The Counter

Five things to know about the SCOTUS challenge to California's ban on extreme farm animal confinement

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The U.S. Supreme Court on Monday agreed to hear the pork industry's challenge to California's Proposition 12, a law that restricts certain confinement practices in industrial animal agriculture.

The law, passed by nearly 63 percent of voters in a 2018 ballot measure, effectively bans "gestation crates"—narrow, metal enclosures with slatted floors that confine pregnant sows to only sitting and standing, and restrict them from turning around. The industry argues the crates, which have been used in large-scale hog farming for more than 30 years, minimize aggression and prevent competition for food. But growing consumer concern about the wellbeing of animals we raise for food, coupled with strong opposition from animal welfare groups, has made the crates increasingly controversial.

Gestation crates have so far been banned in nine states, plus Ohio, which is slated to phase them out by 2026. In addition, California and Massachusetts have passed restrictions on the retail sale of pork that originated from animals kept in gestation-crate systems.

It's that additional restriction on retail sales that's at heart of the current challenge. When SCOTUS rules on Prop 12 in its next term—sometime between December of this year and June of 2023—it will not be ruling on whether the crates themselves are inhumane, but rather on whether the costs of complying with California's law put an unfair burden on out-of-state farmers and have a "dramatic economic effect," according to the petition, on non-California transactions.

Here are five things you need to know about the case:

1.) We've been here before.

Prop 12 requires sows to have at least 24 square feet of living space; in industrial-scale operations they currently have about 14. The law also requires egg-laying hens to be housed in at least 144 square inches of living space, and veal calves to have at least 43 square feet. These

standards ban industry practices that confine egg-laying hens in “battery cages” so small they can’t spread their wings and male calves raised for veal in similarly restrictive spaces.

Because Prop 12 bans not only gestation crates, veal crates, and battery cages on California farms, but also imports of animal products raised in these conditions anywhere in the world, it’s considered one of the strongest farm animal protection laws in the U.S. and is perhaps the most frequently challenged. The pork industry has been fighting like hell to overturn it, and so far, all of its challenges have failed.

In a case before the Ninth Circuit Court of Appeals last year, the National Pork Producers Council (NPPC), a pork industry lobby group, and the American Farm Bureau Federation unsuccessfully argued that Prop 12 violates the “dormant Commerce Clause” of the Constitution—a legal doctrine that bars states from enacting protectionist laws that discriminate against out-of-state businesses.

After that loss, the National Pork Producers Council took its challenge to the Supreme Court, claiming that Prop 12 would “upend an entire nationwide industry” to cater to the ethical preferences of Californians. It also argues that gestation crates don’t allow pigs to turn around “for hygiene, safety, and animal-welfare and husbandry reasons.”

2.) The outcome isn’t a foregone conclusion.

The Supreme Court’s decision to take up a case on which there wasn’t any disagreement among lower courts likely signals a desire among some justices to strike down Prop 12. That the court decided to weigh in on the case at all was surprising to some observers. “It is something that would have been unimaginable not that long ago,” Justin Marceau, an animal law scholar at the University of Denver, said in an email. “This court seems hungry to get involved with every divisive political issue.”

But it only takes four of the justices—not a majority—to agree to hear a case, and the pork industry’s legal argument is considered weak by many legal scholars because Prop 12 applies the same standard to products raised in California as it does to those in any other state. “I think the odds are not great for Prop 12, but I wouldn’t give up at all,” said Harvard constitutional law professor Laurence Tribe. “The Supreme Court’s decisions in this area—going all the way back to the 1920s—I think strongly support California.”

The dormant Commerce Clause on which the case hinges is complex and confusing. It isn’t explicitly written into the Constitution, but instead has been inferred in case law as a limit on states’ ability to interfere with interstate trade. The country’s top pork-producing states are Iowa, Minnesota, and North Carolina, which together make up most of the industry.

The NPPC argues that California’s share of the U.S. pork industry (.12 percent, according to USDA) is extremely small, and Prop 12 would unfairly impact states from which it imports its pork.

Tribe said this doesn’t mean Prop 12 imposes an unconstitutional burden on interstate commerce. “It’s undoubtedly true that it will have most of its impact outside California, but they’re not

exempting California," he said. "Even though the industry is smaller in California, it's not insignificant, and it has to comply with these rules just as fully as [producers] in Iowa and elsewhere do."

The Ninth Circuit Court's ruling in favor of Prop 12 similarly reasoned: "A state law may require out-of-state producers to meet burdensome requirements in order to sell their products in the state without violating the dormant Commerce Clause."

Clarence Thomas, one of the court's Republican-appointed justices, has expressed skepticism that the dormant Commerce Clause even exists, Tribe said. "That's, in a sense, the most conservative originalist view. And it may be that on the current court, only Justice Thomas has that view, but it will certainly influence at least to some extent the way the other conservatives look at this, so that there could be a very powerful conservative as well as liberal argument in support of Prop 12."

3.) You should look up the definition of "extraterritoriality."

Yes, it's a mouthful. But whether or not the court decides that Prop 12 passes muster will likely come down to the value of that one word, and whether the justices believe that ethical concerns of a state outweigh, as the petition puts it, "the wrenching effect of the law on interstate commerce."

"There's very little basis for invalidating California's Prop 12 unless one takes the view that the state's moral concerns for the abuse of animals somehow count less than the kinds of economic concerns that in the past have been used to justify state regulations with nationwide impact like this one," Tribe said. "Pigs are at least as smart as dogs, and anyway smartness shouldn't have anything to do with it. They can suffer."

"If California decides that intelligent mammals like pigs that can suffer are worthy of moral concern, then California should be allowed to protect their interests. But at least some justices might be insensitive to that and might say, 'who cares about animals?' And if they do, that would be an example of a form of judicial activism that conservatives and liberals alike ought to find inappropriate."

"Given that a strong case can (and will through amicus briefs) be made that animal welfare is an extremely substantial interest, it would seem under existing law that the law would be upheld," Marceau from the University of Denver said. But that's if the court adheres to the established doctrine on interstate commerce, which he called "a big if."

4.) Big interests will be represented by Big Law.

One underexamined dimension of the Prop 12 litigation is legal institutions' (including the Supreme Court's) ongoing bias toward business interests. The NPPC's case is being argued by attorneys from the corporate law firm Mayer Brown, which has represented clients like the tobacco conglomerate Altria Group and Cargill, Inc. in a lawsuit alleging child-labor abuses in the global food company's cocoa supply chain.

The attorney of record in the Prop 12 case, Timothy Bishop, "is advertised by Mayer Brown as being a top appellate lawyer in environmental law," said Oren Nimni, litigation director at Rights Behind Bars and a well-known critic of big law. "When you see someone who's an expert in environmental law at a firm like Mayer Brown, a giant corporate firm, that means that they are an expert in destroying the environment." Bishop didn't return a request for comment for this story.

"There's essentially universal neoliberal consensus in the legal field that there can be no judgment for that type of representation," Nimni said, and the Supreme Court likewise favors commercial interests. Whatever the merits of the pork industry's lawsuit, or lack thereof, he added, "it really doesn't matter because there's universal consensus in favor of corporate rights on the Supreme Court."

The Cato Institute, a libertarian think tank, also filed a friend-of-the-court brief in favor of NPPC, arguing that "there is already ample evidence of Prop 12's onerous economic burdens on the pork industry" and that "preventing animal cruelty nationwide is not a legitimate state interest."

5.) SCOTUS heat could chill local efforts.

Invalidating Prop 12 "would cast quite a shadow on perfectly reasonable state regulations, both in favor of animal welfare and various environmental concerns," Tribe said. "It's very hard to come up with a principle that would make the burden on interstate commerce in this case excessive but that wouldn't invalidate all kinds of other rules as well."

The environmental impact of Prop 12 itself would likely be minor because its additional space requirements are minimal, so it wouldn't impose enough additional costs on pork production to substantially scale down industrial animal agriculture, said Silvia Secchi, a natural resource economist at the University of Iowa, in an email. But the Supreme Court's decision could have indirect implications for state environmental regulations. "California leads the nation on climate change via, for example, the CAFE standards carve out," Secchi said. "This might signal a willingness to re-litigate these issues."

The only way to mitigate agriculture's environmental footprint, Secchi added, is to reduce overall meat consumption with policies stronger than Prop 12. "Prices of livestock WOULD be higher and more in line with their environmental impacts, but we would have plenty of other food available and affordable," she said. "If all this squealing (sorry could not resist) about pretty minor changes to livestock production practices causes all this legal chaos, you can see how hard to do more is going to be."

Ultimately, especially with so much recent turnover on the Supreme Court, all bets on Prop 12's fate are off. "It is beyond tea leaf reading to guess how this case comes out," Marceau said. "The idea that one can accurately predict how these new justices will respond to a set of technical commerce clause issues would be the height of legal-prediction hubris."