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Halfway There: Mid-Year Mid-South Review of Legal Developments

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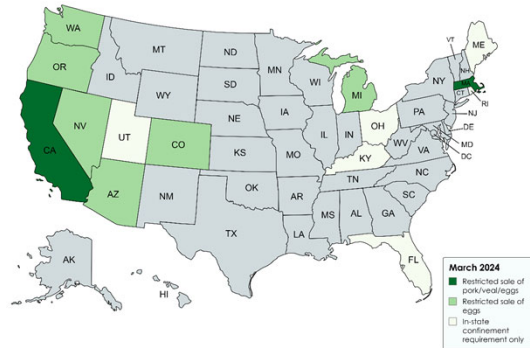
Outline:

-  *Commerce Clause/Prop 12*
-  *Environmental Law*
-  *Foreign Ownership, Farm Bill(?)*



Current Confinement Statutes/Regs: 2024

- Regulating living conditions for specific livestock
 - Laying hens
 - Pregnant sows
 - Veal calves
- Regulating in-state sales of products from non-conforming operations



Prop 12 Basics

- 2018 CA ballot proposal
 - Sponsored by HSUS
 - Passage 62% to 37%
- Overall requirements:
 - Prohibited the act of confining farm animals (egg-laying hens, veal calves and breeding pigs) in a “cruel manner.”
 - Applied to actions and animals within the state of California
 - Prohibited the sale of products within the state that had been made from animals who had been confined in the “cruel manner” outlined in California’s law.
- In other words:
 - Eggs produced/sold in California come from cage-free birds.
 - Previous requirement: “lying down, standing up and fully extending limbs or turning around freely”
 - Pork/veal sold in California come from farms without crates.
 - Applies to: gilts at six months of age or pregnant, older sows that have been bred for commercial breeding to produce pork meat, including a sow’s immediate offspring.
 - 3rd party certification required (cannot self-certify)
- NOTE: Similar, but not identical, requirements in Massachusetts “Question 3”
 - Only states (so far) to regulate sales of pork/veal/eggs, no matter where produced.



Prop 12 Challenge

- Challenge- NPPC/AFBF
 - Foundation of claims: Commerce clause
 - Barrier to trade by imposing “substantial burdens” obligations on out-of-state competitors v. in state producers
- Status:
 - NPPC lost in district & 9th Cir
 - Case appealed to, cert accepted and case heard by SCOTUS in October 2022
- Options for SCOTUS
 - Agree that CA can pass the law, it goes into effect as scheduled.
 - Consequence: states can pass similar laws that have an outsized effect on out-of-state production.
 - Send to lower/trial court for further development of the record
 - Hearing/briefings on what effect it has on in-state v. out-of-state, intent of the law etc.
 - Consequence: potentially see it back at USSC in 2ish years.
 - Disagree that CA can pass the law, Prop 12 struck down as unconstitutional
 - CA's original animal confinement law (Prop 2), would remain in effect.
 - Unlawful to prevent pregnant sows, veal calves and laying hens from lying down, standing up and fully extending limbs or turning around freely
 - Cannot sell shelled eggs in state unless they come from Prop 2 living conditions.



Prop 12 SCOTUS Ruling

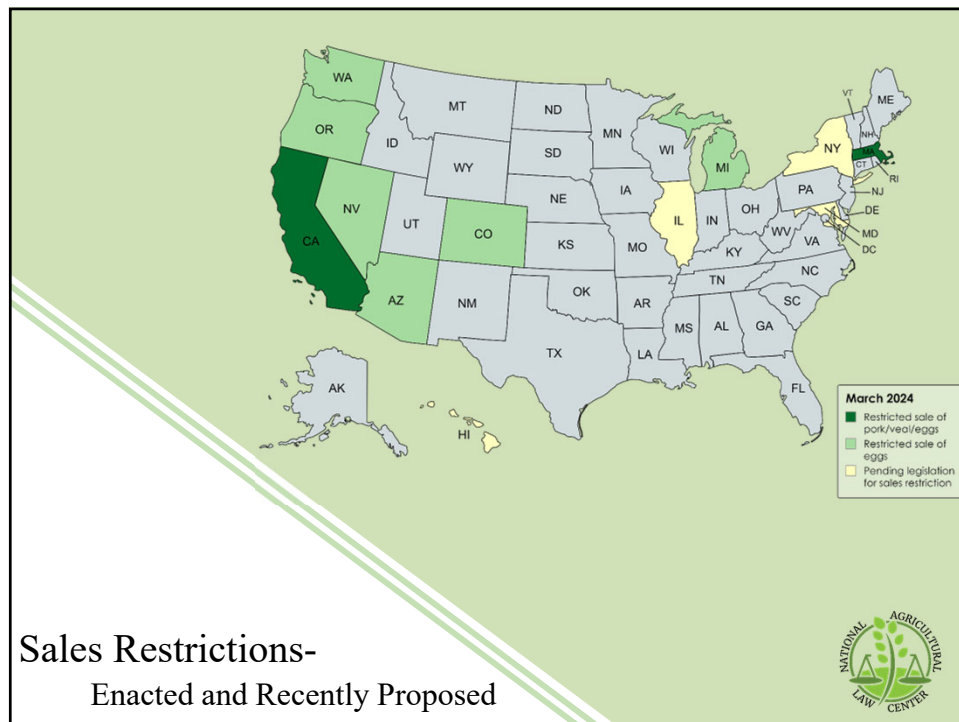
- Overall decision: Prop 12 constitutional & enforceable by California
 - Split decision. “Opinion of the Court” (Gorsuch) and several concurrence/dissents written by other justices
 - Minority of justices would have sent it back to district court for further consideration
- Analysis:
 - Purposeful facial discrimination against out of state producers = unconstitutional
 - No facial discrimination + “practical effect of controlling commerce” = constitutional
 - No facial discrimination + disproportionate effect on out of state businesses = it depends, but not in this case



Read opinion here

More analysis here





Iowa Pork Producers Assn v. Bonta

- Challenge to Prop 12
- Issue:
 - If Prop 12 discriminates against interstate commerce, both directly and under the *Pike* test.
 - Whether lower federal courts evaluating fractured SCOTUS opinions can consider all justices' opinions to determine the majority position on a legal issue, or instead are limited to consider only opinions concurring in the result.
- Claim dismissed by District Court and 9th Circuit
- SCOTUS cert requested
 - 23 state AGs signed onto amicus in favor of granting petition
- Distributed for conference of 5/15/25.



Food Security and Farm Protection Act (S. 1326)

- Proposed by Sen. Joni Ernst (R-IA; cosponsored by 8 R)
- Consequences if passed:
 - State governments cannot impose standards/conditions on preharvest production of ag products if 1) production occurred in different state and 2) the standard is different than that imposed by federal law and the laws of the other state
 - If there are no other standards, that becomes de facto standard.
- Includes broadly applicable private right of action to invalidate standard/condition plus damages
- Upon motion, preliminary injunction required unless the defendant proffers by clear and convincing evidence that likely to prevail + injunction would cause irreparable harm
- Notes:
 - Previous iteration in 118th Congress: "EATS Act" ((S. 2019; HR4417)
 - Letter in opposition signed by 171 Reps (163 D, 5 R and 2 D from non-voting areas) and 30 Sens (27 D, 1 R, 2 D)
 - Harvard Animal Law & Policy Program, July 2023: [Legislative Analysis of S.2019 / H.R.4417: The "Ending Agricultural Trade Suppression Act" 118th Congress – 2023-2024](#)
 - Findings
 - 1000+ state laws could be overturned if the act takes effect
 - Ex: Zoonotic, plant/pest, food safety, natural resources
 - Would result in extensive litigation, imposing costs on state/local governments and fed agencies
 - Would create regulatory uncertainty for producers/industry/consumers



S. 1326



Harvard Analysis



Farm, Food, and National Security Act of 2024

- Farm Bill Proposal
 - Rep. Thompson (R), Chair House Ag Comm.
- Consequences if passed:
 - States may impose conditions on production of livestock for animals physically located in that state.
 - States may not set conditions for sale on products derived from "covered livestock" that are beyond those imposed by the state where "production" occurred.
- Definitions:
 - **Covered livestock:** domestic animal raised for purpose of 1) slaughter or 2) producing milk/milk products.
 - Specifically excludes laying hens
 - **Production:** raising (including breeding) of covered livestock.
 - Specifically excludes movement, harvesting, or further processing of covered livestock.



Senate Ag Republican-Drafted Framework (2024)



UNITED STATES SENATE COMMITTEE ON
AGRICULTURE,
NUTRITION, &
FORESTRY
RANKING MEMBER JOHN BOOZMAN

- Farm Bill Proposal
 - Sen. Boozman (R), Chair Sen. Ag Comm.

Proposal:

- “Protects the ability of livestock producers to raise and sell products into interstate commerce without interference from other states.”

Recent USDA Perspective

- Secretary Rollins testimony at US House Appropriations Committee hearing on the USDA budget, (5/6/25)
 - “When a state like California or other states passes laws that have significant impact outside their state border then that is not sustainable. Specific to Prop 12, we have understood that, we see it, [and] I think it’s pretty bipartisan ... that, that is just not sustainable.”
 - “Having a federal approach to that, ensuring that we’re protecting our pork producers, especially, some of the other livestock producers underneath the regime of Prop 12 is important.”
 - USDA “already has begun the deregulation” of federal policies.



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Environmental Law Trends in 2025

State pesticide liability limitation laws



Final Insecticide Strategy



Monarch butterfly listing proposal



Rescinding the ESA definition of “harm”



Pesticide Liability Limitation Laws

This year, at least ten states introduced pesticide liability limitation bills

- FL, GA, IA, MS, MO, MT, ND, OK, TN, WY

Language varies slightly across the bills, but overall, the legislation would limit liability for pesticide manufacturers facing state level challenges to pesticide label language so long as:

- (1) The pesticide label is consistent with FIFRA and approved by EPA
- (2) The pesticide label is consistent with the most recent human health assessment performed by EPA

North Dakota and Georgia became the first states to successfully pass a pesticide liability limitation bills

- Earlier this year a jury in Georgia awarded a plaintiff \$2.1 billion after finding that a pesticide manufacturer failed to warn consumers about the health risks of using a particular pesticide
- A circuit split on whether FIFRA preempts such claims is on appeal to the Supreme Court



FIFRA Preemption: The Two Main Arguments

FIFRA Preempts Failure to Warn Claims

State law failure to warn claims would require a new warning to be added to the pesticide label that *is different from or in addition to* the federally registered label.
Preemption under 7 U.S.C. § 136v.

FIFRA misbranding requirement is broader than state law failure to warn claims, so preemption does not occur.

No preemption if FIFRA requirements are parallel to state law requirements.

FIFRA Does NOT Preempt Failure to Warn Claims



New ESA-FIFRA Policy

- Broadly, EPA's new ESA-FIFRA Policy focuses on "early mitigations"
 - These are new restrictions that will be added to pesticide labels to reduce impacts to listed species and critical habitat
- The goal of introducing early mitigations is to reduce the number of future ESA consultations that result in findings of "jeopardy" or "adverse modification"
- EPA is developing these early mitigations in two ways:
 - Broadly across different groupings of pesticides (herbicides, insecticides, rodenticides, etc.)
 - Tailored to address species that are considered particularly vulnerable to pesticides
- The mitigation strategies are not self-implementing – EPA will apply the Strategies to pesticide labels as they are submitted to the agency or come up for review



Herbicide Strategy

Outlines "early mitigations" that EPA expects to include on all herbicide labels

Early mitigations fall into two main categories – reducing pesticide spray drift, and reducing pesticide runoff/erosion

Mitigation measures EPA finds are necessary across the entire pesticide use area will be included in the product's general label

Mitigation measures only necessary in specific geographic areas will be posted to EPA's website Bulletins Live! Two



Final Insecticide Strategy

Released on April 29, the final Insecticide Strategy is similar to the Herbicide Strategy but will be applied to insecticides instead of herbicides

Focuses on early mitigations that reduce insecticide exposure to threatened and endangered invertebrate species

Mitigations focus on reducing spray drift and runoff/erosion with a focus on buffer zones to reduce spray drift and a mitigation menu and point system to reduce runoff/erosion

For the first time identifies a conservation program that will count as 9 runoff/erosion mitigation points, EPA says that more programs will be approved

Clarified that use of a qualified expert to help plan mitigation efforts will also count as a mitigation point



Mitigations

Spray Drift Mitigations

- Additional buffer requirements in the form of windbreaks, hedgerows, hooded sprayers, and application rate reduction depending on level of risk
- Buffer distances will range from 10 – 300 ft. based on application method and the degree of population-level impacts that a particular herbicide is expected to have

Runoff/Erosion Mitigations

- A “mitigation menu” of limitations – applicators choose which methods are right for them to achieve the necessary number of “points”
- Includes: weather-based restrictions; methods of application; in-field management activities to reduce runoff; management adjacent to sprayed fields; activities to increase water retention



Monarch Butterfly Proposed for Listing



- FWS published a proposed rule to list the monarch butterfly as “threatened” under the ESA on December 12
- The original 60-day comment period ran through March 12 but has been extended through May 19
- The proposal includes a detailed 4(d) rule with a substantial carve out for agriculture
 - But note, the proposal has little to say about pesticides!



Ag Exemptions

FWS proposes to exempt the following agricultural activities from being considered “take” of the monarch:

- Routine agricultural activities such as plowing, drilling, disking, mowing, mechanical manipulation of land, general maintenance, terracing, dikes, conservation tillage, etc.
 - **Note:** *This does NOT include conversion activities*
- Livestock grazing and routine ranching activities such as rotational grazing, patch-burn grazing, vegetation and invasive species management, construction and maintenance of fences and watering areas, etc.
- Normal silviculture and forest management practices
- Fire management
- Maintenance, enhancement, removal, and establishment of milkweed and nectar plants on residential or other developed properties
- Vegetation management activities that remove milkweed/nectar plants when monarchs are not present



Rescinding ESA “Harm” Definition

- Section 9 of the ESA prohibits anyone from “taking” a species
 - “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
- Since the 1970s, “harm” has been defined through regulations as:
 - “an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”
- On April 17, FWS proposed to completely rescind the regulatory definition of “harm”
 - A comment period is open through May 19 (currently, there are over 121k comments!)
- This represents uncharted territory with many questions currently unanswered regarding Section 7 consultation and how incidental take permits are drafted
- Expect litigation!

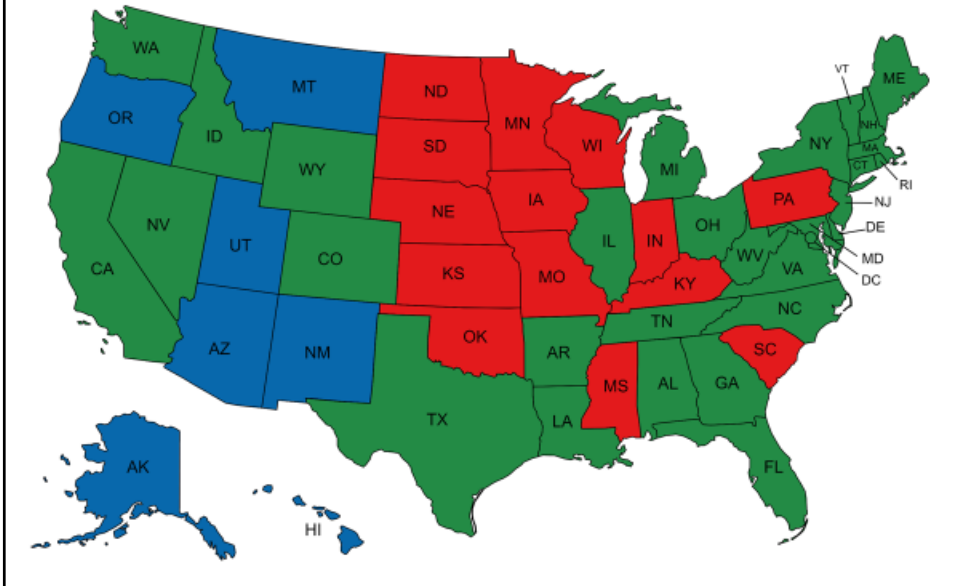


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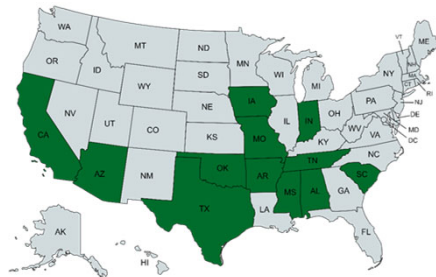


Foreign Ownership Laws: December 31, 2022

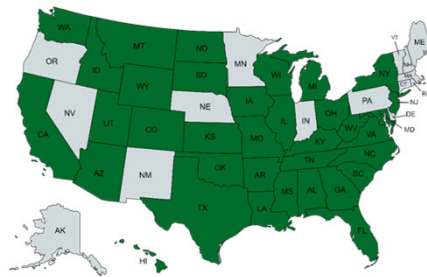


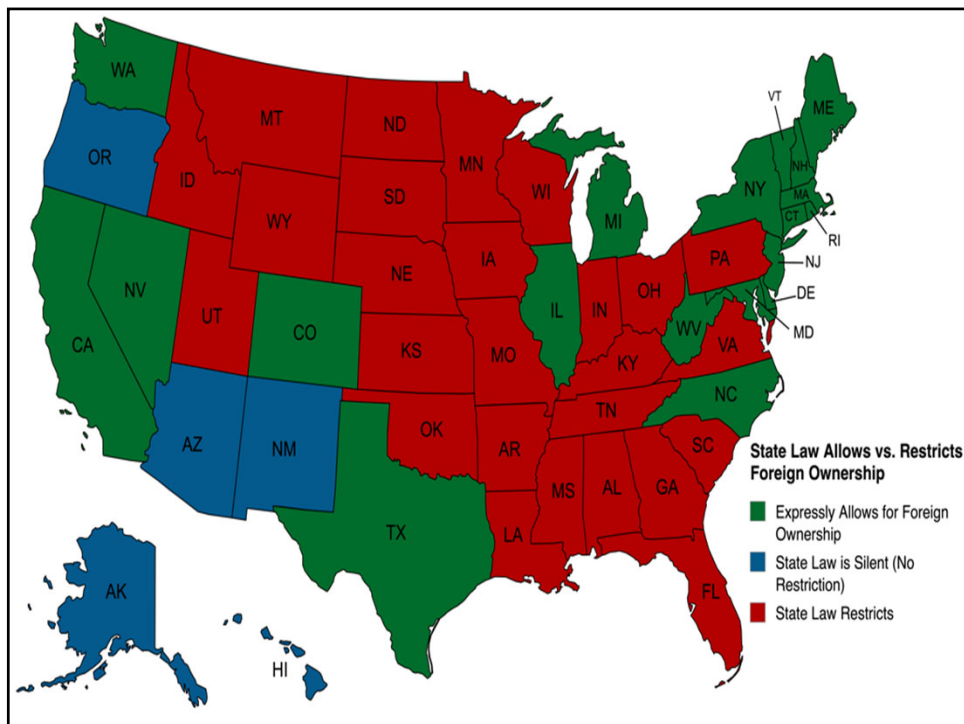
State Foreign Ownership Proposals

2021 – 2022



2023





Foreign Ownership in U.S. Farmland

- Agricultural Foreign Investment Disclosure Act (“AFIDA”) of 1978
- Requires a “foreign person” to report ag landholdings (and leases 10+ years) to USDA
- Latest official data is through December 31, 2023
- Foreign ownership in private ag land: Approx. 45 million acres (3.5% of all private ag land and 2% of all land in U.S.)
 - Almost +3.4 million acre increase from Dec. 31, 2021 to December 2022
 - About 2 million acre increase from 2022
 - 2012 – 2022? Appx. +17.3 million acre (+66%)
- 48% forestland/timber
- 29% cropland
- 21% pasture/other ag



Farmland Security Act of 2025

- S. 845 (Senators Chuck Grassley and Tina Smith)
- This is an evolution of the FY23 Appropriations provision that directed USDA to accept AFIDA filings electronically and to establish a database of certain disaggregated ownership data that is accessible to the public
- S. 845 would, among other things:
 - Penalize shell corporations 100% of FMV of entity's interest in "agricultural land" not reported to USDA
 - Require all foreign-owned shell companies to disclose ag landholdings, failure subject to penalty equal to person's interest in the land
 - However – allows a path for shell company to avoid civil penalty if it corrects filing (60 days within USDA notice of failure to report or a defective filing)
 - Requires annual audits of 10% of AFIDA filings
 - Requires USDA to provide training to state/county employees to identify improperly unreported ag and forestland
 - Reporting – research on leases and impact on family farms/communities/food supply & trends in foreign investment by shell corporations and the production capacity of foreign-owned land



2023 Enacted Foreign Ownership Laws

- *Alabama – HB 379*
 - Restricts **governments** and **political parties** of China, Iran, North Korea, and Russia ("Big 4") from acquiring **agricultural land**
- *Arkansas – SB 383*
 - Restricts a "prohibited foreign party" (**individual, entity, and gov't** of countries subject to **International Traffic in Arms Regulations**) from acquiring ag land
 - Restricts "prohibited foreign-party-controlled business" from acquiring **real property**
 - Criminal liability for violations
 - Office of Agricultural Intelligence
 - Enforcement action against Syngenta
- *Florida – SB 264*
 - Restricts **individual, entity, and gov't** of Big 4 from acquiring **ag land**
 - Restricts Chinese gov't, entities, and individuals from acquiring **real property**
 - Criminal liability for violations
 - *Shen v. Simpson*, No. 4:23-cv-208 (N.D. Fla. 2023)



2023 Enacted Foreign Ownership Laws

- *Louisiana – HB 537*
 - Restricts “**foreign adversary**” from acquiring **real property**
 - “Foreign adversary” determined by U.S. Secretary of Commerce under [15 C.F.R. § 7.4\(a\)](#)
- *Tennessee – HB 40/SB 122*
 - Restricts individual, entity, and gov’t of country on U.S. Treasury Department’s **sanctions program list** from acquiring **real property**
- *Virginia – SB 1438/HB 2325*
 - Restricts “foreign adversary” from acquiring any interest in **ag land**



2025 Picture

- About three dozen states have had one or more legislative proposals, several with multiple bills
- 2025 major action:
 - Idaho (amended existing law, added quite a few provisions)
 - Utah (amended existing law)
 - Kentucky (enacted new law)
 - West Virginia (27th state to enact a foreign ownership law)
 - Tennessee (amended existing law)
 - Georgia (amended to include military installations)
 - Arkansas (amended existing law, revised some definitions)
 - Texas (legislature passed law, sent to Governor)



State Enforcement & Legal Challenges Developments

- Arkansas' Enforcement Action
 - Enforcement action against Syngenta
 - Required to divest interest in 2 years or AG may bring legal action
- *Shen v. Simpson* (lawsuit challenging Florida's 2023 FOL)
 - District court denied preliminary injunction b/c law based on where a purchaser is domiciled rather than on race/ancestry (thus rational basis applies and the law overcomes this test)
 - Not preempted by federal law b/c CFIUS jurisdiction is limited/does not extend to all property
 - 11th Cir. Issues preliminary injunction for two *Shen* plaintiffs on Feb. 1
 - Preempted by federal law (specifically, FIRRMA which extended CFIUS jurisdiction to real property)
- Arkansas litigation – *Jones Eagle LLC v. Ward*



- Farm Bill(?)
- Reconciliation process
- Closing comments/questions

