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Valerie J. Watnick

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# Proposition 12 and a New Paradigm for Federal Law: Toward more humane and Ethical Farm Animal Practices in California and the U.S.

“[In] the long run, our willingness to subject animals to unjustified suffering will be seen as a form of unconscionable barbarity-not the same as, but in some ways morally akin to, slavery and the mass extermination of human beings.”<sup>1</sup>

Valerie J. Watnick\*

## ABSTRACT

This paper explores California’s Proposition 12, a ballot measure designed to improve factory farmed animal welfare and marginally, the conditions for those who work on such farms. The Proposition bans cruelty in farm animal confinement within California and calls for specific space requirements. Proposition 12 also requires that animals raised outside the state and sold within the state comply with the more humane housing standards in the law. Based on a recent ruling upholding Proposition 12 by the U.S. Court of Appeals for the Ninth Circuit and the introduction of multiple other state laws banning the most inhumane practices in the meat, poultry, and egg laying industry, this paper makes the case that factory farming is on the verge of great change. The paper concludes that the time is also ripe for uniform federal legislation requiring humane housing for all farm animals in the U.S, and improved conditions for farm animals in life and death. Additionally, this paper suggests that government incentives prompting more humane animal agriculture could hasten a burgeoning corporate and consumer move in this direction.

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1. Cass R. Sunstein, *The Rights of Animals*, 70 UNIV. OF CHI. L. REV. 387, 401 (2003).

\* Valerie J. Watnick is a Professor and Chair of the Department of Law, Baruch College, Zicklin School of Business, City University of New York. She is a graduate of Cornell Law School. The author presented a version of this paper at the “Future of Food” Symposium in March 2022 at University of Missouri Law School, sponsored by the Business, Entrepreneurship, and Tax Law Journal. This paper updates and adapts portions of a paper previously published in the Boston Environmental Law Journal, Valerie J. Watnick, *The Business and Ethics of Laying Hens: California’s Groundbreaking Law Goes into Effect on Animal Confinement*, 43 BOS. ENV’T AFF. L. J. 45 (2016) [hereinafter Watnick, *The Business and Ethics of Laying Hens*] (see *infra* notes 40–44, 53–60, 63–70, 76–77). The author wishes to thank Zicklin School of Business graduate research assistant on this project, Jonathan Windsor, for his tireless work completed within a compressed time-period, as well as the editors on the Business, Entrepreneurship, and Tax Law Review.

## INTRODUCTION

The core of overcrowded, industrialized animal agriculture in the U.S. is suffering.<sup>2</sup> In the United States, most breeding pigs, egg-laying birds, cows, veal calves, and other animals raised for food are subject to extreme confinement and horrific living conditions.<sup>3</sup> These conditions are witnessed by thousands of farm workers daily.<sup>4</sup> Breeding pigs, for example, commonly live in gestation crates, metal enclosures so small they cannot turn around.<sup>5</sup> They often develop sores on their bodies from the constant friction and then are forced to suckle their young while still confined.<sup>6</sup> Veal calves, sentient, social, and gentle mammals,<sup>7</sup> live alone and are often tethered so they cannot move<sup>8</sup> and most egg-laying hens are crammed into battery cages that restrict them from ever fully opening their wings, or engaging in their natural behaviors, despite being highly intelligent beings.<sup>9</sup>

From a social and environmental view, the animals, farm workers, and surrounding communities withstand the worst effects of this misery-laden animal agriculture. While a full exploration of the effects of industrialized, overcrowded factory farming are too numerous for full inclusion in this article, they are both extensive and well-catalogued.<sup>10</sup> For the animals, these conditions often include physical mutilations without pain relief; freezing or stiflingly hot conditions on the way to slaughter without adequate water, rest, or food; and housing where waste is so ever-present that the animals have difficulty breathing.<sup>11</sup> Industrial animal farming operations also often include stressful and crowded human working conditions which result in physical and psychological harms to workers,<sup>12</sup> environmental effects on

2. Nicole E. Negowetti, *Establishing and Enforcing Animal Welfare Labeling Claims: Improving Transparency and Ensuring Accountability*, 14 J. ANIMAL & NAT'L RES. L. 131, 132 (calling the conditions under which millions of animals are raised and slaughtered in the U.S. appalling).

3. *Factory Farming: Misery for Animals*, PETA, <https://www.peta.org/issues/animals-used-for-food/factory-farming> (last visited Apr. 20, 2022).

4. See Jennifer Dillard, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL'Y 391 (2008).

5. Natasha Daly, *California Voted to Improve Pig Welfare. The Pork Industry is Facing a Reckoning*, NAT'L GEOGRAPHIC (Aug. 13, 2021), <https://www.nationalgeographic.com/animals/article/california-voted-to-improve-pig-welfare-the-pork-industry-is-facing-a-reckoning>.

6. Tom Philpott, *You Won't Believe What Pork Producers Do to Pregnant Pigs*, MOTHER JONES (Aug. 2013) <https://www.motherjones.com/environment/2013/06/pregnant-sows-gestation-crates-abuse>.

7. Lori Marino & Kristin Allen, *The Psychology of Cows*, ANIMAL BEHAVIOR AND COGNITION (2017), [https://www.animalbehaviorandcognition.org/uploads/journals/17/AB&C\\_2017\\_Vol4\(4\)\\_Marino\\_Allen.pdf](https://www.animalbehaviorandcognition.org/uploads/journals/17/AB&C_2017_Vol4(4)_Marino_Allen.pdf); Marc Bekoff, *Cows: Science Shows They're Bright and Emotional Individuals*, PSYCH. TODAY (Nov. 2, 2017), <https://www.psychologytoday.com/us/blog/animal-emotions/201711/cows-science-shows-theyre-bright-and-emotional-individuals>.

8. Maggie Jones, *The Barnyard Strategist*, N.Y. TIMES (Oct. 24, 2008), <https://www.nytimes.com/2008/10/26/magazine/26animal-t.html>.

9. *Cage-Free vs. Battery Cage Eggs*, HUMANE SOC. OF THE U.S. <https://www.humanesociety.org/resources/cage-free-vs-battery-cage-eggs> (last visited Apr. 20, 2022).

10. See *infra* notes 11–18 and accompanying text.

11. See Bruce Friedrich, *Ritual Slaughter, Federal Preemption, and Protection for Poultry: What Legislative History Tells Us About USDA Enforcement of the Humane Slaughter Act*, 24 ANIMAL L. 137, 141 (2018). See generally David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, OXFORD SCHOLARSHIP (Mar. 2012) (“It is not unfair to say that, as a practical matter, farm animals have no legal protection at all.”).

12. F.M. Mitloehner & M.S. Calvo, *Worker Health and Safety in Concentrated Animal Feeding Operations*, 14 J. OF AGRIC. SAFETY & HEALTH 163, (Apr. 2008) (noting physical and psychological effects

surrounding communities, and water pollution of the greater environment.<sup>13</sup> Importantly, industrialized farming also contributes immense amounts of greenhouse gases both in the operation of the farms, and from wastes produced by the animals themselves.<sup>14</sup> Some authors indeed contend that animal agriculture is the greatest contributor to greenhouse gases, even a greater overall contributor than the transportation sector.<sup>15</sup> Likewise, a United Nations Report on climate change, considered a gold standard in reporting on climate change, considers industrial, over-crowded animal agriculture to be at the very least, a major contributor to global climate change.<sup>16</sup> In addition to these climate effects, experts have concluded that animal agriculture contributes to devastating antibiotic resistance in humans.<sup>17</sup> Finally, other medical and scientific scholars have posited that eating animals likely contributes to increases in cancers, diabetes, and heart disease.<sup>18</sup>

In light of these negative effects, at least one scholar has likened the effect of industrialized animal agriculture to smoking and the opioid businesses, calling these industries inherently unsustainable with “negative social, environmental, and economic externalities [that] far exceed the benefits of the products that the industries provide.”<sup>19</sup> The argument advances that factory farming, and its costs to the environment, animals and human beings, is simply not worth the price to society.<sup>20</sup>

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on workers in CAFOs); Kelly K. Dineen, *Meat Processing Workers and the Covid-19 Pandemic: The Subrogation of People, Public Health, and Ethics to Profits and A Path Forward*, 14 ST. LOUIS U.J. HEALTH L. & POL’Y 7 (2020) (detailing the choices workers must make between health and a pay check and widespread disenfranchisement). See Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, NAT’L ASS’N OF LOCAL BOARDS OF HEALTH 12, [https://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf); Jessica Slade & Emma Alleyne, *The Psychological Impact of Slaughterhouse Employment: A Systematic Literature Review*, TRAUMA, VIOLENCE, & ABUSE (July 7, 2021), <https://journals.sagepub.com/doi/pdf/10.1177/15248380211030243>.

13. See e.g., Quirin Schiermeier, *Eat Less Meat: UN Climate-Change Report Calls for Change to Human Diet*, NATURE.COM, <https://www.nature.com/articles/d41586-019-02409-7> (last modified Aug. 12, 2019); *National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule*, 76 Fed. Reg. 65,431, 65,433 (Oct. 21, 2011) (showing that animals on factory farms produce three times the wastes of humans).

14. *Climate Change and Land*, IPCC, <https://www.ipcc.ch/srccl> (last visited Apr. 20, 2022) (“UN Report on Climate Change”); Tara Heinzen & Abel Russ, *Using Emerging Pollution Tracking Methods to Address the Downstream Impacts of Factory Farm Animal Welfare Abuse* 31 PACE ENV’T L. REV. 475, 488 (2014).

15. Robert Goodland & Jeff Anhang, *Livestock and Climate Change: What if the Key Actors in Climate Change are... Cows, Pigs, and Chickens?*, 22 PROQUEST BIOLOGY J. 10, 11 (Dec. 2009). See Aaron E. Carroll, *The Real Problem with Beef*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/upshot/beef-health-climate-impact.html>.

16. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 14.

17. UN, *Global Health Agencies Sound Alarm on Drug-Resistant Infections; New Recommendations to Reduce ‘Staggering Number’ of Future Deaths*, UN NEWS (Apr. 29, 2019), <https://news.un.org/en/story/2019/04/1037471>.

18. Rachel Tackman, *Humanity Has Beef With the Meat Industry: The Cultural Push to Change the Way Beef is Produced, Harvested, and Consumed Stemming From Adverse Effects of Beef on The Environment and Human Health*, 17 ANIMAL & NAT’L RES. L. REV. 151, 152 (July 2021). See A.M. Salter, *Impact of Consumption on Cardiovascular Disease, Diabetes and Cancer in Developed Countries*, 3 ANIMAL FRONTIERS 20, (Jan. 2013).

19. Randall Abate, *Anthropocene Accountability Litigation: Confronting Common Enemies to Promote a Just Transition*, 46 COLUM. J. ENV’T. L. 225, 228–29, 271–72, 276 (2021) (arguing for anthropocene accountability litigation against concentrated animal feeding operations (“CAFOs”) similar to that waged against the cigarette and opioid industries) (Professor Abate notes that this type of litigation is grounded in the two principles: the polluter pays and the precautionary principle).

20. *Id.* at 271–76.

Recognizing these effects and the terrible conditions of cruel and overcrowded animal confinement on industrialized farms, Californians overwhelmingly passed Proposition 12.<sup>21</sup> The new law went into effect on January 1, 2022.<sup>22</sup> The law and the corresponding “Animal Care Program,”<sup>23</sup> prohibits confinement in a “cruel manner.”<sup>24</sup> It also provides that all meat and eggs sold in California must be compliant with the law.<sup>25</sup> This paper explores California’s latest efforts to lead the way toward a better future for farm animals, and at least in part, farm workers who tend to the animals and the surrounding communities. The paper also explores the introduction of multiple additional state laws banning cruel housing practices in the meat, poultry, and egg laying industry.

Part I describes California’s Proposition 12 and other state laws designed to improve further the housing of farm animals. Part II describes existing federal legislation to protect animals, including those raised on farms, as well as those used in research and shows, and for comparison, touches on European and U.K. initiatives to improve the treatment of farm animals. Part III discusses and analyzes litigation related to California’s animal agriculture laws, concluding that the California law is likely to withstand further challenges. Part IV discusses recent attempts to pass federal legislation aimed at industrial farming. Finally, Part V outlines provisions for a model federal law and revised regulations to improve protections for all farm animals and to curtail the worst conditions still existent in most parts of the country.<sup>26</sup> Such a federal law will benefit the animals, the workers, and industry by allowing businesses to avoid a patchwork of anti-cruelty state laws set to take effect in the coming years. This part also discusses private actions designed to improve farm animal welfare and urges greater incentives for these behaviors.

## PART I: LEGISLATION TO PROTECT FARM ANIMALS

### A. California and other State Laws: California’s Proposition 12

California’s newest anti-cruelty legislation, the Prevention of Cruelty to Farm Animals Act, known as Proposition 12,<sup>27</sup> prohibits the “cruel treatment” of pigs, cows, chickens, ducks, veal calves, and egg laying birds from confinement that does not allow the farm animal to lie down, fully extend its limbs, stand up, or turn

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21. See *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTEDIA [https://ballotpedia.org/California\\_Proposition\\_12\\_Farm\\_Animal\\_Confinement\\_Initiative\\_\(2018\)#Support](https://ballotpedia.org/California_Proposition_12_Farm_Animal_Confinement_Initiative_(2018)#Support) (last visited Apr. 20, 2022) (noting the Humane Society of the United States fostered Proposition 12 with an organization called Prevent Cruelty California); Ashley Chang, *This is What Prop 12 Means For Animals*, THE HUMANE LEAGUE (Oct. 13, 2021), <https://thehumaneleague.org/article/prop-12>.

22. *Proposition 12 FAQs*, CDFA 1 (Mar. 5, 2021), [https://www.cdfa.ca.gov/AHFSS/pdfs/prop\\_12\\_faq.pdf](https://www.cdfa.ca.gov/AHFSS/pdfs/prop_12_faq.pdf). California is also notably the first state in the country to regulate methane from dairy farms, *April—Implementing California’s New Dairy Methane Reduction Efforts*, DAIRY CARES, <https://www.dairycares.com/dairymethanereduction> (last visited Sept. 28, 2022).

23. CDFA, *supra* note 22, at 1.

24. CAL. HEALTH & SAFETY CODE § 25990(b) (2022).

25. CDFA, *supra* note 22, at 1.

26. For example, the Humane Society website estimates that over 67% of egg laying hens are confined in battery cages that do not allow the hens to fully open their wings, *Cage-free vs. Battery-cage Eggs*, THE HUMANE SOCIETY OF THE U.S., <https://www.humanesociety.org/resources/cage-free-vs-battery-cage-eggs> (last visited Sept. 29, 2022).

27. *Animal Care Program*, CDFA, <https://www.cdfa.ca.gov/AHFSS/Prop12.html> (last visited Sept. 29, 2022).

around.<sup>28</sup> It also lays out specific space requirements for each type of animal.<sup>29</sup> The law aims to better protect the rights of farm animals and required more humane treatment as of January 1, 2022.<sup>30</sup>

California's prior anti-cruelty law, Proposition 2 (the Prevention of Farm Animal Cruelty Act passed by California voters in 2008), likewise banned the extreme confinement of pregnant pigs, calves raised for veal, and egg laying hens, but did not specifically enact square footage requirements.<sup>31</sup> Instead, it prevented any person from tethering or confining any "covered animal" for all or the majority of any day in a manner that prevented such animal from lying down, standing up, fully extending his or her limbs, or turning around freely.<sup>32</sup> A 2010 amendment to Proposition 2 also banned the sale of shelled eggs from hens raised in environments both within and outside of California that did not comply with Proposition 2's standards,<sup>33</sup> but critically missed other meat products from outside California. The new Prevention of Cruelty to Farm Animals Act, Proposition 12, expands on the anti-confinement provisions contained within Proposition 2, which went into effect on January 1, 2015, by setting defined space requirements and by clearly covering all meat as well as eggs sold in California.<sup>34</sup>

While Proposition 12 still contains a limited list of exemptions,<sup>35</sup> it now clearly bans the sale of pork, beef, duck, chicken, veal, and both shelled and liquid eggs in California from producers who do not comply with its standards, regardless of where the producer is located.<sup>36</sup> In this way, Proposition 12 may upend the worst practices associated with industrial caging in a broad swath of the U.S.<sup>37</sup> This extension of the law is critical in that currently, Californians buy, for example, 15 percent of all pork produced nationwide, but only produce a small fraction of this amount within the state.<sup>38</sup> In addition to these provisions, Proposition 12 charged the California Department of Food and Agriculture and the California Department of Public Health with enforcing the anti-cruelty law, whereas Proposition 2 had left such enforcement to local authorities.<sup>39</sup>

Following California's original lead regarding animal cruelty, in September 2009, Michigan also restricted the use of conventional battery cages for laying hens.<sup>40</sup> The Michigan law prohibits business owners from tethering or confining an animal in a manner that does not allow the animal to spread its wings, fully extend

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28. HEALTH & SAFETY § 25991(e)(1).

29. *Id.* §§ (e)(2)–(5).

30. *See infra* notes 34–39 and accompanying text.

31. CAL. HEALTH & SAFETY CODE § 25991(f) (West 2015).

32. *Id.* § 25990.

33. 2010 Cal Legis. Serv. Ch. 51 (A.B. 1437) (West).

34. CAL. HEALTH & SAFETY CODE § 25991(e) (2022).

35. *Id.* § 25992.

36. *Id.* §§ 25990(b)(1)–(4). *See also* Nat'l Pork Prod. Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022).

37. Joe Trotter, *Banning the Bacon: California Referendums Reshaping Agriculture Throughout the Nation*, ALEC (Dec. 21, 2021), <https://alec.org/article/banning-the-bacon-california-referendums-reshaping-agriculture-throughout-the-nation>.

38. *Id.*

39. CAL. HEALTH & SAFETY CODE § 25993; Sasha Khokha, *Who's Watching the Henhouse to Enforce California's New Law?*, KQED (Jan. 2, 2015), <https://www.kqed.org/news/10394188/whos-watching-the-henhouse-to-enforce-californias-new-egg-law>.

40. *See* JOEL L. GREENE & TADLOCK COWAN, TABLE EGG PRODUCTION AND HEN WELFARE: AGREEMENT AND LEGISLATIVE PROPOSALS 9 (2014), <http://www.fas.org/sgp/crs/misc/R42534.pdf>.

its limbs, or lie down.<sup>41</sup> The law further states that egg-laying hens may not be confined except in cage-free housing systems.<sup>42</sup> Notably, the law exempts gestating sows in the seven day period prior to expected birth and only prohibits the knowing sale of eggs, but not meat, from outside the state of Michigan, if the hens were confined in a manner inconsistent with the Michigan law.<sup>43</sup> The Michigan law finally took full effect on January 1, 2022 after a long phase in period.<sup>44</sup>

In addition to Michigan and California, multiple other states have recently passed legislation aimed at regulating inhumane practices related to animal confinement on factory farms. Legislators and voters have come to understand that prices may increase if conditions are improved, but the cheap price point of meat and eggs comes at a cost to animals, workers, and the environment.<sup>45</sup>

With regard to laying hens, Nevada passed legislation in 2021 phasing out battery cages by 2024 and banning the in-state sale of products from battery cage systems by July 2022.<sup>46</sup> Utah similarly passed legislation in 2021 phasing out battery cages by 2025,<sup>47</sup> and likewise, Washington and Oregon passed similar legislation related to laying hens.<sup>48</sup> Washington's law notably provides that licensed entities providing eggs or egg products for intrastate commerce must also comply with the United Egg Producers' ("UEP") animal husbandry guidelines ("UEP Guidelines"), and by 2026, must comply with American Humane Association protocols for enriched colony housing.<sup>49</sup> Enriched colony housing allows hens more room and does

41. MICH. COMP. LAWS § 287.746(2)(a) (2020).

42. *Id.* § 287.746(2)(b).

43. *Id.* § 287.746(3)(f)-(4).

44. 2019 Mich. Legis. Serv. 132 (S.B. 174) (West) ("The provisions of this section do not apply to egg-laying hens and gestating sows until 10 years after the enactment date of the amendatory act that added this section.").

45. Colorado, passed its anti-confinement law as a compromise to head off a stricter ballot initiative that would have been put to voters, Jennifer Brown, *All Colorado Eggs Must be Cage-free by 2025 Under Law Passed to Head Off Stricter Ballot Measure*, THE CO. SUN (July 1, 2020, 4:00 AM), <https://coloradosun.com/2020/07/01/colorado-cage-free-egg-law>. Massachusetts passed initial 2016 legislation banning battery cages, gestation crates and other cruel confinement, *Massachusetts Minimum Size Requirements for Farm Animal Containment, Question 3 (2016)*, BALLOTEDIA, [https://ballotpedia.org/Massachusetts\\_Minimum\\_Size\\_Requirements\\_for\\_Farm\\_Animal\\_Containment\\_Question\\_3\\_\(2016\)](https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment_Question_3_(2016)) (last visited Sept. 29, 2022). However, fears of spiking eggs prices from egg shortages caused Massachusetts legislators to amend the law in 2021 before it went into effective to make it less stringent, Jasper Goodman, *Warning of a Coming 'Egg-mageddon,' Mass. Lawmakers Move to Alter Animal Welfare Ballot Measure Passed in 2016*, BOS. GLOBE (June 25, 2021, 6:26 PM), <https://www.bostonglobe.com/2021/06/25/metro/warning-coming-egg-mageddon-lawmakers-move-alter-animal-welfare-ballot-measure-passed-by-huge-majority-voters>. Information on Rhode Island legislation is sparse but the recently passed legislation by Rhode Island to restrict factory farming appears to be a compromise between various animal rights organizations and commercial producers in state, Tim Faulkner, *Animal Rights Groups Question R.I.'s Battery-Cage Bill*, ECORI NEWS (July 9, 2018), <https://www.ecori.org/government/2018/7/9/animal-groups-question-battery-cage-ban>. Arizona's House did pass a bill banning battery cages at the prodding of the egg industry, Elizabeth Whitman, *Arizona House Passes Industry-Backed Bill Mandating Cage-Free Eggs*, PHX. NEW TIMES (Mar. 12, 2020, 1:48 PM), <https://www.phoenixnewtimes.com/news/cage-free-eggs-hens-conditions-bill-passed-arizona-legislature-hickmans-11456474>. Arizona does have legislation prohibiting veal and gestation crates enacted following a 2006 ballot initiative, *Arizona Human Farms, Proposition 204 (2006)*, BALLOTEDIA, [https://ballotpedia.org/Arizona\\_Humane\\_Farms\\_Proposition\\_204\\_\(2006\)](https://ballotpedia.org/Arizona_Humane_Farms_Proposition_204_(2006)) (last visited Sept. 29, 2022).

46. NEV. REV. STAT. § 583.237 2 (2021).

47. UTAH CODE ANN. § 4-4a-103 (West 2021).

48. OR. REV. STAT. § 632.847 (2019); WASH. REV. CODE § 69.25.110 (2019).

49. AM. VETERINARY MED. ASS'N, CONFINEMENT REARING—STATE BALLOT INITIATIVES, LEGISLATION AND COURT ACTIVITY, (2013) [hereinafter CONFINEMENT REARING],

away with battery cages.<sup>50</sup> Oregon’s law similarly requires laying hen cages to meet UEP Guidelines, with a progressive implementation of enriched colony facility standards through 2024.<sup>51</sup> Although a move in the right direction, many animal rights groups in Oregon felt that these laws did not go far enough, especially with regard to the long time to phase in the new colony housing standards.<sup>52</sup>

In addition to these standards regarding hens, Florida’s Constitution prohibits the inhumane caging of pigs during pregnancy,<sup>53</sup> Arizona limits confinement of pregnant sows and calves raised for veal in 2006,<sup>54</sup> and Oregon, Colorado, Maine, and Rhode Island have existing legislation limiting animal confinement.<sup>55</sup> All of these state laws require more room for sows and/or veal calves.<sup>56</sup> In addition, Ohio and Kentucky have set up “Livestock Care Standards” Boards or Commissions to establish and maintain standards for the care and well-being of on-farm livestock.<sup>57</sup> While Kentucky standards called for the phasing out of veal crates by 2018,<sup>58</sup> they do not address battery cages for laying hens or gestation crates for sows.<sup>59</sup> Ohio standards called for the end of veal calf crates by 2017 and the phase out of gestation stalls for sows by 2025.<sup>60</sup>

While these are positive developments in state law, the intricate and myriad differences between states may make compliance difficult and costly. Additionally, the vast majority of states have not followed suit by passing anti-cruelty farm animal law, and federal legislation provides abysmally little protection for farm animals. The end result is that in the U.S. today, the majority of farm animals and farm

<https://www.avma.org/Advocacy/StateAndLocal/Pages/sr-confinement-rearing.aspx> [<https://perma.cc/C8HP-TYCJ>]. Washington’s law, for example, requires eggs and egg products to be produced by housing facilities approved under the American Humane Association facility system plan for enriched colony housing, *id.* Full compliance with these standards is required by January 1, 2026, *id.* All new facilities built after January 1, 2012, must also be constructed in accordance with these standards, *id.* In addition, an intermediate standard exists for eggs produced after January 1, 2017, WASH. REV. CODE § 69.25.065. These intermediate standards require 116.3 square inches per hen and access to areas for nesting, scratching, and perching, *id.* §§ 69.25.065, 69.25.107. Colony housed birds are not free roaming, but have access to nesting and perching areas, *see American Humane Approves Enriched Colony Hen Housing as Humane Alternative to Conventional Cages*, AM. HUMANE ASS’N (June 18, 2010), <http://www.americanhumane.org/animals/animal-welfare-news/american-humane-approves-enriched-colony-hen-housing-as-humane-alternative-to-conventional-cages.html> [<http://perma.cc/5648-MZJB>] (colony housing provides larger spaces that allow for movement and some customary behaviors but no access to the outdoors).

50. Daly, *supra* note 5.

51. OR. REV. STAT. §§ 632.845, 632.847 (2019).

52. *See id.*

53. FLA. CONST. art. X, § 21.

54. ARIZ. REV. STAT. ANN. § 13.2910.07 (2006).

55. COLO. REV. STAT. §§ 35-50.5-101 to -103 (2015); ME. STAT. tit. 7, § 4020, tit. 17, § 1039 (2015); OR. REV. STAT. § 600.150 (2013); 4 R.I. GEN. LAWS §§ 4-1-1 to -6.

56. *Compare* OR. REV. STAT. § 600.150, *with* COLO. REV. STAT. §§ 35-50.5-101 to -103, ME. STAT. tit. 7, § 4020, tit. 17, § 1039, and 4 R.I. GEN. LAWS §§ 4-1-1 to -6.

57. OHIO REV. CODE ANN. § 904.01–.09 (West 2015); KY. REV. STAT. ANN. § 257.192 (West 2015). *See generally* Lindsay Vick, *Comment, Confined to a Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation*, 18 ANIMAL L. 151 (2011) (describing the state of Ohio’s factory farm animal welfare laws).

58. Janet Patton, *Agricultural Board Approves Livestock Care Standards Despite Objections*, LEXINGTON HERALD-LEADER (Mar. 27, 2013) [<http://perma.cc/2UPN-HV8K>] (original hyperlink no longer active).

59. *Id.*

60. ELIZABETH R. RUMLEY, LEGAL ISSUES IN ANIMAL AGRICULTURE: REGULATING LIVING SPACE 12 (2011), <http://foodanimalwellbeing.uark.edu/SympPDFs/Confinement%20PPT%20-%20E%20Rumley.pdf> [<http://perma.cc/LF6U-ETPC>].



workers who must witness and tend to the animals suffer overcrowded, often inhumane,<sup>61</sup> factory farms every day.<sup>62</sup>

## PART II. EXISTING AND PROPOSED U.S. FEDERAL LAWS RELATED TO ANIMAL AGRICULTURE AND CONFINEMENT

### A. *The Federal Organic Foods Production Act*

The Organic Foods Production Act of 1990 (the “OFPA”) and corresponding regulations govern organic food production in the United States.<sup>63</sup> Under the OFPA, “organic food” is produced “by farmers who emphasize the use of renewable resources and the conservation of soil and water to enhance environmental quality for future generations.”<sup>64</sup> Overall, the OFPA calls for organic farmers to raise animals in conditions that “allow for exercise, freedom of movement, and reduction of stress appropriate to the species” and that accommodate the “health and natural behavior” of the animals.<sup>65</sup> Such conditions generally call for access to the outdoors.<sup>66</sup> In addition, organic farmers must use one hundred percent organic feed, and are not permitted to give hormones or antibiotics to their animals, except in cases of medical necessity.<sup>67</sup>

61. See *supra* notes 5–11 and accompany text.

62. There were approximately 8.7 billion animals raised annually on CAFOs in 2019, Patricia M. Gilbert, *From Hogs to HABs: Impacts of Industrial Farming in the US on Nitrogen and Phosphorus and Greenhouse Gas Pollution*, 150 BIOGEOCHEMISTRY 139, 139 (2020). Additionally, for example, statistics show the vast majority of pigs, for example, are raised on pigs in the U.S. are raised on factory farms with Iowa being the top pig producing state. For statistics on the beef cattle industry, see generally USDA, CATTLE INDUSTRY (2012), [https://www.nass.usda.gov/Publications/Highlights/2015/Cattle\\_Highlights.pdf](https://www.nass.usda.gov/Publications/Highlights/2015/Cattle_Highlights.pdf) (Operations with 1,000 or more head of cattle on feed accounted for 75 percent of the beef inventory in 2007 and 77 percent in 2012.) and (9.5 million dairy cows in 2017) and hog industry (64 million hogs in 2014), see *Dairy Cattle and Milk Production*, U.S. DEP’T AGRIC. (2017), [https://www.nass.usda.gov/Publications/Highlights/2019/2017Census\\_DairyCattle\\_and\\_Milk\\_Production.pdf](https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_DairyCattle_and_Milk_Production.pdf); *U.S. Hog Industry, 1994-2014*, U.S. DEP’T AGRIC. (Mar. 2016), [https://www.nass.usda.gov/Publications/Highlights/2016/HogIndustryHighlights\\_No2016-1.pdf](https://www.nass.usda.gov/Publications/Highlights/2016/HogIndustryHighlights_No2016-1.pdf).

63. 7 U.S.C. §§ 6501–24; 7 C.F.R. § 205 (2022) (regulation authorized by 7 U.S.C. §§ 6501–24); Valerie J. Watnick, *The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market*, 32 UCLA J. ENV’T L. & POL’Y 40, 40–79 (2014) (providing a detailed discussion of the Organic Foods Production Act and corresponding regulations).

64. Mary V. Gold, *Organic Production/Organic Food: Information Access Tools*, USDA (June 2007), <https://www.nal.usda.gov/legacy/afsic/organic-productionorganic-food-information-access-tools> (last modified Oct. 2021). See also 7 C.F.R. § 205.2 (2022) (defining organic, organic management, organic matter, organic production, and organic system plan). The OFPA called for the Secretary of the USDA to administer the National Organic Program (“NOP”) and to form the National Organic Standards Board, 7 U.S.C. §§ 6503(a), 6518(a). Under the NOP, the Agricultural Marketing Service oversees national standards for the production and handling of organically produced agricultural products, see *National Organic Program*, U.S. DEP’T AGRIC. (Oct. 2, 2015, 6:41 PM, <http://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> [<http://perma.cc/67ML-HQQ4>]). Those producing organic food are required to submit an organic plan that must be approved by a third-party certifying agent and if one exists, by the state’s organic program, 7 U.S.C. § 6513(a).

65. 7 C.F.R. §§ 205.238(a)(4), .239(a) (2022).

66. *Id.* § 205.239(a)(1).

67. 7 U.S.C. § 6509(c). Livestock that is to be labeled and sold as “USDA Organic” must also be under organic management from the last third of gestation, with the exception of poultry, which must be under organic management from the first days of life, *Id.* § 6509(b); Barbara Robinson, *Value Through*

Though these provisions place a greater emphasis on the welfare and treatment of animals than typical industrial animal practices, organic regulations allow for interpretation that may not always result in humane animal care.<sup>68</sup> For example, while federal organic regulations require that animals be given access to the outdoors, they also allow confinement due to “inclement weather” or “to ensure soil or water quality.”<sup>69</sup> Such provisions might be used to reduce or eliminate outdoor grazing for organic cattle.

Additionally, the regulations under OFPA still allow physical mutilation of farm animals. For example, physical mutilation such as tail docking, castration, beak trimming, and ear notching are all permitted on organic livestock.<sup>70</sup> In 2017, the USDA had issued new regulations for organic farm animals as to treatment, housing, transportation and slaughter.<sup>71</sup> These rules had been developed in consultation with animal rights groups over a number of years.<sup>72</sup> The rules would have shored up the definition of organic by clarifying rules about: outdoor space, including provisions for daily outdoor access; physical alterations such as beak trimming and tail docking in pigs; transportation; and slaughter.<sup>73</sup> Additionally, the proposed rules specified requirements for air quality, light, and minimum space.<sup>74</sup> However, in the context of the Trump Administration’s regulatory freeze, the Agency withdrew these proposed rules.<sup>75</sup>

On balance, the existing federal organic regulations do not guarantee better farm animal treatment but do make clear that organic farm animals must have routine access to the outdoors, and farmers must accommodate the health and “natural

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*Verification: USDA National Organic Program*, U.S. DEP’T OF AGRIC., <http://www.organiccotton.org/oc/wGlobal/scripts/wDownloadDocument.php?path=/oc/Cotton-general/Cotton-initiatives/pdf/getfile.pdf&count=1> (last visited Oct. 1, 2022); *Choose Organic to Avoid Foods Produced with Antibiotics*, ORGANIC IT’S WORTH IT, <http://www.organicitsworthit.org/learn/choose-organic-avoid-foods-produced-antibiotics> [<http://perma.cc/B6HZ-HU4U>] (last visited Oct. 1, 2022).

68. See Aurora Paulsen, *Welfare Improvement for Organic Animals: Closing Loopholes in the Regulation of Organic Animal Husbandry*, 17 ANIMAL L. 337, 343–67 (2011).

69. 7 C.F.R. § 205.239(b)(1)–(2) (2022); Although the rules provide that pasture must exist for at least 120 days per year, this may not be continuous, and pasture can be denied under certain conditions, *id.* § 205.239(b), (c); Lee Rinehart & Ann Baier, *Pasture for Organic Ruminant Livestock: Understanding the National Organic Program (NOP) Pasture Rule*, U.S. DEP’T OF AGRIC. 1 (May 2011) <https://www.ams.usda.gov/sites/default/files/media/NOP-UnderstandingOrganicPastureRule.pdf>. See generally Paulsen, *supra* note 68 (examining the vague requirements of organic food regulations and the ways in which they can be made more specific to ensure that organic animals are able to partake in natural behaviors).

70. See *Guide for Organic Livestock Producers*, U.S. DEP’T AGRIC. 53 (Nov. 2012), <https://www.ams.usda.gov/sites/default/files/media/GuideForOrganicLivestockProducers.pdf>; Shiela Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 TEMP. J. SCI. TECH. & ENV’T 51, 52–57, 73 (2011).

71. National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 7042, 7042 (proposed Jan. 19, 2017) (to be codified at 7 C.F.R. pt. 205).

72. *The Battle to Ensure Protections for USDA Organic Animals*, ASPCA (June 4, 2020), <https://www.aspc.org/news/battle-ensure-protections-usda-organic-animals>.

73. National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. at 7042.

74. *Id.* at 7045–46.

75. National Organic Program: Organic Livestock and Poultry Practices, 83 Fed. Reg. 10775, 10775 (final rule; withdrawal Mar. 13, 2018); AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *supra* note 72.

behavior” of the animals.<sup>76</sup> Thus, if enforced and followed in spirit, organic standards could eliminate the most oppressive living conditions for farm animals.<sup>77</sup>

### *B. State Anti-Cruelty Criminal Laws and Other Federal Laws Related to Industrialized Animal Farming*

Although all fifty states have some sort of anti-cruelty laws, it is fair to say that ordinary farm animals have “virtually” no protection.<sup>78</sup> Wolfson and Sullivan note in their work that the farming industry has so controlled the application of these anti-cruelty laws as to render them meaningless.<sup>79</sup> The typical application of the law is that actions taken as part of customary and usual farming cannot be considered cruelty in the majority of states.<sup>80</sup> Thus, if castration without anesthesia or tail docking in pigs is considered usual and customary, it cannot also be considered “cruel.” In other words, these laws are bit like putting the “wolf in charge of the sheep”: the potential violators are the ones responsible for defining what is acceptable in practice. Additionally, because industrial animal farms are private lands, investigation of any reported cruelty, even if it were palatable to local authorities, is difficult and firsthand accounts are thus rare.<sup>81</sup>

Likewise, remaining major areas of federal law regarding animals also do not adequately protect farm animals in life or in slaughter.<sup>82</sup> The Animal Welfare Act covers only animals used for research, shows, or those sold as pets.<sup>83</sup> Also limited in scope, the federal Humane Slaughter Act covers cattle, calves, horses, mules, sheep, swine, and other livestock, but not chickens.<sup>84</sup> Additionally, the so called “28

76. See *supra* notes 65–66 and accompanying text.

77. See *supra* notes 65–66 and accompanying text. *But cf.* Rodriguez, *supra* note 70, at 52–79 (arguing that from a moral and legal standpoint, consumers should avoid eating most eggs).

78. See Friedrich, *supra* note 11, at 14. See generally Wolfson & Sullivan, *supra* note 11, at 205–19 (noting that customary farming practices cannot be considered cruelty and that farms are on private lands).

79. Wolfson & Sullivan, *supra* note 11, at 5–8, n. 20.

80. *Id.*

81. See *id.*

82. See Carrie A. Scufari, *The Tipping Point: Can Walmart’s New Animal Welfare Policy End Factory Farming?*, 6 J. AGRIC., FOOD SYS. AND CMTY. DEV. 103, 105 (2016); Lucinda Valero & Will Rhee, *When Fox and Hound Legislate the Hen House: A Nixon-in-China Moment for National Egg-Laying Standards?*, 65 ME. L. VER. 651 (2013) (providing background on the collaborative efforts of animal rights activists and the egg lobby). Beef cattle live outside and get to stand up, but are often surrounded by their own feces, see generally Andrew Freeman & Cristina Kharbertyan, *18 ‘Food, Inc.’ Facts Everyone Should Know*, TAKEPART (Oct. 24, 2012), <http://www.takepart.com/photos/food-inc-facts/impact-food-inc-lives> [<http://perma.cc/2TYZ-N673>] (listing disturbing facts about agricultural production). Also, beef cattle are fed corn feed, which does not generally agree with their digestive systems allowing E. coli strains to prosper in their waste potentially contaminating their meat, *id.* This type of feed can also contribute to painful abscesses for cows, Negowetti, *supra* note 2, at 132.

83. 7 U.S.C. § 2132(g). Under the Animal Welfare Act, businesses and others that use the animals covered by the law for research or exhibition purposes, or who hold them for sale as pets, must be licensed or registered, and they must adhere to minimum standards of care, see *id.* §§ 2131–59. The Congressional statement of policy related to the Animal Welfare Act indicates: “The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.” *Id.* § 2131.

84. *Id.* § 1902.

Hour Rule,”<sup>85</sup> calling for rest and food and water on long transports, remains largely unenforced and does not apply to poultry.<sup>86</sup>

Particularly, the 28 Hour Rule also contains major exemptions. For example, confinement of animals during transport without food, water, or rest may be extended where a written request by the owner is made.<sup>87</sup> More so, the law allows that animals be confined in excess of 28 Hours if the animals cannot be unloaded safely in unanticipated or accidental situations.<sup>88</sup> Finally, the 28 hour period is inapplicable where the actual transport vehicle itself allows for rest, food and water.<sup>89</sup> In the main, the 28 Hour Rule lacks teeth as it has never had fully drafted supporting regulations.<sup>90</sup> Notably, none of the agencies that might enforce the 28 Hour Rule, the Department of Justice, Department of Transportation, or the USDA have promulgated comprehensive rules to enforce the statute,<sup>91</sup> and fines for non-compliance in the statute itself only range from \$100 to \$500 per violation.<sup>92</sup> While the USDA adopted a one page statement of policy that has been codified, the statement has not significantly been amended since 1963.<sup>93</sup> Moreover, the statement itself may actually not even comport with the 28 Hour Rule as it provides for feeding times of not less than one hour and rest of not less than two hours, while the statute seems to call for a minimum of five hours of rest.<sup>94</sup>

The federal Humane Slaughter Act similarly does not do nearly enough to protect farm animals from suffering. The Act calls for the humane slaughter of—but does not require the humane treatment of—cattle, calves, horses, mules, sheep, swine, and “other livestock”.<sup>95</sup> Regulations define “other livestock” to include goats

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85. 49 U.S.C. § 80502(2).

86. See Bruce Freidrich, *Still in the Jungle; Poultry Slaughter and the USDA*, 23 N.Y.U. ENV'T L. J. 245, 249–50 (2015) (detailing why the USDA must act to make humane slaughter of chickens a requirement). The only federal law covering hens, albeit tangentially, is the Egg Products Inspection Act, which focuses on the quality of the eggs produced and has nothing to do with the humane treatment of the actual hens, see 21 U.S.C. §§ 1031–56. Similarly, The Federal Meat Inspection Act (FMIA) of 1906 regulates the production of meat and meat products from cattle, sheep, pigs, goats, and horses and is primarily concerned with how slaughterhouses are inspected and how meat is labeled for sale, *id.* §§ 601–95. The FMIA includes the Humane Slaughter Act within it. The Poultry Products Inspection Act is designed to make sure that poultry shipped across state lines is not adulterated, *id.* §§ 451–2. It is not concerned with the conditions under which the animals are raised, *id.*

87. 49 U.S.C. § 80502(a)(2)(B).

88. 49 U.S.C. § 80502(a)(2)(A).

89. 49 U.S.C. § 80502(c).

90. See generally 9 C.F.R. §§ 89.1–.5 (2022) (an ongoing controversy has existed for example over whether the 28 Hour Rule applies to trucking of animals. The US Department of Agriculture has stated the Rule does not apply to trucking); Tuberculosis, Brucellosis, and Paratuberculosis in Cattle and Bison; Identification Requirements, 60 Fed. Reg. 48362, 48365 (proposed Sept. 19, 1995) (to be codified at 9 C.F.R. pt. 50, 51, 77, 78, and 80) (however, the USDA section exempts air and water transport, but not trucking); *Twenty-Eight Hour Law*, USDA, <https://www.nal.usda.gov/animal-health-and-welfare/twenty-eight-hour-law> (additionally, the USDA website addressing the 28 Hour Law, states under FAQ regarding exceptions to the 28 Hour Law only that carriers by sea and water are exempted but makes no mention of road transportation).

91. *A Review: The Twenty-Eight Hour Law and Its Enforcement*, ANIMAL WELFARE INST., 1 (Apr. 2020), <https://awionline.org/sites/default/files/uploads/documents/20TwentyEightHourLawReport.pdf>.

92. 49 U.S.C. § 80502(d).

93. See generally 9 C.F.R. §§ 89.1–.5.

94. 49 U.S.C. § 80502(b). See ANIMAL WELFARE INST., *supra* note 91, at 2.

95. See generally 7 U.S.C. §§ 1901–1907. “Other livestock” under the Humane Slaughter Act has been interpreted not to include poultry, see 9 C.F.R. §§ 313.15(5), 313.16 (2015); Watnick, *The Business and Ethics of Laying Hens*, *supra* note \*, at 55, n. 93.

and “other equines,” but not poultry.<sup>96</sup> While the USDA Secretary of Agriculture could choose to include poultry, the Secretary has not done so.<sup>97</sup> This omission is a major oversight in that one million chickens are slaughtered every hour in the U.S. under often abysmal conditions,<sup>98</sup> and poultry makes up 98 percent of all animals slaughtered in the U.S.<sup>99</sup>

The Humane Slaughter Act is further weakened by inconsistent implementation. While the Act requires that all animals within the Act be made insensible to pain before slaughter, and “before they are shackled, hoisted, thrown, cast, or cut,” this does not always happen in practice.<sup>100</sup> Many times, “stunning” is unsuccessful, and there are reported instances of conscious animals being cut and dismembered while in pain and alive.<sup>101</sup> Additionally, new regulations allow plant inspections by in-house inspectors rather than by USDA inspectors,<sup>102</sup> undermining the effectiveness of such oversight.

To make mistakes, failed stunning, and more misery for the humans and animals involved even more likely, a USDA rule change in 2019 also allowed faster processing times for chickens and turkeys<sup>103</sup> and unlimited line processing speeds for hogs.<sup>104</sup> Thus, existing rules had already allowed fast meat-processing or killing at speeds of 18 animals a minute or over 1000 an hour,<sup>105</sup> and the new rules allowed

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96. See 9 C.F.R. §§ 313.5, .9, .16 (2022); 21 U.S.C. §§ 1031–56. See also *Levine v. Connor*, 540 F. Supp. 2d 1113, 1120 (N.D. Cal. 2008), *vacated sub nom. Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009) (holding that Human Slaughter Act did not include poultry).

97. See Friedrich, *supra* note 86, at 259 (detailing why the USDA must act to make humane slaughter of chickens a requirement).

98. *At Slaughter*, ANIMAL WELFARE INST., <https://awionline.org/content/farm-animals-at-slaughter> (last visited Apr. 2022). See generally Friedrich, *supra* note 86, at 250 (additionally, 14,000 pigs and 4,000 cows are slaughtered every hour in the U.S. 156 million animals are slaughtered each year in the U.S.).

99. Friedrich, *supra* note 86, at 249.

100. 9 C.F.R. § 313.2(f) (2022). See Stephanie Storm, *Animal Rights Group Says Video Shows Abuse of Sheep*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/dining/sheep-abuse-video.html> (video of sheep slaughtering ignites a dispute: what rights group says is abusive, processor argues is accepted practice).

101. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-247, HUMANE METHODS OF SLAUGHTER ACT: USDA HAS ADDRESSED SOME PROBLEMS BUT STILL FACES ENFORCEMENT CHALLENGES 4–6 (2004). See also TRACYE L. MCQUIRTER, *BY ANY GREENS NECESSARY: A REVOLUTIONARY GUIDE FOR BLACK WOMEN WHO WANT TO EAT GREAT, GET HEALTHY, LOSE WEIGHT, AND LOOK PHAT* 35 (Lawrence Hill Books 2010) (noting that slaughterhouse employees report that animals are frequently not even rendered unconscious before they are slaughtered, placed upside down in scalding water, or left to bleed out and suffer butchering alive); Amanda Waxman, *6 Cruel Ways That Pigs Are Abused on Factory Farms*, THE HUMANE LEAGUE (Nov. 09, 2020), <https://thehumaneleague.org/article/factory-farmed-pigs>.

102. See Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 52300 (Proposed Oct. 1, 2019) (to be codified as 9 C.F.R. pt. 301, 309, and 302); Kimberly Kindy, *USDA to Shift Some Inspector Tasks to Pork Plant Workers—in Everything but Name*, WASH. POST (May 24, 2019), [https://www.washingtonpost.com/national/usda-to-shift-some-inspector-tasks-to-pork-plant-workers--in-everything-but-name/2019/05/23/9808cc50-66af-11e9-82ba-fcfeff232e8f\\_story.html](https://www.washingtonpost.com/national/usda-to-shift-some-inspector-tasks-to-pork-plant-workers--in-everything-but-name/2019/05/23/9808cc50-66af-11e9-82ba-fcfeff232e8f_story.html).

103. 9 C.F.R. §§ 381.69(a)–(b) (2021); *USDA Increases Line Speeds, Endangering Poultry Processing Plant Workers*, UNION OF CONCERNED SCIENTISTS (Jan. 9, 2019), <https://www.ucsusa.org/resources/attacks-on-science/usda-increases-line-speeds-endangering-poultry-processing-plant>.

104. See Modernization of Swine Slaughter Inspection, 84 Fed. Reg. at 52300.

105. Previous hog lines speeds had been 1,106 an hour. See David Pitt, *Pork Group Asks USDA to Support Faster Slaughterhouse Speeds*, ABC NEWS (May 25, 2021), <https://abcnews.go.com/Health/wireStory/pork-group-asks-usda-support-faster-slaughterhouse-speeds-77897261>.

plants to kill pigs at any speed they chose.<sup>106</sup> Objecting to these speeds, the United Food and Commercial Workers International Union sued the USDA.<sup>107</sup> The Union urged that these increased speeds resulted in greater production but more injuries for workers.<sup>108</sup> On March 31, 2021, in response to the Union’s challenges, a federal district judge in Minnesota stayed the 2019 hogs rules, citing worker concerns about operating at increasingly fast speeds using sharp knives and scissors.<sup>109</sup> The Court found that the Federal Safety and Inspection Service of the USDA had acted arbitrarily and capriciously in eliminating hog line speeds.<sup>110</sup>

In addition to these attempts by industry to speed up line-processing times through rule changes, in the past few years, legislators have proposed several bills in Congress to weaken further the overall welfare protection of animals on factory farms. The so-called King Amendment appears to have been an attempted federal end-run around any more rigorous state-based health and safety laws like California’s Proposition 2 and others at the time.<sup>111</sup> The King Amendment would have

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106. See Modernization of Swine Slaughter Inspection, 84 Fed. Reg. at 52300 (under the Trump Administration, line speeds for swine were totally eliminated in 2019); Michelle Kretzer, *Pig Slaughter Gets Even More Cruel: USDA Cuts Speed Limits, Inspections*, PETA (Sept. 18, 2019), [https://www.peta.org/blog/usda-removes-pig-slaughter-speed-limits-adds-cruelty/?utm\\_source=PETA::Google&utm\\_medium=Ad&utm\\_campaign=1020::veg::PETA::Google::S-Vegan-Grant:::searchad&gclid=EAlaIQob-ChMI2v\\_d9t2a9AIVV8vIChIcowQLEAMYAyAAEgIjX\\_D\\_BwE](https://www.peta.org/blog/usda-removes-pig-slaughter-speed-limits-adds-cruelty/?utm_source=PETA::Google&utm_medium=Ad&utm_campaign=1020::veg::PETA::Google::S-Vegan-Grant:::searchad&gclid=EAlaIQob-ChMI2v_d9t2a9AIVV8vIChIcowQLEAMYAyAAEgIjX_D_BwE). See Keith B. Belton & John D. Graham, *Deregulation Under Trump*, REGUL., 14, 18 (2020) (for discussion of widespread regulation in favor of business); Additionally, the Food Safety Inspection allowed increased line speeds for chickens to over the 140 per minute and 55 birds per minute for turkeys, 9 C.F.R. §§ 381.69(a)–(b); Dineen, *supra* note 12, at 18–19 (the Service did this by granting individual requests to exceed the limits under existing regulatory authority); Federal rules allowed these individual requests, Petition to Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System; Criteria for Consideration of Waiver Requests for Young Chicken Establishments to Operate at Line Speeds of Up to 175 Birds per Minute, 83 Fed. Reg. 49048, 49050–51 (Sept. 28, 2018). This case-by-case determination belies the fact that the Service had set existing poultry line speeds in 2014 only after careful study. See Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566, 49566 (Aug. 21, 2014) (to be codified at 9 C.F.R. pts. 381, 500).

107. United Food and Com. Workers Union, Loc. No. 663 v. U.S. Dep’t of Agric., 532 F. Supp. 3d 741, 748–49 (D. Minn. 2021) (union workers described the perils of increased line speeds (“For example, Chiedo Henry works on the evisceration line at the JBS plant in Ottumwa, Iowa and uses sharp scissors to remove the pancreases of hogs. Decl. of Chiedo Henry (“Henry Decl.”) 4. Demarcus Sykes guts hogs at the Tyson plant in Waterloo, Iowa and uses “sharp knives to remove viscera while hog carcasses pass by on a moving, mechanized line.”); *Id.* at 755).

108. *UFCW Statement on USDA Decision to Eliminate Line Speed Limits at Pork Plants*, UFCW (Aug. 24, 2020), <https://www.ufcw.org/press-releases/ufcw-statement-on-usda-decision-to-eliminate-line-speed-limits-at-pork-plants>.

109. *US Court Blocks Trump—Era Hog Slaughter Line Speed Rule; Union Cheers*, VOA (Mar. 31, 2021), [https://www.voanews.com/a/usa\\_us-court-blocks-trump-era-hog-slaughter-line-speed-rule-union-cheers/6204016.html](https://www.voanews.com/a/usa_us-court-blocks-trump-era-hog-slaughter-line-speed-rule-union-cheers/6204016.html).

110. *United Food and Com. Workers Union*, 532 F. Supp. 3d at 776.

111. Federal Agriculture Reform and Risk Management Act of 2013, H.R. 2642, 113th Cong. § 11312 (2013) (as passed by House, July 11, 2013); Egg Products Inspection Act Amendments of 2013, H.R. 1731, 113th Cong. § 4(c) (2013) (as introduced in the House, Aug. 25, 2013); Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. § 4(c) (2012) (as introduced in the House, Jan. 23, 2012); Prevention of Farm Animal Cruelty Act, H.R. 4733, 111th Cong. (2010) (as introduced in the House, Mar. 2, 2010); Christopher Hendrickson, *The Dangerous King Amendment Has Been Defeated*, THE HUMANE LEAGUE (Dec. 13, 2018), <https://thehumaneleague.org/article/dangerous-king-amendment-defeated>.

prohibited states from imposing standards on agricultural products produced in other states, but the omnibus five-year 2018 Farm Bill did not include it.<sup>112</sup>

### PART III. LITIGATION TO HALT IMPLEMENTATION OF PROPOSITION 12

#### A. Litigation

Meat-industry trade groups have filed suit to enjoin the implementation of California's Proposition 12.<sup>113</sup> These industry groups have made claims that companies would not be able to meet the demand for pork in California under Proposition 12 and that its implementation would create a great shortage, alongside consumer price increases.<sup>114</sup> The National Pork Producers Council and other parties to a suit against the State of California (the "Pork Council Litigation") have also alleged that Proposition 12 violates the Commerce Clause of the U.S. Constitution as unduly burdensome to interstate commerce.<sup>115</sup> The Ninth Circuit Court of Appeals ruled against this particular challenge to Proposition 12 from the National Pork Producers Council, holding that the Proposition does not violate the Interstate Commerce Clause by imposing extra burdens without legitimate reason.<sup>116</sup> The Court further found that any resulting price increases would not qualify as a substantial burden on interstate commerce.<sup>117</sup>

Likewise, the North American Meat Council filed suit against California in 2019 ("Meat Council Litigation"), alleging that Proposition 12 violated the dormant Commerce clause of the US Constitution.<sup>118</sup> The Council asserted, among other things, that the measure had a discriminatory purpose, that the state had a protectionist intent, and that the law would substantially burden interstate commerce.<sup>119</sup>

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112. *Senators: Reject Harmful King Amendment to Farm Bill*, DIANNE FEINSTEIN (Aug. 06, 2018), <https://www.feinstein.senate.gov/public/index.cfm/2018/8/senators-reject-harmful-king-amendment-to-farm-bill>.

113. *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1025 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022); Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief—Final Ruling, Cal. Hisp. Chambers of Com. v. Ross, No. 34-2021-80003765, at 6 (Sup. Ct. Cal. Jan. 21, 2022), <https://thebrooksinsitute.org/sites/default/files/article/2022-02/CA%20Superior%20Court%20Order%20-%20To%20Accompany%202022-1-31%20Weekly%20Digest%20No%20122.pdf>; Associated Press, *California Grocers Sue to Stop Animal Welfare Law that Could Lead to Bacon Shortage*, NBC NEWS (Dec. 13, 2021), <https://www.nbcnews.com/news/us-news/california-grocers-sue-stop-animal-welfare-law-lead-bacon-shortage-rcna8546>; Christine Chung, *Business Groups Sue Over California Law They Say Could Keep Pork Off Plates*, N.Y. TIMES (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/business/california-bacon-law.html>.

114. Associated Press, *supra* note 113; Chung, *supra* note 113.

115. *Nat'l Pork Producers Council*, 6 F.4th at 1025.

116. *Id.* at 1033–34 (It is noteworthy that on March 28, 2022, the U.S. Supreme Court agreed to hear the case in its term that begins in October 2022); Patrick Thomas, *Carl Icahn Targets Kroger Over Pork, CEO Pay*, WALL ST. J. (Mar. 29, 2022), [https://www.wsj.com/articles/carl-icahn-targets-kroger-over-pork-ceo-pay-11648594425?mod=Searchresults\\_pos1&page=1](https://www.wsj.com/articles/carl-icahn-targets-kroger-over-pork-ceo-pay-11648594425?mod=Searchresults_pos1&page=1).

117. The Supreme Court of the United States granted certiorari on Mar. 28, 2022, *Nat'l Pork Producers Council v. Ross*, No. 21-468, 2022 WL 892100, at 1 (U.S. Mar. 28, 2022); Jim Wiesemeyer, *California Proposition 12 Took Effect Jan. 1, But Supreme Court Action Ahead*, FARM J. (Jan. 02, 2022), <https://www.porkbusiness.com/news/ag-policy/california-proposition-12-took-effect-jan-1-supreme-court-action-ahead> (the High Court heard the case as part of its October 2022 term and a decision is forthcoming).

118. *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1017 (C.D. Cal. 2019).

119. *Id.*

The Ninth Circuit Court of Appeals also sided with the State here, holding that the District Court had not abused its discretion in finding that the plaintiffs were not likely to succeed on the merits of their claims.<sup>120</sup> In so holding, the Ninth Circuit relied on prior litigation related to California’s law that banned the force-feeding of birds to produce foie gras and out of state imports of products produced by such force feeding.<sup>121</sup> In that prior case, out of state foie gras producers, Association des Éleveurs de Canards et d’Oies du Québec and Hudson Valley Foie Gras LLC (“HVFG”) brought suit against California, claiming that the ban on force fed geese for sale in California illegally restricted interstate commerce.<sup>122</sup> The Ninth Circuit upheld the law, finding that the law: was intended to prevent the force feeding of geese and ducks; was not discriminatory; did not directly regulate interstate commerce; and did not substantially burden interstate commerce.<sup>123</sup> Citing this prior holding in *Éleveurs de Canards*,<sup>124</sup> the Ninth Circuit likewise rejected the commerce clause argument in the Meat Council Litigation, holding that the legislature had enacted the law with the genuine purpose of reducing animal cruelty and that the law only had indirect effects on interstate commerce.<sup>125</sup>

California’s 2010 Amendment, which made Proposition 2 as to egg laying birds applicable to eggs produced outside but sold within California, had similarly resulted in litigation to halt the enforcement of the Amendment.<sup>126</sup> Plaintiff egg producers there also argued that California had placed unconstitutional restrictions on interstate commerce.<sup>127</sup> State Attorneys General from Missouri, and other states alleged that the cost of complying with the California Amendment’s enhanced hen housing would raise egg prices, destroy the market and violate the Commerce Clause (the “Missouri Litigation”).<sup>128</sup> Plaintiffs likewise urged that if egg producers outside of California were to stop selling eggs in California altogether, this would negatively impact business in their home states and force their local egg farmers out of business.<sup>129</sup> The United States District Court for the Eastern District of California

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120. *N. Am. Meat Inst. v. Becerra*, 825 F. App’x 518, 519 (9th Cir. 2020).

121. *Assoc. Des Eleveurs De Canards Et D’Oies Du Quebec v. Harris*, 729 F.3d 937, 942–43 (9th Cir. 2013). See CAL. HEALTH & SAFETY CODE §§ 25981–82 (West 2022); Max Shapiro, *A Wild Goose Chase: California’s Attempt to Regulate Morality by Banning the Sale of One Food Product*, 35 LOY. L.A. INT’L & COMP. L. REV. 27, 30 (2012) (articulating the domestic and international legal implications of California’s foie gras ban).

122. *Assoc. Des Eleveurs De Canards Et D’Oies Du Quebec*, 729 F.3d at 942–43. See generally *Assoc. Des Eleveurs De Canards Et D’Oies du Quebec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017).

123. *Assoc. Des Eleveurs De Canards Et D’Oies Du Quebec*, 729 F.3d at 942, 947–49, 951–52.

124. *Id.* at 952 (discussing how California has a legitimate interest in preventing animal cruelty and how the ban is a means of advancing that interest).

125. *N. Am. Meat Inst. v. Becerra*, 825 F. App’x 518, 519 (9th Cir. 2020).

126. Complaint ¶¶ 17–28, *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014) (No. 2:14 CV00341; *Koster Picks Up King’s Fight, Files Lawsuit Against CA Hen Standards*, AGRI-PULSE, <https://perma.cc/D2XF-TFE7> (last visited Apr. 22, 2022)).

127. Complaint, *supra* note 126, ¶¶ 3–8.

128. Complaint, *supra* note 126, ¶¶ 6–8; *Five States Join Missouri in Egg Lawsuit*, FEEDSTUFFS (Mar. 6, 2014), <https://perma.cc/EB9M-8ETV>.

129. Complaint, *supra* note 126, ¶ 6 (the Missouri Complaint alleged that the uniform national egg standards under the Federal Egg Products Inspection Act also preempted the 2010 Amendment).



upheld the California law<sup>130</sup> and dismissed the suit, holding that the Attorneys General lacked standing to sue on behalf of egg producers in their states.<sup>131</sup>

Based on the above past precedents<sup>132</sup>, the recent rulings that Proposition 12 will not impose a substantial burden on interstate commerce,<sup>133</sup> and the fact that Proposition 12 was also enacted with a genuine purpose to reduce animal cruelty,<sup>134</sup> Proposition 12 seems poised to withstand any further legal challenges.

### B. Implementation

As of January 2022, the State had not provided specific rules laying out how compliant products would be labeled and/or inspected.<sup>135</sup> However, despite the lack of clarity on that aspect of the law's administration, at least one animal rights advocate noted that space requirements are clear and Californians need not fear an "apocalypse" worthy of a long delay in implementation of Proposition 12.<sup>136</sup> Nonetheless, California businesses affected by the Proposition, grocers in particular, were concerned about clarity in the rules to ascertain compliance for animal products that

130. *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1062–63 (E.D. Cal. 2014); Jacob Bunge, *Judge Upholds California Law Requiring More-Humane Housing of Hens*, WALL ST. J. (Oct. 3, 2014), <https://www.wsj.com/articles/judge-upholds-california-law-on-more-humane-housing-of-hens-1412353791>.

131. *Harris*, 58 F. Supp. 3d at 1074–75, 1077–78; In February 2015, the United States Court of Appeals for the Ninth Circuit likewise affirmed a district court's dismissal of a farmer's suit under Proposition 2, *Cramer v. Harris*, 591 F. App'x 634, 634–35 (9th Cir. 2015). Farmers claimed that Proposition 2 was too vague because it did not state the exact dimensions required for each chicken, *Cramer*, 591 F. App'x at 634–35. See also Carla Hall, *Opinion: Egg-Laying Hens in California Win Another Court Battle*, L.A. TIMES (Oct. 2, 2015), <https://perma.cc/AZ8A-QFX7> (highlighting the Ninth Circuit's decision to uphold the California law).

132. See *supra* notes 113–31 and accompanying text.

133. *N. Am. Meat Inst. v. Becerra*, 825 F. App'x 518, 520 (9th Cir. 2020); *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1033 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022).

134. The legislative history of Propositions 2 and 12 shows that they were designed to reduce animal cruelty. California first passed Proposition 2 in response to horrific video revelations of farm animal abuse uncovered in 2008, particularly the Hallmark/Westland scandal which raised farm animal welfare concerns that led to the passage of Proposition 2, see Maggie Jones, *The Barnyard Strategist*, N.Y. TIMES MAG. (Oct. 24, 2008), <https://www.nytimes.com/2008/10/26/magazine/26animal-t.html>. California passed Prop. 2 in 2008 to ban the use of confinement enclosures for pigs, hens and veal calves that prevents lying down, turning around or stretching limbs, however certain producers got around this prohibition by simply putting in less animals and continuing to use the small confined enclosures, see Kenny Torella, *The Fight Over Cage-Free Eggs and Bacon in California, Explained*, VOX (Aug. 10, 2021), <https://www.vox.com/future-perfect/22576044/prop-12-california-eggs-pork-bacon-veal-animal-welfare-law-gestation-crates-battery-cages>. Proposition 2 also only covered shell eggs and not liquid eggs which accounted for about a third of the egg market and also only initially only applied to the treatment of farm animals in California.

California later passed AB 1437 that required all eggs sold in California to come from hens treated according to the standards of the California law. Proposition 12 seeks to expand and further address shortcomings of Proposition 2 by explicitly requiring cage-free housing for hens, covering hens used to produce liquid eggs as well, mandating stricter requirements regarding gestation crates for sows that include more space, and extending AB 1437 to cover pork products sold in California as well. Proposition 12 also attempts to avoid vagueness in the law by specifying defined minimum space requirements. See BALLOTPEdia, *supra* note 21.

135. See Chuck Abbott, *California is Late With Rules For Prop 12, 'World's Strongest' Animal Welfare Law*, SUCCESSFUL FARMING (Jan. 3, 2022), <https://www.agriculture.com/news/business/california-is-late-with-rules-for-prop-12-world-s-strongest-animal-welfare-law>.

136. Associated Press, *supra* note 113.

come from outside California, such as pork.<sup>137</sup> Based at least partly on this ambiguity, industry producers sued and a California court in January 2022 granted a stay of the law as to retailers and restaurants of 180 days from the promulgation of final rules.<sup>138</sup> In the intervening time since the court’s stay order, California did enact final rules laying out how retailers and restaurants are to certify animal products as Proposition 12 compliant.<sup>139</sup> However, also in this intervening period between final state rule promulgation and the date for enforcement, the U.S. Supreme Court agreed to hear a challenge to Proposition 12 in the Pork Council Litigation and the state court thus extended its stay of enforcement until July 1 for whole pork sales at grocers, other retailers and restaurants pending the High Court decision.<sup>140</sup> Space requirements for pork producers and suppliers in California nonetheless went into effect on January 1, 2022, as did requirements for cage free egg production.<sup>141</sup>

#### PART IV. PROPOSED FEDERAL LEGISLATION RELATED TO INDUSTRIALIZED FARMING AND ANIMAL CROWDING AND EUROPEAN AND U.K. EFFORTS

##### *A. Comparison of European and U.K. Anti-Cruelty Provisions — Animal Welfare Council*

Both European Union (“EU”) and United Kingdom (“U.K.”) laws reflect that animals should be treated in line with the Five Freedoms: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury and disease; freedom to express normal behavior; and freedom from fear and distress.<sup>142</sup> Thus, the overarching purpose of the European Convention for the Protection of Animals Kept for Farming Purposes, to which the EU is party, is to avoid unnecessary suffering or

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137. Jot Condie & Ronald Fong, *No Bacon in California? Restaurants, Grocers Try to Make Sense of New Pork-Products Law*, FRESNO BEE (Jan. 20, 2022), <https://www.fresnobee.com/opinion/op-ed/article257491074.html>.

138. Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief—Partial Tentative Ruling, Cal. Hisp. Chambers of Com. v. Ross, No. 34-2021-80003765, at 9–10 (Sup. Ct. Cal. Jan. 21, 2022) (hereinafter *Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief*) (staying implementation for retailers in sale of whole pork products).

139. *Prop 12 Enforcement Delayed for Some Stakeholders*, NAT’L L. REV. (Jan. 26, 2022), <https://www.natlawreview.com/article/prop-12-enforcement-delayed-some-stakeholders>. California did publish final rules for enforcement of Proposition 12 with regard to whole pork sales from without the state. 3 C.C.R. § 1320-1326.

140. *Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, at 9-10* (staying enforcement and holding: that the promulgation of joint regulations is a condition precedent to the enforcement of the square-footage requirement governing sales of whole pork meat pursuant to Sections 25990(b)(2) and 25991(e)(3)); Nat’l Pork Producers Council v. Ross, 6 F.4th 1021, 1033 (9th Cir. 2021), cert. granted, 142 S. Ct. 1413 (2022); Tod Neeley, *Progressive Farmer*, Proposition 12 Enforcement Waits for Scotus, 12/6/222, <https://www.dtnpf.com/agriculture/web/ag/news/article/2022/12/06/california-court-gives-pork-industry>.

141. In 2020, requirements that calves could not be confined with less than 43 square feet of usable floor space per calf and egg-laying hens (chickens, turkeys, ducks, geese, and guinea fowl) could not be confined with less than one square foot of floor space per animal went into effect, CAL. HEALTH & SAFETY CODE § 25991(e) (2022).

142. *Animal Welfare and Protection: EU Laws Explained (Videos)*, NEWS EUR. PARLIAMENT (June 07, 2020), <https://www.europarl.europa.eu/news/en/headlines/society/20200624STO81911/animal-welfare-and-protection-eu-laws-explained-videos>.

injury while having regard for the housing, food and care provided.<sup>143</sup> For example, a directive on pigs provides that “sows prefer to have social interactions with other pigs...[t]he current practice of keeping sows in continuous close confinement should therefore be prohibited”<sup>144</sup> as is the castration of piglets by tearing tissues.<sup>145</sup> Likewise, the EU effectively outlawed battery caging as of January 2012.<sup>146</sup> In addition, the European Parliament has formed a Committee on the Protections of Animals During Transport to attempt to address and improve conditions for animals while in transport.<sup>147</sup> While animal rights groups are not optimistic that transport conditions for farm animals in the EU will improve,<sup>148</sup> at least consideration of the issue of animal transport is in process.<sup>149</sup>

Likewise, in the U.K, the Animal Welfare Act of 2006 has been the governing law related to animal welfare.<sup>150</sup> The Act provides that animals should have a suitable place to live, a suitable diet, the ability to engage in normal behavior, be housed or apart from other animals as needed, and be protected from pain, injury, suffering, and disease.<sup>151</sup> This Act also provides for criminal penalties, including imprisonment, for animal cruelty.<sup>152</sup> The Welfare of Farmed Animals Regulations 2007, subordinate legislation formulated under the Animal Welfare Act, specifically governs the housing of farmed animals and has similarities with California’s Proposition 12. For example, under 2007 U.K. Regulations, sows must be housed in a manner that allows them freedom of movement except in the seven days prior to birth.<sup>153</sup> Veal calves may not be tethered, and battery cages have also been outlawed since 2012.<sup>154</sup> Additionally, a bill was introduced in September 2021 to ban all cages for laying hens in the U.K.<sup>155</sup>

Overall, what these provisions in U.K. and EU law show is that both the U.K. and the EU have attempted to and recognize the need for more uniform, humane animal housing practices than are typical in the U.S.<sup>156</sup> Notably, these existing EU and U.K. practices are aligned with California’s Proposition 12 in their treatment of sows, veal calves and egg laying birds.<sup>157</sup> In addition, the EU has at least recognized

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143. European Convention for the Protection of Animals Kept for Farming Purposes art. 3–7, Mar. 10, 1976, ETS No. 87.

144. Council Directive 2001/88/EC of Oct. 23, 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs. 2001 J.O. (L 316) 1.

145. 2001 J.O. (L 316) 36.

146. 1999 J.O. (L 203) 55.

147. *Outcome of Committee of Inquiry on the Protection of Animals During Transport*, COMM. EUR. PARLIAMENT (Apr. 04 2022), <https://www.europarl.europa.eu/committees/en/anit/home/highlights>.

148. *See generally EP Plenary: Disappointing Vote on Live Animal Transport*, EUROGROUP FOR ANIMALS (Jan. 20, 2022), <https://www.eurogroupforanimals.org/news/ep-plenary-disappointing-vote-live-animal-transport>.

149. *See generally id.*

150. *Advice and Guidance on Protecting Animal Welfare on Farms, in Transport, at Markets and at Slaughter*, ANIMAL WELFARE (Jan. 20, 2022), <https://www.gov.uk/guidance/animal-welfare>.

151. *Id.*

152. Animal Welfare Act 2006, c. 45, § 32 (Eng.).

153. The Welfare of Farmed Animals (England) Regulations 2007, SI 2007/2078, Sch. 1, ¶¶ 9–10 (Eng.).

154. The Welfare of Farmed Animals (England) Regulations 2007, SI 2007/2078, Sch. 6, ¶¶ 2, 4 (Eng.).

155. Philip Clarke, *Private Bill Launched to Ban Cages for Laying Hens*, FARMERS WEEKLY (Sept. 08, 2021), <https://www.fwi.co.uk/livestock/poultry/private-bill-launched-to-ban-cages-for-laying-hens>.

156. *See supra* notes 142–55 and accompanying text.

157. *See supra* notes 143–46, 153–55 and accompanying text.

the importance of studying and improving animal transport, with the formation of its Committee on the Protections of Animals during Transport.<sup>158</sup>

### *B. Federal Legislative Introductions to Improve Animal Conditions*

While not as clearly directed at animal housing as U.K. or EU law, in the United States Congress in 2021, legislators made an overall attempt to curb large-scale factory farming. Representative Ro Khanna and Senator Cory Booker introduced into both Congressional Houses identical versions of a major new bill, the Farm System Reform Act, aimed at large scale animal feeding operations.<sup>159</sup> The currently pending bills propose to prevent the creation of new large feeding operations, prohibit the expansion of existing large feeding operations and provide for the phasing out of current large scale feeding operations.<sup>160</sup> The bills also allocate funds to help farmers transition from large feeding operations.<sup>161</sup> Legislative history behind the bills shows that, in drafting these bills, legislators are attempting to phase out these operations because they believe that they degrade the welfare of farm animals and have negative effects on the environment and small farmers.<sup>162</sup> Legislators also recognized that continuing to concentrate power in the hands of few in industry is inadvisable.<sup>163</sup> In addition, the proposed Farm System Reform Act makes parties contracting with animal feeding operations for the purposes of raising, selling, and slaughtering livestock and that exercise substantial operational control over large scale feeding operations liable for operations management and prevention of

158. See *supra* notes 147–49 and accompanying text.

159. Release: *Khanna, Booker Reinroduce Farm System Reform Act*, CONGRESSMAN RO KHANNA (July 13, 2021), <https://khanna.house.gov/media/press-releases/release-khanna-booker-reintroduce-farm-system-reform-act>; *Booker Reinroduces Bill to Reform Farm System with Expanded Support From Farm, Labor, Environment, Public Health, Faith Based and Animal Welfare Groups*, CORY BOOKER (July 15, 2021), <https://www.booker.senate.gov/news/press/booker-reintroduces-bill-to-reform-farm-system-with-expanded-support-from-farm-labor-environment-public-health-faith-based-and-animal-welfare-groups>.

160. Farm System Reform Act of 2021, H.R. 4421, 117th Cong. §102 (2021). See also, Farm System Reform Act of 2021, S. 2332, 117th Cong. §102 (2021).

161. Farm System Reform Act of 2021, S.2332, 117th Cong. § 103 (2021).

162. See generally H.R. 4421; S. 2332 (The Farm System Reform Act of 2021 was introduced in both the Senate and the House by Sen. Cory Booker and Rep. Ro Khanna as the primary sponsors). See also *S. 3221 (116th): Farm System Reform Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s3221> (last visited Apr. 13, 2022) (A similar bill was introduced in the 116th Congress, but did not receive a vote); Ezra Klein, *Farmers and Animal Rights Activists are Coming Together to Fight Big Factory Farms*, Vox (July 8, 2020, 8:10 AM), <https://www.vox.com/future-perfect/2020/7/8/21311327/farmers-factory-farms-cafos-animal-rights-booker-warren-khanna> (Sen. Booker began championing the Farm System Reform Act of 2019 while campaigning for the 2020 Democratic Presidential nomination in Iowa in response to concerns by small farmers that concentration of market power by large agricultural companies in the agricultural sector would drive small farmers out of business or result in large companies dictating agricultural policies to small farmers that would degrade the welfare of farm animals and result in pollution from byproducts of such industrial agriculture for which the small farmers would be liable for and rather than the large companies that dictate the policies. This bill has been referred to committee and subcommittee).

163. Sen. Warren supported the farm system reform bill in May 2020 as did Rep. Khanna who was the co-chair for Bernie Sander's presidential campaign. When the bill was introduced as The Farm System Reform Act of 2021, it was again supported by Warren and Khanna. Sen. Sanders and a number of political action groups; Klein, *supra* note 162 (Both Sen. Booker and Sen. Warren have also identified the role the Covid-19 pandemic has had on meatpacking workers and the further consolidation of the agricultural sector as further calls to action in adopting this legislation).

resulting environmental pollution.<sup>164</sup> This provision is important because it would hold large-scale operations liable for their effects even if they sub-contract with smaller operations to produce animal products.<sup>165</sup> The Act would also make these parties' pollution prevention duties from animal feeding operations non-delegable and non-transferable.<sup>166</sup> If passed, these provisions would both begin to reduce the use of crowded, large-scale feeding operations in the U.S. and give the federal government substantial authority over the large-scale industrial food production process.

Another bill introduced in Congress seeking to improve the plight of animals is the Animal Welfare Enforcement Improvement Act, which seeks to amend the Animal Welfare Improvement Act.<sup>167</sup> This bill would increase USDA oversight and enforcement of the licenses of animal dealers and exhibitors and permit private citizens to bring suits enjoining any party violating the standards for animal welfare under the proposed Act.<sup>168</sup> This proposed act is notable in that it allows the USDA to suspend or revoke licenses of parties in violation of the animal welfare standards set out in the bill or subsequent regulations and empowers the Secretary of Agriculture to publish all inspections and investigations.<sup>169</sup> The most significant provision, however, is the bill's expansion of standing for private citizens to sue and enjoin violators.<sup>170</sup> While not directly aimed at factory farming, this proposed legislation would strengthen the federal legislative framework for combatting animal cruelty and would further entrench the norm that private parties have standing to sue and enforce animal welfare laws. Such developments for combatting animal cruelty could potentially improve animal welfare conditions in the shorter term since the Prevention of Farm Animal Cruelty Act and the Egg Production Inspection Amendments failed to advance in Congress.<sup>171</sup>

Overall, the introduction of these bills, Animal Welfare Enforcement and Improvement Act and the Farm System Reform Act, alongside far-ranging state law developments, make it clear that humane animal treatment is at the forefront of legislators' minds and bodes well for future changes in industrialized farming. Americans appear to agree. In a study in 2015, The American Humane Association found that almost all Americans are concerned with animal welfare and a similar study in 2014 found that 80% of those who responded wanted farm animals to have humane living conditions.<sup>172</sup>

164. CONGRESSMAN RO KHANNA, *supra* note 159 (bill introduced by Senator Warren, Senator Booker, and Representative Khanna).

165. See Klein, *supra* note 162 (The bill intends to hold integrators, major agricultural companies, liable for pollution practices that they have influenced small farmers to adopt through the exercise of the major companies' market power and consolidation of the agricultural sector).

166. CONGRESSMAN RO KHANNA, *supra* note 159.

167. Animal Welfare Enforcement Improvement Act, H.R. 3277, 117th Cong. (2021).

168. *Id.* §§ 3, 5.

169. *Id.* §§ 4, 6, 25A.

170. *Id.* §§ 3, 5 (this amends section 19 of the Animal Welfare Act and allows any person to sue to enjoin any entity, including the US and any other governmental entity or agency that violates the Act. See Press Release, Office of Representative Raja Krishnamoorthi, Congressman Krishnamoorthi Announces New Legislation to Strengthen Animal Welfare Act Enforcement (Aug. 29, 2019)).

171. See Prevention of Farm Animal Cruelty Act, H.R. 4733, 111th Cong. (2010); Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. (2012); Egg Products Inspection Act Amendments of 2012, S.3239, 112th Cong. (2012); Egg Products Inspection Act Amendments of 2013, S.820, 113<sup>th</sup> Cong. (2013); Egg Products Inspection Act Amendments of 2013, H.R.1731, 113th Cong. (2013).

172. Scrufari, *supra* note 82, at 1.

PART V: PROPOSED INCENTIVES AND FEDERAL LEGISLATION TO  
PROTECT FARM ANIMALS: A NEW PARADIGM

While new federal proposals regarding factory farming and related animal protection portend change, and a patchwork of state laws are a step in the right direction, existing laws do not begin to address comprehensively the cruelty inherent in our current industrialized animal agricultural system. Current regulations and norms may also help protect workers, to a degree,<sup>173</sup> but federal law will have to begin to better protect animals, the environment, and surrounding communities from the effects of industrialized farms if we are to move toward a more humane and sustainable farming system.<sup>174</sup> Current industrial animal farming practices negatively affect environmental quality; contribute to global warming; confine animals in inhumane ways; and often treat farm workers in ways that result in physical and psychological harms.<sup>175</sup> While the newly proposed Farm System Reform Act and the Animal Welfare Enforcement Improvement Act are good signs that Congress is beginning to consider issues related to animal welfare, neither bill has passed Congress.<sup>176</sup> Indeed, passing such bills will be an uphill battle given the support the industrialized farming industry has received from the federal government and the powerful lobbying forces the industry brings to bear to avoid legislative change or regulation.<sup>177</sup>

However, as a number of states have begun to adopt and implement new laws requiring more humane housing treatment of farm animals, public opinion appears to be moving toward prevention of cruel and supremely overcrowded animal housing conditions.<sup>178</sup> Legislation made state-by-state is, however, patchwork, and

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173. Stephen Lee, *The Food We Eat and the People Who Feed Us*, 94 WASH. U. L. REV. 1249, 52-55, 1285-92 (2017) (discussing how existing laws, norms and regulatory structures can begin to protect those who produce our food).

174. See also, John Ikerd, Symposium, *Farm and Food Policies for a Sustainable Future*, BUS. ENTREPRENEURSHIP & TAX L. REV. (2022) (forthcoming 2022) (for a discussion of how our industrialized farming programs have not achieved a sustainable food system and how major change is needed); Iselin Gambert, Symposium, *Farm and Food Policies for a Sustainable Future, Should the Great Food-Transformation be Fake Meat-Free?*, BUS. ENTREPRENEURSHIP & TAX L. REV. (2022) (forthcoming 2022) (for a discussion on how we should re-envision our thinking and policies to create a more sustainable future of food).

175. See generally *Inhumane Practices on Factory Farms*, ANIMAL WELFARE INST., <https://awionline.org/content/inhumane-practices-factory-farms> (last visited Aug. 16, 2022).

176. See generally *Farm System Reform Act Introduced*, AMERICAN SOC'Y OF ANIMAL SCI.: TAKING STOCK (July 29, 2021), <https://www.asas.org/taking-stock/blog-post/taking-stock/2021/07/29/farm-system-reform-act-introduced>.

177. Abate, *supra* note 19, at 229.

178. See *Farm Animal Anti-Confinement Legislation*, ANIMAL WELFARE INST., <https://awionline.org/content/farm-animal-anti-confinement-legislation> (last accessed Apr. 19, 2022).

inconsistent,<sup>179</sup> and these inconsistencies likely cost industry more to implement.<sup>180</sup> For example, Michigan allows extreme confinement of pregnant sows, but only just before delivery, while other states allow such confinement at any point in the pregnancy.<sup>181</sup> Additionally, Michigan, for example, appears to allow the import for sale of most animals not housed in accord with its anti-cruelty law, but does not allow the import of shelled eggs raised in a manner contrary to Michigan's animal confinement law.<sup>182</sup> California in turn prohibits any imports of meat and eggs that do not comply with Proposition 12. With at least 14 states legislating in this area, and with varied and intricate state laws requiring different agricultural practices, industry will need lawyers conversant in all of the intricacies of state statutes and rules just to sort out the various requirements for housing and labeling to show compliance.<sup>183</sup> To avoid such a burdensome system, and to improve the lives of animals and the workers who tend to them, the time has come for federal legislators to act.<sup>184</sup> In place of a set of conflicting and patchwork laws, one consistent federal regulatory scheme could benefit industry, as well as workers and animals.<sup>185</sup> We owe it to the

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179. See generally *id.* (For example, some anti-confinement legislation is only aimed at outlawing usage of confined enclosures at specific animals such as Florida's constitutional ban on sow gestation crates, see FLA. CONST. ART. X, § 21, and Kentucky's ban on veal crates, see 302 KY. ADMIN. REGS. 21:030, while Oregon outlaws use of sow gestation crates and hen battery cages, OR. REV. STAT. §§ 600.150, 632.840 and Utah requires cage-free housing for egg-laying hens, Ut. Utah Agricultural Code, Title 4, Ch.4a § 101- 107, with California and Colorado having legislation outlawing sow gestation crates, veal crates and hen battery cages, CAL. HEALTH AND SAFETY CODE §§ 25990-94 and COLO. REV. STAT. ANN. §§ 35-50.5-201-209. Also, what constitutes confinement differs as Arizona prohibits confinement of veal calves and gestating cows most or all of the day, ARIZ. REV. STAT. ANN. § 13-2910.07, while Ohio requires veal calves to be put in group pens after 10 weeks and limits sow gestation crates to post-weaning, O, ADMIN. CODE 901:12-08, 901:12-05, and Oregon limits confinement of gestating sows to 12 hours, OR. REV. STAT. § 600.150. In addition, the definition of confinement differs as Rhode Island defines confinement as the inability of a chicken to stretch its wings without touching enclosures or other birds, R.I. GEN. LAWS § 4-1.1-6, while Maine prohibits preventing veal calves and gestating sows from being able to stand up, turn around, lie down or fully extend limbs for most or all of the day, ME. REV. STAT. 7:9-379 § 4020, while California established minimum square footage for crates and cages, CAL. HEALTH AND SAFETY CODE-§§ 25990-94, and Washington and Utah use United Egg Producers Guidelines for poultry, ORE. REV. STAT. § 632.840 and WASH. REV. CODE. § 69.25.065. Importantly California extends prohibitions on battery cages to all egg producers, CAL. HEALTH AND SAFETY CODE §§ 25995-96 and §§ 2599094, while Utah does not extend its rules beyond its border, Utah Agricultural Code, Title 4, Ch.4a § 101-107. Furthermore, certain states only ban the sale of eggs from cruelly confined hens (such as Michigan and Colorado, MICH. COMP. LAWS § 287.746; COLO. REV. STAT. ANN. § 35-50.5-201-209, while others ban meat from cruelly confined animals (see CAL. HEALTH AND SAFETY CODE §§ 25990-25994 (2010) (bans pork that does not meet porcine welfare requirement); Ashley Chang, *What Does Question 3 Mean in Massachusetts?*, THE HUMANE LEAGUE (Feb 2, 2022), <https://thehumaneleague.org/article/question-3> (Massachusetts additionally bans pork that does not meet their requirements of porcine welfare, though implementation of Massachusetts's ban has been delayed)).

180. See *infra* notes 181-83 and accompanying text; *supra* note 179 and accompanying text.

181. See MICH. COMP. LAWS § 287.746(3)(f) (2020).

182. MICH. COMP. LAWS § 287.746(4) (2021).

183. ANIMAL WELFARE INSTITUTE, *supra* note 178.

184. See *Farm Animal Confinement by State*, ASPCA, <https://www.aspc.org/improving-laws-animals/public-policy/farm-animal-confinement-bans>, (last visited Apr. 19, 2022).

185. See generally Jennifer Shiek, *UC Davis Professor Says Impact of Proposition 12 Won't Be Catastrophic*, AG WEB FARM J. (Sept. 14, 2021), <https://www.agweb.com/news/livestock/pork/uc-davis-professor-says-impact-proposition-12-wont-be-catastrophic> (noting that it is hard for producers to comply with myriad regulations and some may give up California market share to avoid compliance).

animals, the environment, and our society to change the current misery-laden system.<sup>186</sup>

### *A. Incentivize Private Actions Toward a More Humane Farming System*

In 2015, Walmart announced that its suppliers should adhere to higher standards of animal care that included eliminating both battery cages for hens and penning cages for sows, as well as the use of antibiotics.<sup>187</sup> Walmart also noted that it expressly supports the “Five Freedoms” for farm animals as recognized worldwide.<sup>188</sup> While laudable, Walmart’s stance is voluntary and only recommends that its suppliers adhere to these higher standards.<sup>189</sup> In another corporate effort to improve animal welfare and inform consumers, Whole Foods currently has an animal care rating program that ranks animal care standards from one to five, with five signifying the best treatment of the farm animal.<sup>190</sup> This system expressly labels its in store products so consumers can presumably make more informed and transparent choices.<sup>191</sup>

While these announcements and programs, and others, can spur consumer demand and encourage consumer purchasing of more humanely raised products, what if they were coupled with tax or other governmental incentives? Such incentives might induce a faster turnaround in farming practices, promote broader consumer knowledge, and spur developing consumer demand for sustainably and humanely raised animals. Voluntary actions by retailers and distributors would also obviate the need for dedicating limited federal and state resources to enforcement and thus might bring change at a faster and less resource intensive manner than federal mandates alone.

### *B. Model Law Provisions to Improve Farm Animal Conditions*

#### *1. Caging/Housing*

As a starting point, along with federal incentives to improve animal welfare voluntarily and transparently, federal mandates should at least provide all farm animals the ability to stand up, turn around and move about freely to stretch limbs, and space enough to move at will toward food and water. Country-wide mandates

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186. See generally Sunstein, *supra* note 1, at 391–98 (discussing potential animal rights reform measures).

187. Press Release, Walmart, Walmart U.S. Announces New Animal Welfare and Antibiotic Positions (May, 22 2015) (<https://corporate.walmart.com/newsroom/2015/05/22/walmart-u-s-announces-new-animal-welfare-and-antibiotics-positions>); see Scrufari, *supra* note 82, at 104.

188. Walmart, *supra* note 187.

189. Scrufari, *supra* note 82, at 104 (Costco had taken a similar pledge in 2008 and later undercover organizations detected horrific conditions at factory farms that sourced Costco).

190. *Meat Department Quality Standards*, WHOLE FOODS MKT., <https://www.wholefoodsmarket.com/quality-standards/meat-standards> (last visited Apr. 20, 2022).

191. *Id.*



should not be out of the question as they have already been enacted in other developed nations, such as in the EU and in the U.K.<sup>192</sup>

Legislation closely mirroring California's Proposition 12 would be a good start so that farm animals have at a minimum, places to live that allow for stretching, turning, and moving, and ready access to food and water.<sup>193</sup> This seems to be a minimally achievable goal. Moreover, all such federal humane farm animal treatment legislative proposals must expressly include *all* covered farm animals: cows, pigs, sows, calves, turkeys, calves, goats, and chickens, and must not exempt any farmed animal in the United States.<sup>194</sup> There is simply no reason not to include birds as worthy of humane treatment as well as slaughter.<sup>195</sup> Federal legislation should also expressly prohibit the penning of pregnant and lactating sows and extreme confinement of veal calves.<sup>196</sup>

## 2. *A Life Well Lived*

Congress should pass new federal legislation requiring farmers to treat animals humanely in life, expressly prohibiting animal cruelty, and making it a crime to engage in intentional farm animal cruelty,<sup>197</sup> specifically defining cruelty so that industry cannot easily skirt such requirements.<sup>198</sup> This type of national anti-cruelty scheme already exists in the U.K., whereby intentional animal cruelty is a crime.<sup>199</sup> In the U.K., the Farm Animal Welfare Committee adopted the Five Freedoms for farm animals, and the EU recognizes this Freedom as well.<sup>200</sup> Currently, U.S. agriculture is not aligned with these five widely recognized freedoms.<sup>201</sup> Widely available evidence suggests that the current industry standard does not provide for a life

192. *EU Bans the Routine Use of Antibiotics in Farmed Animals*, WORLD ANIMAL PROT. (Jan. 28, 2022), <https://www.worldanimalprotection.org/european-union-bans-antibiotic-overuse-farmed-animals-animal-welfare>; Jonathan Moens, *The Worst Horrors of Factory Farming Could be Soon Phased Out of Europe*, VOX (Sept. 29, 2021, 1:30 P.M.), <https://www.vox.com/future-perfect/22698265/europe-cage-ban-animal-welfare-eggs-pork-united-states>.

193. Daly, *supra* note 5.

194. *See supra* notes 139–45.

195. Lori Marino, *Thinking Chickens: A Review of Cognition, Emotion, and Behavior in the Domestic Chicken*, 20 ANIMAL COGNITION 127, 128 (2017) (“In the past few years, numerous studies have shown that there is no ‘bright line’ between ‘avian’ and ‘mammalian’ intelligence and complexity; complex intelligence is found in both birds, mammals, and also fish.”).

196. *See generally Pregnant Sow Housing*, AM. VETERINARY MED. ASS'N., <https://www.avma.org/resources-tools/avma-policies/pregnant-sow-housing> (last visited Apr. 21, 2022) (describing the benefits of spacious housing for pregnant sows, and endorsing housing that allows adequate quality and quantity of space permitting sows to assume normal postures and express normal patterns of behavior); *Veal Calf Management*, AM. VETERINARY MED. ASS'N., <https://www.avma.org/KB/Policies/Pages/Veal-Calf-Management.aspx> (last visited Apr. 21, 2022) (explicitly endorsing group housing for veal calves).

197. *See supra* notes 78–101 and accompanying text (discussing limited federal laws protecting animals and noting that there is no federal anti-animal cruelty statute). New federal legislation should prohibit intentional animal cruelty and exact stiff civil and criminal penalties for those who do not comply.

198. No federal law defining to prohibiting animal cruelty currently exists in the U.S. *See supra* notes 78, 81–104 and accompanying text (for discussion of U.S. laws concerning animal welfare); *supra* notes 79–80 for a discussion about how the farming industry defines cruelty standards.

199. *Animal Welfare*, DEP'T FOR ENV'T, FOOD & RURAL AFFS., ANIMAL & PLANT HEALTH AGENCY (Aug. 10, 2022), <https://www.gov.uk/guidance/animal-welfare>.

200. *Animal Welfare and Protection: EU Laws Explained (video)*, NEWS EUR. PARLIAMENT (Jan. 24, 2022), <https://www.europarl.europa.eu/news/en/headlines/society/20200624STO81911/animal-welfare-and-protection-eu-laws-explained-videos>. *See supra* note 142 and accompanying text.

201. *Cf. Id.*

free from hunger and thirst with ready access to fresh water and a proper diet; a life free from discomfort, pain, injury or disease or one in which farm animals may express normal behaviors free from fear and distress.

Normatively, federal legislation would be considered with the Five Freedoms in mind but would also require that all farm animals have access to the outdoors and be raised in conditions that allow them to engage in their natural behaviors.<sup>202</sup> In the case of sows or cows, for example, enough space should be provided so that sows may move around and build nests for her young and all cows should be permitted grazing time and time with their young, including dairy cows. Providing appropriate amounts of living space would also obviate the stated necessity for many of the inhumane and gruesome practices in animal husbandry, including debeaking for laying hens, ear notching, painful tail cutting without anesthesia for hogs,<sup>203</sup> and other such barbaric practices. Moreover, castration of piglets without anesthesia should be outlawed, as alternatives exist to attain desired meat quality,<sup>204</sup> and castration without pain killers is unnecessarily cruel.

### 3. *Humane Treatment on the Way to Slaughter*

In addition to prohibiting intentional animal cruelty and requiring a humane life, new federal law should also prevent cruelty on the way to slaughter. The existing “28-Hour Rule” requiring that animals be given access to water and a rest on long transports beyond 28 hours should be shortened and revised to include birds and all farm animals that are transported by truck.<sup>205</sup> As written, the law only covers cows, sheep, pigs, goats and equines.<sup>206</sup> Rules should be drafted that give the 28 Hour law teeth: which should include clearly drawn limited exceptions and much higher fines for non-compliance.<sup>207</sup> Current fines ranging from \$500 to \$1,000 appear to be small fines for industrial agricultural producers.<sup>208</sup> This law is one of the only laws that aims to protect farm animals and its sad history is replete with a lack of effect, a failure to adopt enforcement regulations and exceptions that render the law ineffectual.<sup>209</sup>

While perhaps utopian or idealist, it seems fair to say that twenty-eight hours is a long time to travel without access to water, rest or food. Such a period should

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202. Watnick, *supra* note 63, at 51 (noting that organic regulations require that animals live in conditions that accommodate their “health and natural behavior”). See e.g., *Animal Behavior, Resources for Applied Ethology*, ANIMAL BEHAV., <https://www.animalbehaviour.net/pigs> (last visited Apr. 21, 2022) (pigs will create comfortable nests to birth and care for their young when given space to do so); *Providing Suitable Dust Bath Areas for Your Chickens*, VT. FARM HEART (Apr. 19, 2013), <https://vermontfarm-heart.wordpress.com/2013/04/19/providing-suitable-dust-bath-areas-for-your-chickens> (Similarly, hens must be allowed enough space to dust bathe, or engage in the process by which they keep themselves clean).

203. Stephanie J. Engelsman, *World Leader – At What Price? A Look at Lagging American Animal Protection Laws*, 22 PACE ENV'T L. REV. 329, 338, 343, 351 (2005).

204. *Pig Castration*, TEXAS TECH UNIV. LABORATORY OF ANIMAL BEHAVIOR, PHYSIOLOGY AND WELFARE, <https://www.depts.ttu.edu/animalwelfare/Research/PigCastration>.

205. 49 U.S.C. § 80502; 9 C.F.R. §§ 89.1–.5(2022).

206. 49 U.S.C. § 80502; 9 C.F.R. §§ 89.1–.5(2022).

207. *C.f.* 49 U.S.C. § 80502(d).

208. *Id.* at (d) (Current fines ranging from \$100 to \$500 appear to be small fines for industrial agricultural producers).

209. See *supra* notes 87–94 and accompanying text (for a discussion of the shortcomings of the 28 Hour Rule).

normatively be shortened so that animals have access to water and food more frequently. Additionally, transportation to slaughter must keep animals sheltered from the elements, so that they do not suffer on the way to slaughter.<sup>210</sup> Accounts exist of sentient and gentle animals standing in their own frozen urine in unheated cabs as they head toward a slaughtering plant.<sup>211</sup> Other accounts exist of animals arriving frozen solid or otherwise dead at the destination.<sup>212</sup> At a minimum, adequate shelter, food, and water on the way to slaughter seems an achievable minimum and ethical standard reflective of the values of a civilized society.<sup>213</sup>

#### 4. *Truly Humane Slaughter*

At the outset, Congress should amend and strengthen the Humane Slaughter Act to expressly cover all farm animals, including laying hens, turkeys, and broiler chickens, the largest portion of animals killed daily in the U.S.<sup>214</sup> At present under the Act, chickens, turkeys and other poultry do not have to be rendered insensible to pain before they are shackled, thrown or cut.<sup>215</sup> Indeed, “[t]here is evidence that most or all of the animals are conscious throughout the entire process.”<sup>216</sup> Birds are routinely shackled and then shocked in an electric bath, not to make them insensible to pain, as this is *not* required by law, but to make them easier to manipulate and kill.<sup>217</sup> Workers must move so fast in the shackling process that they may break a bird’s leg so a bird is then hanging by one leg, which makes it harder to shock the bird and potentially puts the bird in terrible pain. Rather than this mayhem with regard to poultry, the federal government should ensure that *all* animals, including birds, are insensible to pain and unconscious before slaughtering or handling for slaughter.

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210. GUIDELINES FOR HANDLING, TRANSPORT, AND SLAUGHTER OF LIVESTOCK, FOOD & AGRIC. ORG. OF THE UNITED NATIONS REG’L OFF. FOR ASIA & THE PACIFIC 33–34, 43 (2001), <https://www.fao.org/3/x6909e/x6909e.pdf>.

211. Gloria Galloway, *Canadian Standards for Farm-Animal Transport Dangerously Lax, Report Says*, THE GLOBE AND MAIL (Jun. 2, 2010), [https://www.theglobeandmail.com/news/national/canadian-standards-for-farm-animal-transport-dangerously-lax-report-says/article1211566/?\\_ga=2.3813104.196144594.1648140665-2003649450.1648140665](https://www.theglobeandmail.com/news/national/canadian-standards-for-farm-animal-transport-dangerously-lax-report-says/article1211566/?_ga=2.3813104.196144594.1648140665-2003649450.1648140665); *Curb the Cruelty: Canada’s Farm Animal Transport System in Need of Repair*, WORLD SOC’Y FOR THE PROTECTION OF ANIMALS 18–21 (2010), [https://www.worldanimalprotection.ca/sites/default/files/media/ca\\_-\\_en\\_files/curbthecrueltyreport.pdf](https://www.worldanimalprotection.ca/sites/default/files/media/ca_-_en_files/curbthecrueltyreport.pdf).

212. Sophie Kevany, *More than 20 Million Farms Animals Die on Way to Abattoir in US Every Year*, THE GUARDIAN (June 15, 2022, 1:30 PM), <https://www.theguardian.com/environment/2022/jun/15/more-than-20-million-farm-animals-die-on-way-to-abattoir-in-us-every-year>.

213. David DeGrazia, *Moral Vegetarianism from a Very Broad Basis*, 6 J. MORAL PHIL. 143, 154–55 (2009) (making the case that all animal farming and consumption is immoral but especially so in the case of industrialized animal farming).

214. See 7 U.S.C. § 1902 (The Humane Slaughter Act does not cover chickens, turkeys, rabbits, bison, or fish.).

215. Sara J. Shields & A.B.M. Raj, *A Critical Review of Electrical Water-Bath Stun Systems for Poultry Slaughter and Recent Developments in Alternative Technologies*, 13 J. APPLIED WELFARE SCI. 281, 283 (2010).

216. Friedrich, *supra* note 11, at 160; See Nicholas Kristoff, Opinion, *Abusing Chickens We Eat*, N.Y. TIMES, (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/opinion/nicholas-kristoff-abusing-chickens-we-eat.html>.

217. Friedrich, *supra* note 11 at 160.

The Humane Slaughter Act must also be shored up to ensure that slaughter is truly humane and painless for all animals,<sup>218</sup> and line speeds should reflect this requirement.<sup>219</sup> Recent increases in line speeds are more likely to result in failed stunning as well as harm to workers.<sup>220</sup> Failed stunning might be minimized if line speeds were made more manageable.<sup>221</sup> Federally mandated methods of slaughter must also be clarified,<sup>222</sup> and resources directed so that inspections toward compliance with line speeds and humane procedures occur on a regular basis by USDA and/or third-party inspectors.<sup>223</sup> Resources should also be directed toward development of more humane and effective methods of rendering an animal insensible to pain.<sup>224</sup>

At least one other scholar has suggested that specifically as to slaughterhouses, which often operate under the same roof and as part of large over-crowded animal feeding operations,<sup>225</sup> the federal government must take additional action to assess the regulation of the slaughterhouses in industrial meat production relative to the many stakeholders impacted.<sup>226</sup> This view reflects the fact that animal agriculture negatively impacts workers, the environment, and our society, as well as the animals.

California legislators and voters got it right. They recognized the need for a new, more humane future of food and passed Proposition 12 overwhelmingly. This California action is in line with popular views. Polls conducted in 2019 show that U.S. voters support greater federal oversight over industrial farming and recognize the need to treat animals humanely in life and in slaughter.<sup>227</sup>

While more humane measures cost money and may result in slightly higher prices to consumers, the effects do not appear to be inordinate.<sup>228</sup> After the passage

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218. See *supra* notes 84–85 and accompanying text (noting that the Human Slaughter Act does not cover birds); *supra* notes 214–217 and accompany text (for a discussion about how birds suffer pain on route to slaughter).

219. See *Congress Moves to Restrict Extreme-Speed Slaughter*, ASPCA (Mar. 11, 2021), <https://www.asPCA.org/news/congress-moves-restrict-extreme-speed-slaughter>.

220. See *supra* notes 103–110 and accompanying text (for a discussion on increased line speeds).

221. KURL D. VOGEL, *THE WELFARE OF CATTLE* 131 (Terry Engle et al. eds., 2018).

222. See generally *The Case for Controlled-Atmosphere Killing*, PETA, <https://www.peta.org/features/case-controlled-atmosphere-killing> (last visited Apr. 21, 2022); National Chicken Council Brief on Stunning of Chickens, NAT'L CHICKEN COUNCIL (Feb. 8, 2013), <https://www.nationalchickencouncil.org/national-chicken-council-brief-on-stunning-of-chickens>.

223. See Friedrich, *supra* note 11, at 169; Bruce Friedrich, *When Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 GEO. L.J. 197, 212 (2015) (“[A]lthough the Food Safety Inspection Service (FSIS) employs approximately 8,000 inspectors, there is no plant in the United States that has an inspector dedicated to humane slaughter enforcement, and the Agency has not done much in the way of regulation.”).

224. See PETA, *supra* note 222 (work on gas methods of rendering birds insensible to pain noting that further work could ensue if such were more a societal priority).

225. *Vertical Integration*, NAT'L CHICKEN COUNCIL, <https://www.nationalchickencouncil.org/national-chicken-council-brief-on-stunning-of-chickens> (last visited Apr. 21, 2022).

226. See Delcianna J. Winders & Elan Abrell, *Slaughterhouse Workers, Animals, and the Environment: The Need for a Rights-Centered Regulatory Framework That Recognizes Interconnected Interests*, 23 HEALTH & HUM. RTS J. 21, 23 (2021).

227. *Survey: Majority of Voters Surveyed Support Greater Oversight of Industrial Farms*, JOHN HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Dec. 10, 2019), <https://publichealth.jhu.edu/2019/survey-majority-of-voters-surveyed-support-greater-oversight-of-industrial-animal-farms>.

228. Richard Sexton & Daniel Sumner, *Opinion, California's Animal Welfare Law Caused Hysteria on Both Sides — Here are the Real Impacts*, THE HILL, (Aug. 20, 2021, 3:00 PM),

of California's Proposition 2, for example, many claimed egg prices would skyrocket.<sup>229</sup> However, after one year, prices stabilized and the average price of eggs raised under California's Proposition 2's more humane conditions increased by modest amounts.<sup>230</sup> For example, one study showed that over the initial 22 month period after Proposition 2 went into effect, households had an effect of 55-68 cents per month,<sup>231</sup> but that in coming years, as prices stabilized, California homes would only have a welfare loss of two dollars per household.<sup>232</sup> "Similarly, while an earlier study projected bacon prices soaring by up to 60% in California, a UC-Davis report estimated that uncooked pork prices would rise eventually by a more manageable 8% in California."<sup>233</sup> On balance, the more humane treatment of farm animals, as shown by the above modest costs after the passage of Proposition 2, does not seem prohibitively expensive.<sup>234</sup> Modest price increases for farm animal products simply do not seem like an appropriate barrier to action in light of our collective desire to improve animal welfare and our moral obligation to do so.<sup>235</sup> Congress should likewise act accordingly, and not give in to lobbying from big agriculture to do otherwise.<sup>236</sup> Consumers should hold Congress accountable, and not allow it to put the political and economic interest of the industrialized food sector ahead of consumer interest, industrial workers, the environment and ethical action.<sup>237</sup> The time for change is now.

## CONCLUSION

California's Proposition 12 improving confinement for farm animals and banning sales of animal products within the state that do not comply with the Proposition has the power to profoundly alter the way we treat farm animals in the United

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<https://thehill.com/opinion/energy-environment/568762-californias-animal-welfare-law-caused-hysteria-on-both-sides-here?rl=1>.

229. See DANIEL A. SUMNER et al., ECONOMIC EFFECTS OF PROPOSED RESTRICTIONS ON EGG-LAYING HEN HOUSING IN CALIFORNIA ii (2008) <http://aic.ucdavis.edu/publicaitons/eggs/egginitiative.pdf>.

230. Conner Mullally & Jayson Lusk, *The Impact of Farm Animal Housing Restrictions on Egg Price, Consumer Welfare, and Production in California*, 100 AM. J. OF AGRIC. ECON. 649, 663 (2018). In their study, the authors noted that the initial shock to egg prices was quite high, as high as a 33% increase in the months of Dec. 2014 to Feb. 2015, *id.* at 663. In dollar terms the authors found that California markets studied had a household welfare loss of 55-68 cents per month for the 22 observed months just before and after Proposition 2 went into effect, or \$6.63 to \$8.17 per year, *id.* at 666.

231. *Id.*

232. *Id.* at 66.

233. Scott McFetridge, *Will New Bacon Law Begin? California Grocers Seek Delay*, THE PRESS DEMOCRAT (Dec. 12, 2021), <https://www.pressdemocrat.com/article/news/will-new-bacon-law-begin-california-grocers-seek-delay>; HANBIN, LEE ET AL., VOTER-APPROVED PROPOSITION TO RAISE CALIFORNIA PORK PRICES 5 (2021), [https://s.giannini.ucop.edu/uploads/pub/2021/08/17/v24n6\\_2.pdf](https://s.giannini.ucop.edu/uploads/pub/2021/08/17/v24n6_2.pdf); Letter from Jen Sorenson, President, National Pork Producers Council to Thomas J. Vilsac, Sec. of Agric. (May 27, 2021), <https://nppc.org/wp-content/uploads/2021/05/NPPC-Letter-to-Sec.-Vilsack-on-Prop.-12-Background-Study.pdf> (A North Carolina State University study predicted that animal prices would rise 15% as a result of California's new law).

234. See generally Kenny Torrella, *The Fight Over Cage-Free Eggs and Bacon in California, Explained*, VOX (8:10 AM), <https://www.vox.com/future-perfect/22576044/prop-12-california-eggs-pork-bacon-veal-animal-welfare-law-gestation-crates-battery-cages>.

235. Klein, *supra* note 162. See also *supra* notes 172, 227 and accompanying text.

236. See Rachel Tackman, *Humanity Has Beef With the Meat Industry: The Cultural Push to Change the Way Beef is Produced, Harvested, and Consumed Stemming From Adverse Effects of Beef on The Environment and Human Health*, 17 ANIMAL & NAT'L, RES. L. REV. 151, 172-73 (2021).

237. *Id.*

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States. A number of states have followed California's lead and have likewise begun to pass more humane farm animal legislation. These enactments are consistent with the fact that most Americans support federal legislation that would ban inhumane treatment of farm animals, would require some reasonable level of decent conditions for farm animals, and would require federal oversight of factory farms to ensure humane treatment and slaughter.

Congress should thus pass new federal law that goes further than the road on which California has embarked; requiring humane slaughter for all animals; expressly prohibiting and defining animal cruelty and making its intentional commission a crime; laying out additional strict civil penalties where it is found; setting out minimum space requirements; making transport on the way to slaughter humane and limiting excessive increases in slaughter line processing speeds. At the very least, Congress could also adopt in the near term a mandatory or voluntary labeling program under USDA guidance so that consumers can make more informed choices about the animal products they purchase. Additionally, Congress should provide incentives for corporate behaviors that inform consumers, lead to more humane treatment of farm animals, as this could also increase demand for more humanely created animal products. Overall, a comprehensive federal legislative framework will have the advantage of avoiding a patchwork of state legislation regarding farm animals, is consistent with public viewpoint, and will inure to the benefit of farm animal workers, the animals, the environment, and the farming industry as a whole.