

# The Biden Administration Flub: Proposition 12 Maneuver May Damage State-Based Clean Energy Initiatives

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From President Biden's first day in office, a core ambition of his administration has been to push the United States towards clean, renewable energy. Policies, plans, and laws abound: from the Build Back Better plan, to the Bipartisan Infrastructure Law, to authorizing the Defense Production Act to accelerate clean energy production, his administration seems – at least on the surface – to be charging forward towards a future of renewable, efficient, and emission-free energy.



SCOTUS | Photo by Animal Wellness Action

But what the Biden Administration doesn't appear to realize is that it may have undercut its ability to execute on that strategy by working with its Solicitor General to file an amicus brief on the side of the pork industry in the upcoming Supreme Court case *National Pork Producers Council v. Ross*.

*NPPC v. Ross* is a challenge from the pork industry over the constitutionality of Proposition 12, a voter-backed California state law that bans the in-state sale of pork from cruelly confined sows regardless of where the animals are raised. The measure, which also provides more space for veal calves and laying hens, has taken effect in stages, with all provisions set to go into effect as of January 2022. Voters approved the measure in November 2018 with nearly 63 percent of voters—more than 7.5 million Californians, and the majority of both Republican and Democrat voters—choosing the humane treatment of animals and safer food in the state.

The pork industry's theory is that a legal doctrine called the dormant Commerce Clause (DCC) does not allow states to enact laws that have a disproportionate economic impact on other states. Past Supreme Court cases have articulated a balancing test – the Pike test – by which

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judges attempt to weigh the “putative local benefits” of the state law in question versus the potential financial harms visited on other states when such laws are enacted. Another angle of the theory is that the DCC’s “extraterritoriality” doctrine prohibits state laws that effectively control out-of-state business practices.

In an earlier stage of the litigation, the Trump Administration submitted a brief on the side of the pork producers. But it was a shocker not only animal welfare advocates, but also environmental protection champions and clean energy backers, when the Biden Administration

refused to reverse Trump’s course and continued its support of the corporate pork industry – stubbornly going against the litany of voices from local family farmers and farming businesses, public health organizations, 15 states, worker safety organizations, veterinarians and animal welfare scientists, economists, top-tier legal scholars, state farmer associations, and even ethicists who believe Prop 12 was a proper exercise of state authority.

If a conservative Supreme Court strikes down Prop 12 as a sop to the pork industry – an industry dominated by only four major companies, including a Chinese-controlled entity, that control 70 percent of the very profitable pork production in the United States – it will represent a dramatic expanding the DCC beyond any other past application and significantly threaten the ability of states to protect their own residents.

As numerous law professors and legal academics from top law schools explained in a recent article, such an expansion of the DCC may very well endanger many of the clean energy programs and plans that the Biden Administration has spent the past couple years advancing, because they rely on state-level laws and policies. It is these state-level acts that a turbocharged dormant Commerce Clause could strike down in future proceedings should judges find that Prop 12 cannot stand because of its negligible impact on other state producers.

Neil Gorsuch, who has grappled with the very underpinnings of the DCC, has questioned whether judges should have a role in determining the rights of states to enact laws in areas where Congress has not chosen to regulate, like on farm animal welfare issues. In a recent case before the Supreme Court that struck down a Tennessee law related to alcohol sales because of its out-of-state impact, Gorsuch authored a dissent stating, “[t]he regulation of alcohol wasn’t left to the imagination of a committee of nine sitting in Washington, but to the judgment of the people themselves and their local elected representatives.”

For some of the justices, the Prop 12 case will undoubtedly hinge on the exaggerated doomsday economic forecast that the \$26-billion-a-year pork industry has described if the law were properly implemented in California. In a brief filed with the Court, the pork industry claims,

without any concise economic support or independent expert backing, that the “burdens on interstate commerce clearly exceed any putative local benefits of Proposition 12.” The Heritage Foundation, despite its longstanding position of the 10th Amendment as a vital source of power for the states, responded to Prop 12 with claims that “the law generates drastic shockwaves through the pork production and sales markets that force pig farmers across America to comply with California’s requirements.”

But agricultural and resource economists have done the economic analysis that the pork industry and the Heritage Foundation have seemingly sidestepped. In their own brief filed with the Court, these experts cite actual research and data—some of which was funded by the pork industry itself—that shows that “those producers that choose not to supply the California market will suffer at most only marginal economic harm” and that the “quantity of live hogs produced in North America will not significantly change.”

The economists’ findings are borne out by recent reports from pork suppliers across the country who are already preparing and, in many cases, already able to meet the demands of Prop 12-complaint pork for California consumers. A veterinarian with the Animal Care Program at the California Department of Food and Agriculture -- who spent the past year visiting an array of hog producers across the country, including some who contract with Hormel, Smithfield, JBS and Premium Iowa Pork – found that many producers are excited about the market opportunities created by Prop 12. In her July 2022 report she visited farms with crate-free and open-pen housing systems. Farmers and processors told her “that tracing pigs throughout the pig production cycle is relatively straightforward because farmers and processors have already been tracing product from sow farm to end-product for years” for economic reasons, like market advantages for premium pork. This means that these same mechanisms are easily implemented for Prop 12’s needs, along with more than 60 major food retailers that have publicly condemned gestation crates as inhumane.

If the six conservatives on the bench hold true to the states’ rights and judicial ‘restraint’ rhetoric that’s long been a core principle for them, they will ignore the Biden Administration’s counterproductive position and unanimously vote to uphold Proposition 12. The remaining liberal justices on the bench should easily see what this case is really about even if Biden did not: a handful of politically powerful pork producers—with the leading U.S. producer based in China and the second one based in Brazil—who simply don’t like the choice that the voters of California have made when it comes to the humane treatment of animals raised for food and are looking to subvert the democratic process for their own petty financial gain.

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Amicus Brief the Center for a Humane Economy, [et al in support of Prop 12 located here.](#)

Amicus Brief of Farm Animal [Veterinarians in support of Prop 12 located here.](#)

A list summarizing all amici briefs submitted in support of Prop 12 will be furnished upon request.

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