy Perry, *A Quarter of a Century of Animal Law: Our Roots, Our Growth, and Our Stretch Toward the Sun*, 25 ANIMAL L. 395, 409-10 (2019).

172. *Id.*

173. *Nat'l Pork Producers Council*, 598 U.S. at 388-89.

174. Petition for Writ of Certiorari at 4-5, *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 21-468).

175. CAL. CODE REGS. tit. 3, § 1322.1 (2022); *Sector at a Glance*, *supra* note 52

176. *Nat'l Pork Producers Council*, 598 U.S. at 401.

177. *Welfare Impact of Gestation Sow Housing*, AM. VETERINARY MED. ASS'N (Nov. 19, 2015) <https://perma.cc/9848-EBUA>.

178. Dominiek Maes et al., *Impact of Group Housing of Pregnant Sows on Health*, PORCINE HEALTH MANAG., July 1016, at 7.

179. *Id.*

180. *Id.*

181. *How Much Space Does a Sow Need in a Group-housing System?*, THE PIG SITE (2012) <https://perma.cc/MX5Z-ZG5H>.

182. Harold Gonyou et al., *Group Housing Systems: Floor Space Allowance and Group Size*, PORK CHECKOFF, (2013) <https://perma.cc/375V-B35V>.

183. CAL. CODE REGS. tit. 3, § 1322.1 (2022).

184. Yuzhi Li et al., *How Much Floor Space Do Group Housed Sows Need?*, NAT'L HOG FARMER (Dec. 27, 2017) <https://perma.cc/DZQ7-5UU6>; see Reply Brief for Petitioner, *supra* note 92, at 17, 21.

185. Li et al., *supra* note 184.

provided sixteen square feet per sow and twenty-two square feet per sow.¹⁸⁶ In an attempt to justify the decision, Justice Gorsuch mentioned that several out-of-state producers have transitioned to group housing.¹⁸⁷ However, he fails to recognize that virtually no producers currently comply with the twenty-four square foot minimum required by Proposition 12.¹⁸⁸ Furthermore, Justice Gorsuch fails to analyze the twenty-four square foot minimum at all.¹⁸⁹ California's law does not further a legitimate public interest by requiring such large square footage per sow; instead, it imposes a burden on producers and will allow every state to set square footage minimums.¹⁹⁰

The *Pike* balancing test next looks at the burden imposed by the law.¹⁹¹ In analyzing the burden potential, the Court found that it was impossible to weigh the competing factors as one is economical and the other is not.¹⁹² While Justice Sotomayor's concurrence did not find that the NPPC met the substantial burden test, she explained that the Court has and can balance competing factors that are both economic and noneconomic.¹⁹³ She further concluded that the NPPC did not meet the substantial burden requirement.¹⁹⁴ However, Chief Justice Roberts' dissent, Justice Kavanaugh's dissent, and Justice Barrett's concurrence indicate that the NPPC's complaint plausibly alleged that Proposition 12 is substantially burdensome and will be primarily felt outside of California.¹⁹⁵ Proposition 12 primarily affects out-of-state production placing an enormous burden on out-of-state producers.¹⁹⁶ California alone consumes about thirteen percent of the pork produced in the United States.¹⁹⁷ However, California accounts for less than one percent of pork production in the United States.¹⁹⁸ Most of the United States pork is produced in the Midwest, with Iowa leading the nation in pork production, while Minnesota, Illinois, Indiana, Nebraska, Missouri, Ohio, and South Dakota rank in the top ten states for pork production.¹⁹⁹ North Carolina and Oklahoma also rank in the top ten, producing between eight and nine million pigs in 2017.²⁰⁰ Considering this data, Proposition 12 will affect animal confinement regulation in

186. *Id.*

187. *Nat'l Pork Producers Council v. Ross*, No. 21-468, slip op. at 23 (2023).

188. *PORK CHECKOFF*, *supra* note 182.

189. *Nat'l Pork Producers Council*, 598 U.S. at 385 (2023).

190. *See id.* at 406-07 (Kavanaugh, J., opinion) (discussing that the Courts opinion will allow states to implement laws effecting production wholly outside their borders which will substantially affect other states production methods).

191. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

192. *Nat'l Pork Producers Council*, 598 U.S. at 381.

193. *Id.* at 391-93 (Sotomayor, J., concurring).

194. *Id.* at 393.

195. *Id.* at 393-94 (Barrett, J., concurring); *id.* at 394-95 (Roberts, C. J., concurring in part and dissenting in part); *id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part).

196. *See Reply Brief for Petitioner*, *supra* note 92, at 10-11.

197. *CAL. PORK PRODUCERS ASS'N*, *supra* note 152.

198. *Id.*

199. *United States Hog Inventory Down 2%* (U.S.D.A 2021) <https://perma.cc/US4U-HGLP>; *Top 10 U.S. States by Inventory of Hogs and Pigs as of March 2023*, STATISTA, <https://perma.cc/6DAG-G3KN> (last visited Dec. 20, 2023).

200. *Id.*

other states because California is importing nearly all of its pork from outside the state.²⁰¹

Along with primarily affecting out-of-state production, the cost of complying with Proposition 12 is exponential.²⁰² Proposition 12 requires existing farms to make infrastructure and management changes in order to comply with its confinement standards.²⁰³ Converting a stall barn into a group housing barn can be both costly and time-consuming.²⁰⁴ The economic cost of converting a gestation barn into group housing depends on a multitude of factors, some of which include: (1) remaining life of the barn and flooring condition; (2) existing feeding system; (3) space allocation requirements and space available; (4) time available for renovations; and (5) management and labor learning curve.²⁰⁵ Professor Brian L. Buhr estimates that retrofitting barns could result in the industry losing between \$1.87 billion and \$3.24 billion.²⁰⁶ In one prototype analysis, Professor Buhr estimated that converting a 2400 head sow barn from gestation stalls to a trickle feed small pen site would be around \$731,429.²⁰⁷ Professor Buhr's calculations ranged anywhere from \$150 per sow to over \$1000 per sow depending on barn condition and space.²⁰⁸ While these estimates vary substantially and depend heavily on barn conditions, the calculations only consider twenty square feet per sow and do not count for inflation.²⁰⁹ Proposition 12 requires twenty-four square feet per sow; therefore, most farmers, if they desired to maintain herd size and production levels, would have to expand their barns in order to accommodate for the extra square footage.²¹⁰

Not only does Proposition 12 control out-of-state production and impose large costs on out-of-state farmers, it also does not provide enough time for producers to comply.²¹¹ Proposition 12 only provided farmers with a four-year period to comply.²¹² This means producers must completely change their farming operation, including management, infrastructure, labeling, and tracking, within a

201. See generally *United States Hog Inventory Down 2%* (U.S.D.A 2021) <https://perma.cc/US4U-HGLP> (explaining that a majority of pork is produced beyond California borders); see also CAL. CODE REGS. tit. 3, § 1322.1 (2022) (requiring all pork entering the state to be from a sow that is housed in a group setting with a minimum of twenty-four square feet).

202. “[M]ost sow farmers will have to alter their facilities, practices, and contractual relationships to accommodate California’s requirements, incurring enormous costs to do so.” Reply Brief for Petitioners, *supra* note 92, at 3-4.

203. See *id.* at 23.

204. Brian L. Buhr, *Economic Impact of Transitioning from Gestation Stalls to Group Pen Housing in the U.S. Pork Industry*, AGECON SEARCH (May 2010), at 18-19 (discussing the procedure and cost of retrofitting gestation stall barns to group housing barns).

205. *Id.*

206. *Id.* at 5.

207. *Id.* at 22.

208. *Id.* at 21-22; see also National Hog Farmer Staff, *Retrofitting Buildings*, NAT’L HOG FARMER (Aug. 1, 1998) <https://perma.cc/TUR5-D4CH> (discussing the cost associated with improving facilities).

209. Buhr, *supra* note 204, at 22.

210. *Id.* at 21-22 (explaining that larger square footage allocation may require a new barn be built to accommodate the same size herd prior to retrofitting); CAL. CODE REGS. tit. 3, § 1322.1 (2022).

211. See generally *Animal Care Program*, *supra* note 38 (explaining that voters passed Proposition 12 in 2018 with an intended effective date of 2022).

212. See *id.*

four-year period.²¹³ “As the time frame for conversion to pens is reduced the cost of conversion increases dramatically as new investment is made in the pen facility but the cash flows from the facility do not change.”²¹⁴ Depopulating a barn for renovations will have an effect on productivity and production.²¹⁵ The time period for retrofitting a barn can vary depending on the barn structure.²¹⁶ For example, Murphy-Brown, LLC estimated it took ten days to retrofit each barn, and another company estimated three months to convert from gestation stalls to group housing.²¹⁷ Factoring this time into the compliance period decreases the overall length of time a farmer must save for these investments.²¹⁸

In addition to the burdens imposed on out-of-state farmers, there are burdens imposed on out-of-state companies involved in slaughtering, packing, and selling pork in California.²¹⁹ Proposition 12 will require companies to track, document, and label any pork product entering the state of California.²²⁰ Many of these transactions occur outside of California but will now be controlled by California law.²²¹ In light of its many rules and regulations, Proposition 12 imposes a substantial burden on out-of-state pork producers by controlling the industry through regulations that make no positive impact on the overall welfare of animals or public safety.²²²

As mentioned above, the Court typically does not find nondiscriminatory laws unconstitutional.²²³ However, Proposition 12 is similar to other statutes the Court has found unconstitutional.²²⁴ The presumption of a statute’s validity may be overcome when the statute produces little to no benefit and may instead be harmful.²²⁵ The Court in *Bibb* found that Illinois transportation regulations

213. *See id.*

214. Buhr, *supra* note 204, at 33.

215. *See generally id.* at 23 (discussing the length of time to depopulate a barn and that it would cause further concerns for the farmer considering the loss of production that comes with depopulation).

216. *Id.* at 22.

217. *Transitioning from Stalls to Pens*, NAT’L HOG FARMER (Nov. 15, 2012), <https://perma.cc/NZ2Y-H4CS>; Kevin Kurbis, *Converting a Stall Barn to a Group Sow Housing at Pembina Colony*, NEW STANDARD GRP. (July 16, 2018), <https://perma.cc/X2YP-58NX>.

218. *See Transitioning from Stalls to Pens*, *supra* note 217 (explaining the length of time it takes to retrofit a barn); *see also* Buhr, *supra* note 204, at 12 (discussing the cost of retrofitting a barn from gestation stall to group housing); *see generally*, *Animal Care Program*, *supra* note 38 (indicating that Proposition 12 only allotted four years to complete compliance retrofitting). This data together explains that Proposition 12 creates costly renovations with limited time to complete them.

219. CAL. CODE REGS. tit. 3, § 1322.1 (2022); CAL. CODE REGS. tit. 3, § 1322.4 (2022).

220. CAL. CODE REGS. tit. 3, § 1322.4 (2022).

221. *See* Reply Brief for Petitioner, *supra* note 92, at 10-11.

222. *Id.*

223. *See Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

224. *See, e.g., Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977) (violating a state law for requiring apples to be graded before being sold within the state; similarly, the requirements of Proposition 12 require specific sow husbandry regulations for pork being sold in the state).

225. “A discriminatory law is ‘virtually per se invalid’ . . . and will survive only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives’” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (citing *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 99 (1994) and *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

requiring curved mudguards created no actual benefits.²²⁶ The Court instead found that the curved mudguards could be more dangerous.²²⁷ Similarly, research has not established any benefits for using group housing systems over stalled housing systems.²²⁸ Moreover, the industry has years of experience using stalled housing which makes it more reliable and safer for animals compared to group housing systems, where animals have more opportunity to injure one another and spread diseases.²²⁹

Along with having no established benefits, Proposition 12 requires extensive tracking and labeling, implementation of new management systems, and billions of dollars in barn renovations.²³⁰ While producers and packers could choose not to comply with these regulations, noncompliance would restrict them from distributing pork to or through California.²³¹ California is not only a huge pork market itself, but it is also a hub for exportation.²³² Just as it would be impossible for truck drivers to avoid using roads in certain states, it would be impossible for the pork industry to avoid selling and transporting products in California.²³³ Justice Gorsuch's plurality opinion repeatedly states that producers can choose whether or not to sell in California, allowing them to decide if they want to comply with Proposition 12.²³⁴ However, this is inaccurate because noncompliance will substantially limit producers' selling options.²³⁵ Proposition 12 essentially requires all or most pig producers to comply with the requirements.²³⁶ Justice Roberts recognized this stating that "due to the nature of the national pork market, California has enacted rules that carry implications for producers as far-flung as Indiana and North Carolina, whether or not they sell in California."²³⁷

VI. PROPOSED SOLUTIONS

Group housing is relatively new in the United States pig industry and much less evolved than the use of gestation stalls.²³⁸ "[G]estation stall housing is well

226. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524-25 (1959).

227. *Id.* at 525.

228. Maes, *supra* note 178.

229. *Id.*

230. Buhr, *supra* note 204 (explaining that retrofitting a barn to accommodate larger square footage comes with substantial costs); CAL. CODE REGS. tit. 3, § 1322.1 (2022).

231. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 405 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

232. OFFICE OF THE U.S. TRADE REPRESENTATIVE, STATE BENEFITS OF TRADE: CALIFORNIA (2023).

233. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Nat'l Pork Producers Council*, 598 U.S. at 399-401 (Roberts, J., concurring in part and dissenting in part).

234. *Nat'l Pork Producers Council*, 598 U.S. at 382.

235. *See id.* at 404-06 (Kavanaugh, J., concurring in part and dissenting in part). Justice Kavanaugh explains that it would be infeasible for farmers not to comply with Proposition 12 considering California's large market share. Along with this he points out that it is nearly impossible for farmers to segment compliant and noncompliant pigs, essentially requiring all producers to comply with Proposition 12 regulations.

236. *Id.*

237. *Id.* at 400 (Roberts, C. J., concurring in part and dissenting in part).

238. Buhr, *supra* note 204.

defined in the U.S. because a prototypical system has been installed as the industry modernized in the past 25 years.”²³⁹ Because group housing is still emerging, any benefits to production and animal welfare remain limited.²⁴⁰ Without the proper knowledge and research, group housing can be less efficient and more dangerous for overall animal welfare.²⁴¹ Companies have begun moving towards group housing, societal views are changing, and the industry is working to change with those views.²⁴² However, a forced change will not benefit either the animal or the farmer.²⁴³

A. LABELING

Informational labeling of products has become very common in the United States.²⁴⁴ One alternative would be to maintain Proposition 12's labeling requirement but to eliminate its production requirement.²⁴⁵ This would sever the portion of the law that requires all meat sold in California to comply with Proposition 12.²⁴⁶ Without requiring all meat to comply, the regulation would instead only require pork products to be labeled indicating whether they are in compliance with Proposition 12, similar to labeling for antibiotics-free and pasture-raised meat.²⁴⁷ Labeling would provide a benefit for farmers who have already complied with Proposition 12 but would not impose a burden on out-of-state farmers by requiring compliance with California-only-based laws.²⁴⁸ Similarly, it allows consumers to make informed decisions based on their own moral beliefs regarding animal welfare.²⁴⁹ Limiting Proposition 12 to a labeling

239. *Id.* at 13; *see also* Prof John J. McGlone, *Sow Stalls – a Brief History*, PIG PROGRESS (Sep. 12, 2013) <https://perma.cc/5TB4-3JAA> (last visited Dec. 21, 2023) (noting that gestation crates became common among United States pig farmers in the 1970 and have continued to be widely used among farmers today. However, the use of crates can be dated all the way back to 1807.).

240. Buhr, *supra* note 204, at 60.

241. *Id.* at 62-63.

242. *Id.* at 9.

243. *See, e.g.*, University News Release, *Cargill Moves to Group Housing for Company's Sows*, FARM JOURNAL'S PORK (June 10, 2014) <https://perma.cc/GJ2C-6BUG> (last visited Dec. 21, 2023) (explaining Cargill's initiative to update housing facilities to accommodate group housing by 2015).

244. *See* Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 295 (1994) (describing the variety of product labeling requirements and their effects on consumers).

245. *See generally*, CAL. CODE REGS. tit. 3, § 1322.4 (2022) (explaining that pork being sold in the state must be labeled "Pork CA Prop 12 Compliant" and pork transporting through the state may be labeled "For Export", "For Transshipment", or "Not Prop 12 Compliant").

246. *See* CAL. CODE REGS. tit. 3, § 1322.1 (2022).

247. Donna M. Byrne, *Cloned Meat, Voluntary Food Labeling, and Organic Oreos*, 8 PIERCE L. REV. 31, 40-45 (2009) (explaining that most processing information is not required to be labeled on food packaging but can be voluntarily disclosed on the labeled for marketing purposes).

248. Severing the mandate of twenty-four square feet per sow, under Cal. Code Regs. tit. 3, § 1322.1, would allow farmers the option of whether to comply or not. Allowing the labeling requirements of Cal. Code Regs. Tit. 3, § 1322.4 would provide California residents the opportunity to make an informed decision when purchasing and consuming pork.

249. Labeling provides information to consumers allowing them to make the choice. Byrne, *supra* note 247, at 70-71; "Consumers want information not only when it matters for decision making, but just for information's sake. Information helps consumers think they are making better decisions, even when they are ignoring the information in front of them." *Id.* at 71; *see generally* Sean P. Sullivan, *Empowering*

requirement upholds many of the statute's values but does not pose any violation to the dormant Commerce Clause or the extraterritoriality doctrine.²⁵⁰ Solely requiring labeling eliminates the portion of Proposition 12 that regulates transactions wholly outside of California's borders.²⁵¹ However, using labeling as a solution has been criticized as ineffective and unrealizable.²⁵²

B. FEDERAL REGULATION ON CONFINEMENT LAWS

The federal government could always enact a federal law regulating animal confinement requirements.²⁵³ This would preempt any state law attempts and set a standard for farmers to follow in the country.²⁵⁴ Many countries have already implemented their own confinement regulations.²⁵⁵ More countries have promoted confinement regulations in order to comply with the European Union's gestation stall bans.²⁵⁶ The EU's regulations promote implementing confinement standards and eliminating the use of gestation crates.²⁵⁷ In implementing these regulations, the EU created a provision for existing farmers to continue using gestation stalls, grandfathering all barns using gestation stalls at the time of the implementation.²⁵⁸ Therefore, the regulation requires all new barns to comply with confinement regulations, eliminating the use of gestation stalls in any new

Market Regulation of Agricultural Animal Welfare Through Product Labeling, 19 ANIMAL L. REV. 391, 420-23 (2013) (pointing out that the "market regulation" relies on labeling and assumes that consumers will make purchasing decisions based on their preference for animal welfare).

250. Eryn Terry, *The Regulation of Commercial Speech: Can Alternative Meat Companies Have Their Beef and Speak It Too?*, 23 VAND. J. ENT. & TECH. L. 223, 226 (2021) ("Generally, lawmakers have justified [meat labeling] statutes as protecting consumer choice and public health by preventing a confusing and misleading labeling scheme.").

251. See *supra* Part V (discussing that the requirement of twenty-four square feet per sow regulates animal confinement wholly beyond the California's borders).

252. Sullivan, *supra* note 249, at 420-23.

253. "Under the Constitution, Congress could enact a national law imposing minimum space requirements or other regulations on pig farms involved in the interstate pork market." *Nat'l Pork Producers Council v. Ross*, No. 21-468, slip op. at 4 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

254. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000) (citation omitted) ("Express' preemption occurs when a federal statute includes a preemption clause explicitly withdrawing specified powers from the states."). Even where Congress does not expressly preempt state law, the Court may "conclude that a federal statute wholly occupies a particular field and withdraws state lawmaking power over that field. The Court has indicated that a federal regulatory scheme may be 'so pervasive' as to imply 'that Congress left no room for the States to supplement it.'" *Id.* at 227 (citation omitted).

255. *About the EU Sow Stall Ban*, COMPASSION IN WORLD FARMING (last visited Dec. 22, 2023), <https://perma.cc/H2VJ-YP5F> (noting that twenty-five countries are already compliant with the EU's gestation stall bans by implementing national regulations).

256. In 2013, the European Union implemented confinement standards with the goal of phasing out gestation cages. Tony McDougal, *European Parliament: No More Cages and Crates by 2027*, PIG PROGRESS (June 15, 2021), <https://perma.cc/ZE36-4HD9>.

257. *Id.*

258. The codified law illustrates that the confinement regulations laid out only apply to newly built barns. Council Directive 2001/88, art. 3, 2001 O.J. (L 316) 9 (EC). "The provisions laid down in paragraphs 1(b), 2, 4, 5 and the last sentence of paragraph 8 shall apply to all holdings newly built or rebuilt or brought into use for the first time after 1 January 2003. From 1 January 2013 those provisions shall apply to all holdings." *Id.*

sow barn.²⁵⁹ The EU's animal confinement regulations have created national standards with reasonable implementation periods.²⁶⁰

Considering other countries are moving towards implementing national standards for regulating animal confinement, it would be a viable option for the United States government to consider.²⁶¹ One news article argued “[o]ften, society at large would like to have better welfare, but the consumer doesn’t always want to pay for it. Regulators might want to apply a new bottom or minimum welfare standard, and slowly increase that level so you can reach non-cage housing in the end.”²⁶² Producers, consumers, and the industry at large need a gradual progression towards improving animal welfare because currently, the pork industry is not set up for rapid change.²⁶³ Many scholars have recognized that the United States is lagging behind in animal welfare regulations.²⁶⁴ Moving forward, implementation of these animal welfare regulations must be done in a practical manner that will not cripple the pork industry.²⁶⁵

VII. CONCLUSION

Proposition 12 imposes a substantial burden on interstate commerce without establishing a legitimate state interest.²⁶⁶ California failed to establish any human health or safety interest through adequate research and evidence.²⁶⁷ Instead, California relies on morality to establish a legitimate state interest.²⁶⁸ The Court’s decision to uphold Proposition 12 in its entirety gives states the authority to impose regulations that reach far beyond their borders.²⁶⁹ Justice Gorsuch’s opinion

259. *Id.*

260. *Id.* (allowing over a ten-year compliance period).

261. *Implementation of Ban on Individual Sow Stalls, In Force Since 1 January 2013 In Accordance With Directive 2008/120/EC on the Protection of Pigs*, E-000321-13 (Jan. 14, 2013), <https://perma.cc/LTW2-4YWC> (pointing out that Sweden established animal confinement regulations in 1994 and the United Kingdom established animal confinement regulations in 1999).

262. Ross Kelly, *Europe Leans Toward Benning Cages for Farmed Animals*, VIN NEWS SERVICE (April 28, 2021) <https://perma.cc/M7TS-KUC5> (last visited Dec. 22, 2023) (quoting Dr. Tijs Tobias).

263. See Dermot J. Hayes et. al., *A Descriptive Analysis of the COVID-19 Impacts on U.S. Pork, Turkey, and Egg Markets*, 37 AGRIBUSINESS 122, 122-24 (2021) (describing the effects of Covid on the industry due to rapid changes in the productions chain); see generally WE CARE, *supra* note 52 (discussing segmentation of the industry).

264. See Stephanie J. Engelsman, “World Leader” - at What Price? *A Look at Lagging American Animal Protection Laws*, 22 PACE ENVTL. L. REV. 329, 365-68 (2005) (explaining that for being one of the world’s largest animal producing countries the United States is behind in protecting animal welfare); see also ANIMAL LEGAL DEFENSE FUND, *supra* note 24 (addressing the minimal federal animal welfare laws in the United States); Sullivan, *supra* note 249, at 391 (explaining that the United States has taken a “market-regulation” approach when it comes to animal welfare limiting the amount of statutory regulations related to animal welfare).

265. See Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 325 (2007) (discussing farm animal welfare regulations around the world and analyzing the best practices being utilized by countries and states).

266. See *supra* Part V (explaining the burdens imposed by Proposition 12 on out-of-state producers and discussing the lack of state interest in implementing pig confinement regulations).

267. *Id.*

268. *Id.*

269. Petition for A Writ of Certiorari at 4-5, Nat’l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201 (9th Cir. 2021) (No. 21-468).

limits the dormant Commerce Clause to only discriminatory statutes.²⁷⁰ As pointed out by Justice Kavanaugh's dissent, the opinion of the Court may lead to problems, as it allows states to use their moral judgment to dictate operations in other states.²⁷¹ Without congressional intervention, the pork industry may be facing an uphill battle as states continue to implement differing confinement regulations.²⁷² Animal welfare is important and should remain a priority in the production animal industry.²⁷³ However, stall-free production cannot be done without adequate research, time, and implementation by proper legislative authority.²⁷⁴ Regulations should be implemented in a practical manner to ensure economic welfare and limited disruption of our food supply, but Proposition 12 fails to do this.²⁷⁵

270. *Nat'l Pork Producers Council*, 598 U.S. at 371-72.

271. *Id.* at 408-09 (Kavanaugh, J., concurring in part and dissenting in part).

272. *See generally id.* (discussing that the Court's decision will allow states to implement neutral laws that effect production and transactions wholly out-of-state).

273. *See* Victoria E. Hooton, *Slaughtered at the Altar of Free Trade: Are WTO Rules Hindering the Progression of Animal Welfare Standards in Agriculture*, 8 MANCHESTER REV. L. CRIME & ETHICS 152, 173 (2019) (“[R]ecognizing the importance of animal welfare in international trade, there is still a long way to go before agricultural developments in farmed animal welfare are accepted and desired.”).

274. Buhr, *supra* note 204, at 18-19, 27-28; *see generally supra* Section B (discussing federal implementation of animal confinement regulations); *supra* Part V (analyzing the issues of Proposition 12 and suggesting changes to make the implementation of stall free production more practical).

275. *See generally supra* Section B (discussing federal implementation of animal confinement regulations); *supra* Part V (explaining that Proposition 12 burdens production negatively affecting the pork market).