

POLICY BRIEF

The impact of California's Proposition 12 in increasing national production costs and food prices

By Pam Lewison,
Washington Policy Center's Center for Agriculture Director

November 2023

Key Findings

1. Californians consume 13 percent of all U.S. pork while raising just one percent of its supply. West Coast pork consumers account for the least amount of pork eaten annually at just 42 pounds per person.
2. Prop 12 regulations were widely adopted by egg and veal producers. Pork producers filed a lawsuit alleging the law violated the dormant commerce clause and placed an undue financial burden on pig producers.
3. The Supreme Court of the United States ruled pork producers must comply with the regulations of Prop 12 in May 2023.
4. The penning rules under Prop 12 require 24-square-feet of space be available for each sow on a hog farm. On an average farm, the estimated investment to retrofit pens is approximately \$3.5 million.
5. The cost of compliance will likely shrink the national hog herd and cause additional consolidation of pork producing farms.

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Introduction

In 2018, voters in California passed Proposition 12, called the Farm Animal Confinement Initiative, by a wide margin.¹ The state law established regulations for housing laying hens, veal calves, and hogs whose food products – eggs, veal, and pork – would be sold in California. Additionally, the regulation prohibited the sale of these animal products if the farmer, stock raiser, or seller knowingly housed the animals in a “cruel” manner, as defined by Proposition 12.² The housing requirements included cage-free and free-range designs with minimum floor space allowances per animal.

Proposition 12 also included a specific detail forcing adoption of the rules by every other state in the United States: no eggs, veal, or pork could be sold in California – regardless of place of origin – if California's housing rules were not followed. California used its enormous political influence to impose its rules on producers in other states. Despite the costly housing requirements, egg and veal producers adopted the regulations of Proposition 12 quickly. Pork producers, 99 percent of whom live outside of California, chose to challenge the regulations. After a lengthy legal battle that ended with the United States Supreme Court upholding Proposition 12's application to other states, the law has now become the standard that pork producers must obey if they want to sell their products in California.³

Market clout - Californians eat a lot of pork

Despite raising about one percent of all U.S. hogs, Californians eat a great deal of pork. Californians consume about 13 percent of all U.S.-produced pork, so the demand for the meat is high in the state. Pork consumption varies by region and demographics, with residents on the West Coast eating about 42 pounds of pork per person annually and rural consumers eating more pork than their urban

- 1 California Proposition 12, the Farm Animal Confinement Initiative (2018). Accessed June 23, 2023. [https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_\(2018\)](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018))
- 2 California Department of Education. *Proposition 12 - Farm Animal Confinement Proposition 12 Final Rule, the Farm Animal Confinement Initiative management bulletin*. Oct. 2022. Accessed June 23, 2023. <https://www.cde.ca.gov/ls/nu/fd/mb-fdp-03-2022-a.asp>.
- 3 National Pork Producers Council. Accessed June 23, 2023. <https://nppc.org/prop12/#:~:text=Timeline%20%26%20Status,-June%2021%2C%202023&text=May%2011%2C%202023%3A%20The%20Supreme,SCOTUS%20Reply%20Brief%20to%20Petitioners.>

counterparts.⁴ However, the Midwest holds the distinction of consuming more pork than any other region of the country – an average of 58 pounds per person annually. The Midwest, not coincidentally, also produces the most pork, with Iowa leading the nation in pork production and export.⁵

Legal challenge based on the Dormant Commerce Clause

Despite leading in neither production nor consumption of pork, California’s voters passed a law that forced every pork producer in the United States to follow their chosen rules. The food supply chain in the United States is an integrated system in which food producers from one region sell their product to a packer. The packer, in turn, packages meat into what we see in the grocery store and distributes it to other parts of the country. In this way, a hog producer is never truly aware of where his meat will end up unless he sells directly to customers.

The layered nature of the food supply chain, at this point, means pork producers have been put into an all or none conundrum by Proposition 12. If they choose not to abide by the rules of Proposition 12, packers may cancel their purchase contracts with the producers in favor of those who have chosen to comply. California becomes the de facto arbiter of whether pork producers can or will get paid for their livestock.

The imposition of California’s virtue signaling on all other states that produce pork for the national supply chain prompted the National Pork Producers Council and the American Farm Bureau Federation to file a lawsuit to invalidate the initiative. The council and farm bureau cited the “Dormant Commerce Clause” in their invalidation petitions against the proposition. A court in California declined to invalidate Proposition 12 and implementation of the law moved forward.

Appeal to the U.S. Supreme Court

The pork council and farm bureau continued to challenge Proposition 12 through the court system with the case finally ending up in the U.S. Supreme Court. The court was asked to examine the interpretation of the “Dormant Commerce Clause” and whether a state had the authority to impose its will upon people living in other states.

Under the U.S. Constitution, no state has the ability to create regulations that influence another state’s ability to operate. The clause gives Congress the authority to regulate commerce with foreign nations, the states, and Indian Tribes.⁶ Interpretations of the commerce clause include a “positive” approach in which Congress is the final authority on commerce regulations. Other interpretations

4 U.S. Department of Agriculture, Economic Research Service. *Factors Affecting U.S. Pork Consumption*. May 2005. Accessed June 27, 2023.

5 Iowa Pork Producers Council. 2020 Iowa Pork Industry Facts. Accessed June 27, 2023. <https://www.iowapork.org/newsroom/facts-about-iowa-pork-production#:~:text=Iowa%20has%20more%20than%205%2C400,48%20million%20hogs%20in%202018>.

6 Constitution Annotated: Analysis and Interpretation of the U.S. Constitution. Accessed June 23, 2023. <https://constitution.congress.gov/browse/article-1/section-8/clause-3/>.

include a “negative” or “dormant” approach to commerce which “prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.”

Delving more deeply into the interpretations at play in the Dormant Commerce Clause reveals there are two standards that must be met for the clause to have been violated: 1) states may not discriminate against interstate commerce, and 2) states may not take actions that are facially neutral but unduly burden interstate commerce.⁷ The Supreme Court has typically used a historical perspective to interpret questions of interstate commerce, relying heavily on past precedent and specific facts in each case.

The Supreme Court decided the Proposition 12 case in mid-2023, with the court ruling there was no violation of the Dormant Commerce Clause. The ruling noted the clause “prohibits the enforcement of state laws driven by ... ‘economic protectionism—that is, regulator measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” The decision further noted the pork producers and the farm bureau had failed to show that California was intentionally causing an undue financial burden on every other state to further its own economy.⁸

Moving forward

With a decision from the Supreme Court in hand, the California Department of Food and Agriculture began a series of outreach programs throughout the country. These outreach meetings included staff from the Department and have been open to producers throughout the country. The goal of the meetings has been to educate producers on how to comply with Proposition 12.

The regulations for hog penning under Proposition 12 are specific. Sows, in particular, must be given 24-square-feet of space in which to live without touching the sides of their pen or another hog. For most small to mid-sized farms there are two ways to achieve that: 1) add space to barns and pens, or 2) sell to a larger farm.

The penning requirement is a significant change from standard practice. Sow pens, specifically those used during gestation and birth, are often about 6.5 feet by 2.5 feet in size. Proposition 12 labels pens of that size as “cruel” confinement. However, gestation crates of that size have been industry standard for several reasons. Pigs are social animals with a hierarchy that is enforced via fighting, making pregnant sows more likely to be injured when housed in a communal pen.

Small pen size also helps avoid piglet mortality by allowing a sow to lie down without crushing or stepping on her offspring. The smaller pen size also allows

7 Constitution Annotated. *Overview of Dormant Commerce Clause*. Updated 2023. Accessed June 27, 2023. https://constitution.congress.gov/browse/essay/artI-S8-C3-7-1/ALDE_00013307/.

8 Supreme Court of the United States. *National Pork Producers Council et al v. Ross, Secretary of the California Department of Food and Agriculture*. Decision May 11, 2023. Accessed June 28, 2023. https://www.supremecourt.gov/opinions/22pdf/21-468_5if6.pdf.

each sow to receive feed formulated to her individual needs during pregnancy.⁹ By demanding a penning footprint nearly twice the size of current industry standard, Proposition 12 puts the life of piglets in danger from their own mother and puts the lives of mothers in danger from other pigs in the herd.

Industry estimates for adding space or retrofitting existing penning throughout the United States suggests the adoption of Proposition 12 regulations will cost approximately \$3,500 per sow. For an average hog farm of 1,000 pigs, that represents a cost of \$3.5 million.¹⁰ The average net cash farm income for hog raisers is forecast to be \$330,000 in 2023, down 28 percent from last year.¹¹ That income accounts for the salaries of employees – an average of \$54,000 annually – as well as the purchase of feed, land taxes, equipment and building maintenance, veterinary care, and more, leaving little room for an investment of millions to retrofit housing facilities.

Given the downturn in net income, the stark choice facing many small- to medium-sized farm owners may be to sell to larger farms. Consolidation in the meat production industry has long been a source of concern for producers, consumers, and even lawmakers. In 2021, the White House issued a statement listing concerns about the cost of meat increasing as the number of large-scale meat packers decreased.¹²

Market estimates

Proposition 12 was passed in 2018 and has yet to be fully implemented. The overall influence of the regulations on increasing the consumer price of pork is yet to be determined. However, the National Pork Producers Council notes it is likely pork prices will go up due to less supply and higher production costs imposed by Proposition 12.¹³

“Consider this – a farmer has one pig, and that one pig gets processed into a multitude of different cuts that are feeding people all over the world. That pig is

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- 9 American Veterinary Medical Association. *Welfare implications of gestation sow housing*. 2015. Accessed June 28, 2023. <https://www.avma.org/resources-tools/literature-reviews/welfare-implications-gestation-sow-housing#:~:text=Gestation%20Stall,-A%20gestation%20stall&text=Dimensions%20vary%20but%20are%20typically,udders%20protruding%20from%20the%20stall>.
 - 10 National Pork Producers Council. *California Proposition 12*. Updated June 23, 2023. Accessed June 28, 2023. <https://nppc.org/prop12/>.
 - 11 U.S. Department of Agriculture, Economic Research Service. *Farm Sector Income & Finances: Farm Business Income*, February 7, 2023. Accessed June 28, 2023. <https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/farm-business-income/>.
 - 12 The President of the United States, the White House. *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*. September 2021. Accessed June 28, 2023. <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>
 - 13 Farm Journal’s Pork Business. *Prop 12 Ruling: A Major Blow to Farmers and Consumers Who Will Pay the Price*. May 15, 2023. Accessed July 5, 2023. <https://www.porkbusiness.com/news/ag-policy/prop-12-ruling-major-blow-farmers-and-consumers-who-will-pay-price#:~:text=The%20price%20of%20pork%20is%20going%20to%20go%20up%2C%20he,to%20be%20absorbed%20by%20someone>.

going to bear the cost of California's ill-considered regulations here," National Pork Producers Council Lead Legal Strategist Michael Formica said. "Consumers all across America will feel the cost of this."

When Proposition 12, and its requirements, are fully in place, no one will be spared the change in market pressures. What those market pressures do to the overall higher cost of pork, however, won't be known until the next marketing cycle after implementation.

Full implementation

Initially, producers were given until July 1, 2023, to come into compliance with the housing regulations imposed by Proposition 12. The Supreme Court issued its decision on the case on May 23, 2023, giving hog raisers little time to redesign their penning facilities and hire a contractor, let alone complete construction. On June 21, a Sacramento County judge issued an order extending the compliance deadline until the end of 2023.

Conclusion

As the rocky roll out of Proposition 12 continues to impact national pork production, the true negative effects of this law are still largely supposition. Certainly, there will be a smaller national pork herd as some producers will opt to sell their livestock to come into compliance with the regulations. Certainly, pork will become more expensive as both supply constricts and the actual cost of compliance is revealed. The result will be higher food prices in every state. Only time under the new system will reveal whether larger gestation pen sizing is beneficial for sows and their piglets. Current indicators suggest sow and piglet mortality will increase.

Perhaps the larger question of California setting the rules for hog producers throughout the country will be revisited as well. When a large state, often at odds with the agricultural community, pushes its political agenda on people living in every other state in the country, it is bad public policy. Agricultural producers caring for the livestock that employ people, keep bills paid, and, ultimately, feed the families of those intimately involved in their raising, is a cornerstone of what makes our food supply chain reliable and affordable.

Hog raisers are not immune to caring for their animals, no matter what their end use may be. Anyone who worries about and witnesses the births of animals each day is acutely aware of the needs of those animals. Proposition 12, intentionally or otherwise, strips the humanity away from pork producers by reducing the whole of animal care down to the size of a pen.

Published by Washington Policy Center and Pacific Research Institute

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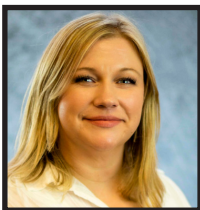
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