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ANIMAL LAW FUNDAMENTALS

The Critical Role of States in Farm Animal Confinement and Sales Laws

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Introduction

Row after row of mother pigs gnashing their teeth against the metal bars of crates so small they cannot turn around; hens packed so tightly into stacks of barren wire cages that they cannot flap their wings; calves unable to stretch their lanky limbs. These are just some of the routine realities of daily existence for animals used to produce food for human consumption on farms across the country—a far cry from pastoral images of Old MacDonald's farm. As public awareness of the plight of these farm animals has grown, so too has the call for more humane treatment. Indeed, recent survey data from a national poll conducted by the American Society for the Prevention of Cruelty to Animals showed that approximately three quarters of consumers are concerned about the welfare of animals raised for food.1 States have increasingly answered that call by passing ballot initiatives and statutes outlawing some of cruelest confinement of farm animals within their borders—and sometimes also restricting the in-state sale of such products. Throughout this paper, such laws will be collectively referred to as "farm animal confinement and sales laws."

However, not everyone has applauded this new wave of farm animal laws. Producers of farm animal products and their allies have come out in force against even the most modest of humane standards. In lawsuit after lawsuit, they have challenged the constitutional authority of states to enact such laws, predicting doom to their businesses should the laws go into effect—even as many such companies are choosing to comply with the very laws they object to in court. Court after court has rejected these challenges.

This paper will briefly address some of the various ways that states within the United States have legislated for farm animals—and why they have taken it upon themselves to do so—before focusing on the recent legal battles over state farm animal confinement and sales laws. In doing so, this paper will focus on three California confinement and sales, as it is those laws which have garnered the vast majority of legal challenges and have served as inspiration for other states that want to enact humane legislation. Through exploring the California lawsuits readers should gain an understanding of the outer limits of state regulation of farm animal products, advocates' best arguments for upholding these laws, and some of the features of farm animal laws that necessary for them to withstand constitutional scrutiny. Because this paper is primarily about farm animal confinement and sales laws, it is not an in-depth treatment of the full universe of

[1] World Animal Foundation, *Majority of Americans Concerned About Farm Animals – Farm Animals Fact & News*. https://www.worldanimalfoundation.org/advocate/farm-animals/params/post/1274393/americans-concerned-about-farm-animals (Last visited Feb. 6, 2022).

farm animal law topics, which include, among others: slaughter and transport, limitations on painful practices like tail docking, environmental degradation by factory farms, and product labeling—as well as whistle blower laws targeting farm investigations known as Ag-Gag laws.

State-Level Farm Animal Laws

Why State Laws and Permissible Areas of Regulation

In 2020, a total of 9,760,161,200 land animals were slaughtered for American appetites, and Americans are "devouring eggs in numbers not seen in nearly five decades—about 279 per year per person."[2] Due to the staggering number of animals involved in food production, laws related to farm animal treatment have the potential to do enormous amounts of good. But why should such humane legislation fall to individual states? Why not leave how farm animals are treated to federal law?

The answer is twofold. *First*, the federal framework of farm animal regulation is dominated by increasingly consolidated agricultural interests—with an extraordinary amount of power over smaller producers and regulators alike. Indeed, the White House recently released an analysis showing that four of the biggest meat-processing companies used their consolidated market power to drive up meat prices and underpay farmers.[3] *Second*, the existing federal framework of farm animal regulation is thus far entirely unconcerned with the on-farm treatment of those animals. The federal Animal Welfare Act ("AWA") explicitly exempts farm animals from its definition of "animal[s]," thereby excluding them from that law's protections.[4] And while there are some minimal federal protections for some animals during slaughter[5] and transport,[6] there simply are no federal laws governing the *on-farm treatment* of farm animals, where they spend the vast majority of their short lives.[7] In fact, the United States Department of Agriculture

[2] United States Department of Agriculture, Economics, Statistics and Market Information System: Poultry Slaughter Annual Summary (Feb. 26, 2021); United States Department of Agriculture, Economics, Statistics and Market Information System: Livestock Slaughter Annual Summary (Apr. 21, 2021).
[3] Brian Deese, et al., Press Release, White House Briefing Room, Recent Data Show Dominant Meat Processing Companies are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins (Dec. 10, 2021), https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/.
[4] 7 U.S.C. §§ 2131-2159 (2009).
[5] Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1906 (1958).
[6] 28-Hour Law, 49 U.S.C. § 80502 (1994).
[7] *See* David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House—Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205–07 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

("USDA") itself has disclaimed regulation of what constitutes "humane" treatment of farm animals.[8]

This void in federal law pertaining to on-farm treatment of animals creates an urgent need for states to fill, and it also helps to identify what types of state farm animal regulation are legally permissible. As will be discussed, the raising of animals is a traditional area of state regulation.[9] And, state laws that remove animals from the food production pipeline entirely before they get to the slaughterhouse have routinely been upheld, in cases where reviewing courts noted, for example, that "Congress did not intend to preempt the entire field of meat commerce under the [Federal Meat Inspection Act]"[10] and that states "can ban bullfights and cockfights and the abuse and neglect of animals."[11]

Of course, the line between permissible and impermissible state regulation has not always been a clear one. Take, for example, the *National Meat Association* Supreme Court case overturning a 2008 California law banning the sale of meat derived from the slaughter of nonambulatory (or "downed") animals (animals that cannot stand or walk). The law was passed in response to a 2007 Humane Society of the United States ("HSUS") investigation at the Hallmark Meat Packing Company and Westland Meat Company in Chino, California. The horrifying results of the investigation revealed employees using cruel practices to force animals too sick or injured to move to walk to slaughter, including "ramming [cows] with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks[,] and even torturing them with a high pressure water hose."[12] The release of investigation footage triggered an avalanche of responses—from the largest meat recall in history, to criminal charges, to a False Claims Act case filed by HSUS and later joined by Department of Justice, and USDA eventually closing a legal loophole that had allowed downed cattle to enter the food supply.[13]

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[8] *See, e.g.,* Brief For Defendant-Appellees, at 36, *ALDF et al. v. USDA et al.*, (9th Cir. 2015) (No. 13-55868) (Dkt. 27-1) (USDA asserting that "concern for animal welfare" is "*a patently irrelevant factor under the PPIA*" and explaining that in analyzing a petition for rulemaking under the PPIA, USDA "properly ignor[ed] all irrelevant evidence relating to animal welfare" (emphasis added)).
[9] *See infra* Part IV.
[10] *Empacadora de Carnes de Fresnillo, S.A. DE CV* v. *Curry*, 476 F.3d 326, 336 (5th Cir. 2007) (upholding Texas law prohibiting selling or transporting horsemeat for human consumption because the Federal Meat Inspection Act —"in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place").
[11] *Cavel Int'l. Inc. v. Madigan*, 500 F.3d 551, 556–67 (7th Cir. 2007) (upholding Illinois ban on the sale, import or export of horse meat for human consumption, because "if it is not produced, there is nothing so far as horse meat is concerned for the [federal law] to work upon").
[12] Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15ANIMAL L. 149, 156–57 (2009) (internal citation omitted).
[13] *Id.*

Ultimately, however, the Supreme Court struck down California's legislation, finding that it was preempted by the Federal Meat Inspection Act's ("FMIA") prohibition on state regulation of the "premises, facilities and operations of federally inspected slaughterhouses," 21 U.S.C. § 678.[14] Essentially, the Court found that the California law impermissibly forced slaughterhouses to treat animals differently than the FMIA, requiring them to humanely euthanize downed animals rather than set them aside as "suspect"—an FMIA categorization that facilitated the very abuses documented in the Humane Society investigation.[15] The decision has sometimes been used by humane legislation opponents to argue that the FMIA has a broad preemptive effect, and should therefore preclude any manner of laws regulating on-farm treatment of farm animals. But while the decision certainly limits what states can do about issues like downed animals, the Court emphasized that the sales ban was preempted only because it indirectly regulated the treatment of animals *inside federally inspected slaughterhouses*—an area of regulation committed solely to federal law by the FMIA. To the Supreme Court, California's law "function[ed] as a command to slaughterhouses to structure their operations" in a particular way.[16] The decision thus left room for state laws that do *not* regulate the operations of official establishments (directly or indirectly), for example those laws which regulate only on-the-farm treatment of animals, like the farm animal confinement and sales laws discussed in this paper.

Where to Place Farm Animal Laws

Where within a state's legal framework might laws regarding on-farm treatment of farm animals fit, and what might those look like? There are at least several options for the placement of such laws, each with its own unique advantages and limitations.

WORKING WITHIN EXISTING CRIMINAL LAW FRAMEWORKS

To some—particularly seasoned animal advocates long outraged by how overlooked the treatment of farm animals has been—the obvious answer to where states should locate farm animal protections might be existing state animal cruelty codes. While such laws vary by state, most provide criminal penalties for a person who, for example, beats a dog or sets a cat on fire. Similar to the AWA on the federal level, however, state laws routinely exempt farm animals, or

[14] *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 463 (2012).
[15] *Id.*
[16] *Id.* at 464.

treat them very differently from other animals. For example, state codes often exclude farm animals from the definition of "animal," or exempt common farm animal husbandry practices (such as tail docking and castration without anesthesia) from the definition of cruelty.[17] Thus, one conceivable way for states to legislate for farm animals would be to change such exemptions such that farm animals are covered under those cruelty codes. Including farm animal protection in a state's cruelty code sends a strong message to would-be animal abusers that a state takes cruelty to farm animals seriously. In addition, the threat of criminal penalties might deter some would-be animal abusers from maltreating animals.

Such changes to criminal codes are easier said than done, however, and their ultimate effectiveness and desirability is sometimes questionable. Advocates pushing for such changes are likely to face opposition on multiple fronts. For example, producers of animal products are likely to bristle at the notion that pervasive agricultural practices that they view as routine and necessary should be criminal. Such change might ultimately hurt their profits. In addition to producer opposition, consumers might be uncomfortable putting the treatment of farm animals in the same category as treatment of companion animals. Surely abuses and suffering can and do occur in both contexts, but criminalizing practices tied to the food people are putting on their table is harder for some people to swallow than criminalizing maltreatment of Fluffy or Fido.

And even from within the animal law community, there are those who question whether criminalizing cruelty to animals is always a desirable or ethical goal. For example, Justin Marceau has argued that while criminalizing animal abuse provides a sense of accomplishment for animal advocates, it often does so without addressing the underlying causes of animal abuse and suffering, and the enforcement of such laws can be fraught with inequities across population groups.[18] Moreover, Marceau notes that in its quest for more and stronger criminal penalties for the abuse of companion animals, the "carceral animal law" movement has not infrequently traded away protection of farm animals—for example, by way of exemptions in state (as well as federal) law. That, in turn, has meant that even though animals raised for food make up over 90% of domestic animals in the United States, corporations like factory farms are often inoculated

[17] ANIMAL WELFARE INSTITUTE, *Legal Protections for Animals on Farms*, (2021), https://awionline.org/sites/default/files/uploads/documents/21LegalProtectionsFarmReport.pdf.
[18] Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250, 253 (2021) ("In the realm of human victims, there is a large body of research documenting the fact that the most severe punishments are imposed on persons with low social status who harm a high-status victim.").

from prosecution while individual abusers—usually abusers of companion animals—remain the focus of criminal laws.[19] Marceau has contended that resources should be reallocated toward corporate accountability rather than the carceral.[20]

Thus, while changing state criminal codes to include farm animals may address some of the imbalances in terms of the types of animals covered, in many states it also represents a radical change of course. This might prompt pushback from legislators and policy makers used to advocates conceding that these same laws can exclude farm animals. Moreover, stronger cruelty code provisions for farm animals could be practically useless in states where district attorneys, exercising their prosecutorial discretion, prioritize any number of other cases over farm animal cruelty. A shift to criminalizing certain treatment of farm animals would therefore necessarily involve far more than a shift in public attitude.

WORKING WITHIN EXISTING ADMINISTRATIVE LAW FRAMEWORKS

One potential alternative to locating state farm animal laws within the criminal law framework is to instead work within a state's administrative code. Influencing the creation, makeup, and standards set by "livestock care standards boards" is one such potential avenue. All states have a department of agriculture, a growing number of which delegate some of their authority to such boards.[21] For example, in 2009, Ohio created a livestock board by constitutional amendment, tasking it with "establishing standards governing the care and well-being of livestock and poultry in the state."[22] At first glance, a board like this one seems to provide enormous potential for change for farm animals. After all, having a state-created body tasked with farm animal "care and well-being" sounds like an opportunity for advocates to press for restrictions on cruel and inhumane practices—such as tail docking and castration without anesthesia. In practice, however, such boards—which are frequently dominated by animal agricultural interests even if they do sometimes reserve a seat for humane groups—are less about livestock "care" and more about keeping such cruel routine practices in place. Indeed, Ohio's

[19] *Id*. at 261 ("[T]he logic of increased attention to crimes and penalties for individual animal abusers actually reinforces hierarchies and perpetuates larger-scale animal abuse and exploitation caused by corporations.").
[20] *Id*. at 252.
[21] AWI, *Legal Protections for Animals on Farms*, 13–14, https://awionline.org/sites/default/files/uploads/documents/21LegalProtectionsFarmReport.pdf.
[22] OHIO CONST. art. XIV, § 1(A) (West through 2015-2016 General Assemb.).

board was actually created as a preemptive strike against animal advocates trying to press other avenues of humane reform in a state.[23] And, while animal advocates were able to successfully convince the board to phase out several inhumane confinement practices (in order to avoid a ballot initiative campaign to achieve similar results), the board still largely rubber stamps many standard industry practices.[24]

The regulatory capture of agencies that oversee livestock care standards boards (or otherwise implement farm animal standards) by animal agricultural interests is perhaps most clearly reflected in a 2008 New Jersey case. There, the legislature directed the state's department of agriculture to create regulations pertaining to domestic livestock—going so far as to take the unusual step of specifying that the guiding principle should be whether such standards were "humane."[25] In response, the department of agriculture simply deferred to producers and other industry players, exempting "routine husbandry practices" from those considered to be cruel, and listing some of the cruelest routine practices—including tail docking and castration without anesthesia of cattle, debeaking of birds, and crating of pigs—as presumptively humane.[26] Animal welfare groups filed suit, and the court ultimately invalidated some of those regulations for failing to state a humane standard.[27] However, the court was clear that the decision was not an outright ban on any particular husbandry practices. Rather, the court recognized that the way some of the standards were defined were insufficient to ensure that they met the statute's "humane" requirement.[28]

Ultimately, while humane change for farm animals is possible within existing administrative frameworks, regulatory capture by animal agricultural interests means that they are not often a particularly viable avenue for change.

EMERGENCE OF NEW STAND-ALONE CIVIL LAW SCHEMES

In part because of some of the shortcomings of other types and placements of state farm animal regulation discussed above, farm animal confinement and sales laws—most often situated as new stand-alone civil law schemes—have recently emerged as arguably the most powerful

[23] Lindsay Vick, *Confined to A Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation*, 18 ANIMAL L. 151, 154 (2011).
[24] AWI, *Legal Protections for Animals on Farms, supra* note 21, at 14.
[25] *New Jersey Soc'y for Prevention of Cruelty to Animals v. New Jersey Dep't of Agric.*, 196 N.J. 366, 403 (2008).
[26] *Id*.
[27] *Id*.
[28] *Id*. at 418.

tool in a state's farm animal legislation toolkit. Such laws address some of the most extreme and pervasive types of cruelty inflicted on farm animals, and their placement in state civil codes has at least several advantages. *First*, such placement avoids at least some of the difficulties of placement in the criminal scheme, including the need to overcome years of treating companion animal cruelty as a distinct construct from farm animal cruelty. Locating the laws in the civil scheme may also send a message that advocates are helping industry evolve to a new and more humane future, rather than simply criminalizing outdated cruel practices. *Second*, this placement allows for enforcement by attorneys general rather than state departments of agriculture, thereby avoiding some of the problems of co-opting by agribusiness associated with placement in the administrative scheme. Some farm animal production and sales laws even provide for private consumer actions to enforce the laws.[29] While some of these emerging laws do call for departments of agriculture (and/or other state departments) to draft implementing regulations, such regulations must be in accordance with the new laws, and therefore farm animal product producers' ability to influence these regulations in a way that is harmful to animals is limited. *Third*, this placement allows animal advocates to take advantage of the ballot initiative process in the 26 states that allow for it—bringing the power to create change for farm animals directly to the people.[30] When politics lag behind the will of a state's citizens to create positive change for animals and one another, ballot initiatives "present[] a unique solution to fill that gap by allowing the people to force the legislature to recognize their will."[31]

While much of the recent litigation surrounding farm animal confinement and sales laws has been located in California, the story does not begin there. It actually begins in Florida, where after repeated inaction from the legislature, Florida voters took pig welfare into their own hands. In 2002, voters passed a ballot initiative that banned the use of gestation crates (individual enclosures that are so small the animals cannot turn around, commonly used to confine breeding pigs during their pregnancies).[32] Doing so allowed animal advocates to bypass the legislature, which, as was clearly true here, is nearly always slower or more reluctant to enact reforms—particularly in regard to farm animals with well-heeled lobbying groups behind their

[29] *See, e.g.,* Cal. Health & Safety Code § 25993(b).
[30] National Conference of State Legislatures, *Initiative and Referendum States*, https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx (listing states with citizen initiatives or popular referendum mechanisms) (last visited Feb. 5, 2022).
[31] Neil Thapar, *Taking (Live)stock of Animal Welfare in Agriculture: Comparing Two Ballot Initiatives*, 22 HASTINGS WOMEN'S L.J. 317, 331 (2011).
[32] Lovvorn, *supra* note 12, at 154.

exploitation. While the use of ballot initiatives to enact change for animals was not new, the Florida law marked the first time the initiative process had been used for farm animals.[33] Arizona soon followed suit with a similar ballot initiative that banned the use of both gestation crates and veal crates used to confine calves raised for veal.[34]

California Farm Animal Confinement and Sales Laws

Emboldened by the ballot initiative wins for pigs and veal calves in Florida and Arizona, and still reeling from the Westland Hallmark investigative footage, *supra* note 12, animal advocates broadened the scope of their aims when it came to California, setting in motion a wave of legislative wins for animals in one of the country's largest agricultural production states—as well as an onslaught of litigation.

Proposition 2

The scope of the ballot initiative that became Proposition 2 covered not only breeding pigs and veal calves, but also—for the first time—egg-laying hens. The measure required that farms in California provide sufficient space for the covered animals to stand up, turn around, and extend their limbs. By its terms,

[a] person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

(a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely.[35]

While the measure was criticized by some animal advocates for not going far enough to protect animals,[36] those straightforward behavioral standards represented the most comprehensive state farm animal reforms to date—and its eventual passage was truly a watershed moment for farm animals.[37] A diverse coalition of advocates and organizations—from those focusing on animal advocacy to those that also focus on environmental protection, food

[33] *Id.*
[34] *Id.*
[35] Cal. Health & Safety Code § 25990 (West 1999 & Supp. 2009).
[36] Joan Morris, *Will Proposition 12 stop farm animals from being mistreated?,* THE MERCURY NEWS (Oct. 22, 2018), https://www.mercurynews.com/2018/10/22/will-proposition-12-stop-farm-animals-from-being-mistreated.
[37] Lovvorn, *supra* note 12, at 150.

safety, and workers' rights—came together to plead their case in the court of public opinion.[38] During public forums and door knocking campaigns, they meticulously explained the initiative to voters, who were often shocked to learn about the plight of most farm animals on modern farms. When voters learned, for example, that most egg laying hens have less space than an iPad on which to live their entire lives, they were horrified. Advocates beat back fierce and well-funded opposition, and Proposition 2 overwhelmingly passed in 2008 by 63.5% of the vote—which, at the time, was the highest margin of victory of any ballot initiative in the state's history.[39]

But while advocates hailed the passage of Proposition 2 as an end to some of the cruelest forms of animal confinement,[40] California egg producers—who had opposed the measure—were hatching plans to get the law overturned. In each of three losing cases, discussed *infra* Part V, these in-state producers maintained that Proposition 2's behavioral terms were too difficult for them to understand what the law required.[41]

AB 1437

In 2010, as California's egg industry continued to fight against Proposition 2 in court, the legislature passed AB 1437, which required that all shell eggs sold in California come from Proposition 2-compliant conditions, whether the eggs were produced in-state or out-of-state.[42] In several challenges to California's farm animal confinement and sales laws, various plaintiffs have contended that California's intentions in passing this bill were nefarious—that the legislature's intent in passing this law was to protect the state's in-state egg industry from out-of-state competition. However, no court has held that to be true, and the legislative history of the bill makes clear that the legislature instead enacted AB 1437 "to protect California consumers from the deleterious health, safety and welfare effects of the sale and consumption of eggs

[38] *Id.*
[39] *See generally* CAL. SEC'Y OF STATE, VOTES FOR AND AGAINST NOVEMBER 4,2008, STATE BALLOT MEASURES (2008), http://elections.cdn.sos.ca.gov/sov/2008-general/7_votes_for_against.pdf.
[40] Lovvorn, *supra* note 12, at 167.
[41] *See, e.g., Cramer v. Brown*, No. CV 12-3130-JFW (JEMx), 2012 WL 13059699 (C.D. Cal. Sept. 12, 2012), *aff'd sub. nom. Cramer v. Harris*, 591 Fed. App'x 634 (9th Cir. 2015); *JS West Milling Co. Inc. v. California*, No. 10-04225 (Cal. Sup. Ct. Fresno County 2010); *Ass'n of Cal. Egg Farms v. State of California, et al.*, No. 12-CECG-03695 (Cal. Super. Ct. Aug. 22 2013).
[42] Cal. Health & Safety Code § 25996.

derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease and pathogens including salmonella."[43]

Scientific support for AB 1437's health and safety goals have only grown over time.[44] *See infra* Part V(C). And, as with the challenges to Proposition 2, none of the challenges to AB 1437, discussed *infra* Part V(B), have gotten any traction.

Proposition 12

For ten years, Proposition 2 and AB 1437 represented the gold standard of state farm animal confinement and sales laws. Together, the laws meant that California required certain minimum behavioral standards for covered animals raised by in-state producers, and required that shell eggs sold in the state—regardless of where they were produced—were sourced from hens raised in compliance with those standards. In that time, the California egg industry and an army of conservative states lost a series of legal challenges to the California scheme. These legal wins for animals encouraged activists to dream of bolder, stronger protections for farm animals and for Californians. It was time for an upgrade.

In November of 2018, California voters enacted Proposition 12. As with Proposition 2, a broad coalition of interest groups supported the wildly popular measure, which passed by roughly 63%.[45] And just as with Proposition 2, Proposition 12 applies to egg-laying hens, breeding pigs, and calves raised for veal. It also similarly includes provisions specific to "farm owner[s] or operator[s] *within the State of California,*" who are prohibited from knowingly confining covered animals "in a cruel manner" (emphasis added).[46] Animals are not "confined in a cruel manner," in part, if they can engage in the same behavioral standards of Proposition 2 (*i.e.*, lying down, standing up, fully extending limbs, and turning around freely).[47]

However, Proposition 12 also made some important changes to California's humane legislative scheme, including two this paper will focus on in detail. *First*, Proposition 12 mandated that in addition to the behavioral standards of Proposition 2, covered animals must also

[43] *Id.* at § 25995(e).
[44] *See infra* Part IV.
[45] *California Proposition 12, Farm Animal Confinement Initiative* (2018), BALLOTPEDIA, https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018) (last visited Feb. 6, 2022).
[46] Cal. Health & Safety Code § 25990(a).
[47] *Id.* § 25991(e)(1).

have access to modest species-specific amounts of usable floor space in order to not be "confined in a cruel manner."[48] *Second*, Proposition 12 added a sales provision that parallels AB1437's sales provision for eggs. The sales provision prohibits business owners and operators from knowingly engaging in the sale within California of any covered products (including shell and liquid eggs, whole pork meat, and whole veal meat) that the owner or operator "knows or should know is the [product] of a covered animal who was confined in a cruel manner," or, in the case of whole pork "is the meat of immediate offspring of a covered animal who was confined in a cruel manner."[49]

Thus, prior to 2018, California required certain behavior-based standards for covered egg, pork, and veal products *produced* in California, and AB 1437 required that eggs *sold* in the state met that same standard. Proposition 12 built upon the behavioral standards included in Proposition 2 and, by reference, in AB 1437. By the time Proposition 12 fully went into effect on January 1, 2022, all covered egg, pork, and veal products *produced or sold* in California needed to conform with *both* the behavioral standards, as well as the usable floor space standards.

[48] *Id.* § 25991(e)(2)–(5).
[49] *Id.* § 25990(b)(1)-(4).

California's Confinement and Sales Laws:

YEAR	LAW	WHAT'S COVERED	TYPE OF STANDARDS
2008	Proposition 2	In-state production of covered: shell eggs; pork; veal	Behavior-based
2010	AB 1437	In-state sale of covered: shell eggs	Behavior-based
2018	Proposition 12	In-state production of covered: shell eggs; liquid eggs; pork; veal **AND** In-state sale of covered: shell eggs; liquid eggs; pork; veal	Behavior-based **AND** Usable floor space

While the behavioral and usable floor space standards have been at the center of the recent industry lawsuits, discussed *infra* Part V(C), it should be noted that Proposition 12 was significant for hens for several additional reasons. *First*, Proposition 12's sales provisions not only cover shell eggs (as Proposition 2 and AB 1437 did), but also "liquid eggs."[50] Liquid eggs are those broken from their shells, often utilized by restaurants. In 2020, liquid eggs made up over a quarter (27.8%) of eggs sold in the United States.[51] Thus, their inclusion in Proposition 12—the first time liquid eggs have been included in such a law—is monumental. *Second*, Proposition 12 requires that shell and liquid eggs sold in California must come from hens who were housed in a "cage-free housing system,"[52] and was thereby the first law to explicitly define that term.[53] *Third*, Proposition 12 is the first farm animal protection law in the United States to include enrichment standards for egg-laying hens.[54] The inclusion of such enrichments means shell and liquid eggs sold in California must come from hens with access to scratch areas,

[50] *Id.* § 25990 (b)(4).
[51] United Egg Producers, *Facts & Stats*, https://unitedegg.com/facts-stats/ (last visited Feb. 6, 2022).
[52] Cal. Health & Safety Code § 25991(e)(5).
[53] See *supra* Part V(A)-(B).
[54] Cal. Health & Safety Code § 25991(c).

perches, nest boxes, and dust bathing areas—things routinely denied to them on most egg farms, but which provide immense welfare benefits, allowing hens to be able to express their most basic instincts.[55]

Since the passage of Proposition 12, many states have adopted similar farm animal confinement and sales laws.[56] And, like the California laws that came before it, Proposition 12 has triggered an avalanche of litigation, much of which is still playing out in the courts.[57]

State Authority for Confinement and Sales Laws

From where does California derive the authority to pass these farm animal confinement and sales laws? A common theme running through the legal challenges detailed in Part V of this paper is various plaintiffs' insistence that no such authority exists.

Contrary to the position of these various plaintiffs, however, a state's interest in preventing cruelty within its borders has deep roots. Enacting laws that codify and enforce moral values is a function inherent to state governments, whose traditional police power "is defined as the authority to provide for the public health, safety, and morals."[58] Regulation of animals fits squarely within these police powers.[59] Indeed, "the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."[60] While the Supreme Court has not previously considered the constitutionality of any farm animal confinement and sales law—and, thus, has not previously addressed whether a cruelty interest is independently sufficient to uphold such a law—the ability of states to address cruel practices has long been judicially recognized.

Challengers to California's humane legal scheme would have the courts believe that California's actual purpose in passing these laws is not just about preventing cruelty in

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[55] *See, e.g.*, Md Saiful Bari, et al., *Relationships Between Rearing Enrichments, Range Use, and an Environmental Stressor for Free-Range Laying Hen Welfare*, 7 FRONT. VET. SCI., 1, 3–4; D.L.M. Campbell, et al., *A review of environmental enrichment for laying hens during rearing in relation to their behavioral and psychological development*, Oxford University Press (2018).
[56] *See, e.g.*, Colo. Rev. Stat. Ann. § 35-21-203; Mass. Gen. Laws, Ch. 129 App., § 1-1 *et seq.*; Mich. Comp. Laws Ann. § 287.746; 2019 Ore. Laws, Ch. 686 (SB 1019); 2019 Wa. Laws, Ch. 276 (HB 2049).
[57] *See infra* Part V(C).
[58] *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991); *see also Cotta v. City and County of San Francisco*, 157 Cal. App. 4th 1550. 1557 (2007) (California legislature has authority to pass laws "in furtherance of public peace, safety, morals, health and welfare").
[59] *See DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) ("[R]egulation of animals has long been recognized as part of the historic police power of the States . . . [as part of the States'] authority to provide for the public health, safety and morals.") (*quoting Barnes v. Glen Theatre*, 501 U.S.560, 569 (1991)); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (2003) (recognizing the "legitimate governmental interests in . . . preventing cruelty to animals").
[60] *United States v. Stevens*, 559 U.S. 460, 469 (2010).

California, but about prohibiting cruelty *in other states*. If this were California's actual purpose, it would create a blatant constitutionality problem.[61] However, a state's choice to exclude cruel products created outside its borders by way of an in-state sales restriction is not a constitutional problem. To the contrary, states have a well-founded interest in preventing cruel products from entering their marketplaces. Indeed, a state's prerogative to codify and enforce moral values would mean little if it did not include a state's right to exclude products that are not in line with those values. Courts across the country have upheld states' authority to make sure their marketplaces reflect their citizens' humane values.[62] Moreover, such laws help ensure that state production laws (pertaining to animals raised in the regulating state) can be effectively enforced.[63]

California's farm animal confinement and sales laws are about more than just the state's cruelty interest. As articulated in Proposition 12's purpose section, the measure was intended:

> to prevent animal cruelty by phasing out extreme methods of farm animal confinement, *which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts* on the State of California.[64]

None of the cases challenging California's farm animal confinement and sales laws have thus far challenged whether health and safety falls within a state's permissible police powers. Nor could they.[65] Instead, they have challenged whether the laws actually further this purpose.[66] To that end, there are at least two significant public health concerns addressed by farm animal confinement and sales laws, which are just as well founded as California's cruelty interest. *First*, cruel confinement is linked to food safety threats, as foodborne bacterial pathogens "can be

[61] *See infra* Part V(C).
[62] *Ass'n des Eleveurs du Quebec v. Harris*, 729 F. 3d 937, 952 (9th Cir. 2013) ("Plaintiffs give us no reason to doubt that the State believed that the sales ban in California may discourage the consumption of products produced by force feeding birds and prevent complicity in a practice it deemed cruel to animals."); *Chinatown Neighborhood Ass'n v. Brown*, 2013 WL 60919, at *7 (N.D. Cal. Jan 2, 2013), *aff'd*, 539 F. App'x 761 (9th Cir. 2013) (shark fin law restricting sale of shark fins in California was "intended to protect and conserve sharks and marine ecosystems dependent on them by means of regulating *local market* conditions, which laws targeting the actual practice of shark finning in domestic waters alone do not address); *Cresenzi Bird Imps., Inc. v. State of New York*, 658 F. Supp. 1441, 1447 (S.D.N.Y. 1987), *affirmed sub. nom.* 831 F. 2d 410 (2d Cir. 1987) ("New York has a legitimate interest in regulating its local market conditions which lead, in a short causal chain, to the unjustifiable and senseless suffering and death of thousands of captured wild birds . . . The State has an interest in cleansing it markets of commerce which the Legislature finds to be unethical.").
[63] See, *e.g., New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 40–41 (1908); *Andrus v. Allard*, 444 U.S. 51, 58 (1979).
[64] Prevention of Cruelty to Farm Animals Act, Prop. 12, § 2 (emphasis added).
[65] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (recognizing that states may permissibly "exercise[] their police powers to protect the health and safety of their citizens").
[66] *See infra* Part V(C).

facilitated by intensified livestock systems," which "generally have high density populations."[67] For example, Salmonella—a common, dangerous, and sometimes lethal type of food poisoning—is a greater risk in eggs from hens raised in conventional cages than those raised cage-free conditions.[68] *Second*, extreme confinement of farm animals increases the risk of pandemic flu outbreaks. As a Fourth Circuit judge noted in 2020 in affirming a jury verdict holding Smithfield Foods liable for creating a nuisance that caused harm to neighbors of a nearly 15,000 pig growing facility, it is "well-established that close confinement leads to the 'increased risk of the spread of disease' between hogs" and that "humans are not far behind."[69] Judge Wilkinson noted that "pathogens like H1-N1 swine flu, which incubate and mutate in pigs, can sometimes jump to human hosts" and cause highly contagious and deadly outbreaks among humans, including those that are not immediate neighbors of farms.[70]

As will be further explored in the case studies below, an explicitly stated purpose section—or, at the very least, clear legislative history indicating that a law was enacted in furtherance of these constitutionally permissible purposes—is often crucial to the legal defense of animal confinement and sales laws. Plaintiffs challenging these laws have done everything in their power to twist the purpose of such laws into something impermissibly protectionist or just plain unfounded. Being able to draw a reviewing court's attention to the permissible state purposes of a law is therefore essential.

Constitutional Limits on State Authority

Notwithstanding states' well-founded authority to pass farm animal confinement and sales laws, how are states' options for legislation limited by federal constitutional considerations? Understanding the federal limitations to state authority is essential to ensuring that a contemplated law will survive challenges by farm animal producers, trade groups, or even states hostile to humane change.

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[67] Bryony A. Jones, et al., *Zoonosis Emergence Linked to Agricultural Intensification and Environmental Change*, 110 Proc. NAT'L ACAD. SCIS. U.S., no. 21, at 8399 (2013), https://www.pnas.org/content/110/21/8399.
[68] Kostas Koutsoumanis, et al., *Salmonella control in poultry flocks and its public health impact*, Panel on Biological Hazards, European Food Safety Commission, Feb. 18, 2019. ("A review of risk factors for Salmonella in laying hens revealed that overall evidence points to a lower occurrence in non-cage compared to cage systems.").
[69] *McKiver v. Murphy-Brown, LLC,* 980 F. 3d 937, 980 (4th Cir. 2020) (Wilkinson, J., concurring).
[70] *Id.* (internal quotations omitted).

This section will explore examples of the most common types of constitutional challenges to animal confinement and sales laws, and how those challenges have been, thus far, successfully combatted.

Void For Vagueness Challenges

In 2008, as the California egg industry first adjusted to the new reality of Proposition 2's in-state production ban on cruelly produced products, it brought a series of legal challenges—primarily asserting that Proposition 2 was unconstitutionally vague under the federal Due Process Clause, 42 U.S.C. § 1983.[71] To survive a federal void for vagueness challenge, a law must "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[72] If a law implicates no constitutionally protected conduct, a facial vagueness challenge can succeed only if the law "is impermissibly vague in all applications."[73] Vague laws are constitutionally offensive not only because they may "trap the innocent by not providing fair warning," but also because they may create "dangers of arbitrary and discriminatory applications" of enforcement.[74]

In two separate cases, egg producers argued that Proposition 2 was void for vagueness. The thrust of their argument in each case was that because the law did not contain numeric space standards for permissible hen enclosures or define what it means for a hen to be "prevented" from engaging in the Proposition 2-specified behaviors (lying down, standing up, etc.), the law was unintelligibly vague.[75] Animal advocates were at the edge of their seats as the courts considered whether standards that approximately 63% of voters found clear enough to vote in favor of were not sufficiently clear from a constitutional perspective. They need not have worried.

As the district court noted in *Cramer v. Brown*, the question of how much space per hen is enough under Proposition 2's standards "is simple enough to determine using objective criteria."[76] The Due Process Clause, the court noted, "does not present an 'insuperable obstacle

[71] The very first lawsuit regarding Proposition 2 was actually not a constitutional attack on the initiative at all, but was instead a declaratory judgment action in which egg producer *JS West* sought a declaration from state court that its cages were compliant with Proposition 2. It was dismissed for lack of case or controversy. *JS W. Milling Co., Inc.*, No. 10-04225.
[72] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[73] *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 US. 489, 494–95 (1982).
[74] *Grayned*, 408 U.S. at 109.
[75] *See, generally, Cramer, 591 Fed. Appx* at 635; *Ass'n of Cal. Egg Farms*, NO. 12-CECG-03695.
[76] *Cramer*, No. CV123130JFWJEMX, at *4.

to legislation' by demanding perfect clarity and precise guidance."[77] Nor was the *Cramer* court persuaded by the egg producer's argument that Proposition 2 lacked explicit enforcement standards. Referencing a 1970's detective drama, the court stressed that "Proposition 2 establishes a clear test that any law enforcement officer can apply, and that test does not require the law enforcement officer to have the investigative acumen of Columbo to determine if an egg farmer is in violation of the statute."[78] The court also recognized that a hen is not *prevented* from lying down, standing up, etc., if she *chooses* not to engage in those behaviors; Proposition 2 simply requires that hens have "the ability" to do those things.[79]

The district court's decision was affirmed by the Ninth Circuit, which pointed out that because hens have a readily observable wing span and turning radius, a person of reasonable intelligence can determine what types of confinement comply with Proposition 12.[80] All that is required, the court found, "is that each chick be able to extend its limbs fully and turn around freely" which can be "readily discerned using objective criteria."[81] While the district court *Cramer* case was still pending, the Association of California Egg Farmers brought a nearly identical challenge in state court, alleging that Proposition 2 was unconstitutionally vague under the California Constitution's Due Process Clause—which mirrors the federal Due Process Clause.[82] As in the similar federal case, the state court determined that the fact that Proposition 2 did not define confinement requirements in terms of square inches or other such measurements does not make the law facially vague.[83] Thus, the case was dismissed without leave to amend.[84]

The first of California's farm animal confinement laws had survived the first legal onslaught, and advocates were thrilled. While these cases reinforce that mathematical precision is not required in drafting a farm animal law, it is of course nevertheless good practice to draft laws that are as clear and specific to thwart any potential vagueness challenges. Sometimes that is

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[77] *Id*., quoting *U.S. v. Petrillo*, 332 U.S. 1, 7 (1947). *See also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (quotations and citations omitted) ("But perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.").
[78] *Id*. at 4.
[79] *Id*. at 4. The *Cramer* plaintiff also alleged that Proposition 2 violated the dormant Commerce Clause. Such challenges are discussed *infra* Part V(C). The district court summarily dismissed the claim, noting that Cramer conceded that if Proposition 2 were not unconstitutionally vague "there would not be a [Commerce Clause] problem." *Cramer*, No. CV123130JFWJEMX at *6. On appeal, the egg farmer dropped its dormant Commerce Claim.
[80] *Cramer*, 591 F. App'x at 635.
[81] *Id*.
[82] CAL. CONST., Art. I, § 7 subd. (a).
[83] *Ass'n of Cal. Egg Farms*, NO. 12-CECG-03695, at 8-9.
[83] *Id*.
[84] *Id*.

easier said than done. For instance, while some advocates may have preferred Proposition 2 language that explicitly prohibited cages instead of prohibiting certain cruel practices, how precisely does one define a "cage?" If it is defined as an enclosure to house animals, that would also include barns, thereby making the definition overinclusive. If it is defined in terms of what materials it is made of (metal or wire, for instance), that might be under-inclusive and fail to account for future types of cages created by the egg industry. In other words, defining key terms is often easier said than done, and such considerations guided advocates as they considered language options for drafting the later Proposition 12.

Preemption Challenges

STATES CHALLENGE AB 1437

In 2014, nearly four years after the enactment of AB 1437, California's humane laws were challenged again. This time, the challenge was not from the egg industry, but from a coalition of six states led by Missouri, which challenged California's egg sales law on grounds including that AB 1437 was expressly and impliedly preempted by the Federal Egg Products Inspection Act, 21 U.S.C. §§ 1031, *et seq* ("EPIA").[85] Plaintiffs also challenged the law on dormant Commerce Clause grounds.[86] The case was the first test of whether the sales ban component of farm animal confinement and sales laws would hold up in court.

To determine whether a federal statute preempts a state law, Congressional intent is "the ultimate touchstone."[87] Courts assume "that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[88] This presumption against preemption is especially strong where the federal law regulates an area of traditional state regulation—which food production, like shell eggs here, most assuredly is.[89]

As to whether or not Congress evidenced a clear intent to supersede state egg laws like AB 1437, consider the text of the EPIA. Its primary focus is the federal inspection of "official

[85] *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1066 (E.D. Cal. 2014), *aff'd and remanded sub nom. Missouri ex rel. Koster v. Harris*, 842 F.3d 658 (9th Cir. 2016), *aff'd and remanded sub nom. Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017).
[86] *Id.*
[87] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)
[88] *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
[89] *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963) (upholding California law requiring maturity standards for avocados sold within the state that were stricter than federal requirements, and noting that such regulation concerned "a subject matter of the kind [the Supreme] Court has traditionally regarded as properly within the scope of state superintendence. Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of particularly local concern.").

plant[s]"—facilities where dried, frozen, or liquid "egg products" (rather than shell eggs) are processed.[90] Like many federal statutes, the EPIA contains an express preemption clause delineating the limits of state regulation in this area.[91] The clause provides that states may not impose "requirements within the scope of this chapter with respect to the premises, facilities, and operations of any official plant" if those requirements are "in addition to or different than those made under this chapter."[92] However, the EPIA expressly *authorizes* states to enact parallel egg safety laws. Outside of official plants making egg products, the EPIA affirmatively authorizes "any State or local jurisdiction [to] exercise jurisdiction with respect to eggs and egg products for the purpose of preventing the distribution for human food purposes of any such articles which are outside such a plant" if those eggs or egg products are "in violation of [the Food, Drug and Cosmetic Act ("FDCA") or the Fair Packaging and Labeling Act ("FPLA") *or any State or local law consistent therewith.*"[93]

In other words, while the EPIA establishes a *ceiling* for state regulation at official plants—making such state regulation impermissible— it establishes a *floor* for such regulation outside of such plants, inviting additional regulation by states as long as it is consistent with the FDCA and FPLA. In this way, AB 1437 seems to be a clear example of permissible supplemental state regulation. It reflects the judgment of California's legislature that the law was necessary to protect shell-egg safety in the state—particularly in regard to *Salmonella* contamination—as well as to prevent cruel eggs from being sold in the state.[94] And, it regulates such sales only outside of official plants, and without any inconsistency with the FDCA or FPLA.

The courts, however, did not reach the preemption claim in this case (nor did they reach plaintiffs' dormant Commerce Clause claim), and, thus, EPIA preemption of farm animal confinement and sales laws has never been fully litigated. The reason the courts did not reach the merits of the plaintiffs' claims is that it was ultimately dismissed on standing grounds, before the courts reached the merits of the case. The plaintiff states advanced a narrow and exceedingly rarely used standing doctrine here known as *parens patriae*, in which a state government steps in

[90] *See* 21 U.S.C. §§ 1033(f), (q).
[91] For more on express preemption, see *infra* Part V(B)(2).
[92] 21 U.S.C. § 1052(a).
[93] 21 U.S.C. § 1052(b) (emphasis added).
[94] *See, e.g.*, Cal. Health & Safety Code § 25995(a) (endorsing findings of Pew Commission that "food animals that are treated well and provided with at least a minimum accommodation of their natural behaviors and physical needs are healthier and safer for human consumption").

on behalf of its citizenry as a whole.[95] The theory hinges, in part, on a state being able to sufficiently allege an injury to a substantial segment of its population—one that is separate and apart from the interests of particular private parties.[96] In the case against AB 1437, however, the plaintiff states alleged only speculative, particularized harm to a handful of private egg producers, who could easily sue on their own behalf—and which is manifestly not enough for *parens patriae* standing.[97] Indeed, plaintiffs themselves described the case as being about the "difficult choice" that *a subset of egg farmers in Plaintiffs' states* faced in deciding whether to abide by AB 1437 or stop selling eggs in California altogether.[98] Interestingly, this losing argument foreshadows one that has become one of producers' central tenets in the later dormant Commerce Clause challenges to Proposition 12 from pork producers, discussed *infra* Part V(C). Also interesting is that although there was no merits determination in this case, the Ninth Circuit nevertheless clearly stated that "the Shell Egg Laws are not discriminatory."[99] Due to AB 1437's similarity with Proposition 12 in terms of the core sales components, this determination has proved useful in advocates' continued defense of that measure, discussed *infra* Part V(C).

FOIE GRAS LAW

Because the *Missouri v. Harris* case never reached the merits, it does not by itself make for a comprehensive study on the various types of preemption claims that can come up in challenges to state farm animal laws. It is therefore worth a brief detour into examining a preemption challenge to a California law that is unrelated to farm animal *confinement*, but every bit related to farm animal cruelty: the state's ban on the sale of products from force-fed birds known as the "Foie Gras Law."[100] Structural similarities between the federal law considered in that challenge and the EPIA considered in *Missouri v. Harris* make it an especially relevant reference point.

As the litigation battles over Proposition 2 and AB 1437 raged, the California legislature was tackling another issue of animal cruelty. The force-feeding of ducks or geese known as "gavage" involves inserting a long, rigid tube into a bird's mouth, forcing it so far down her esophagus that feed can be rapidly pumped directly into her stomach. This painful practice, which a judge on

[95] *Table Bluff Rsrv. (Wiyot Tribe)* v. *Philip Morris, Inc.*, 256 F. 3d 879, 885 (9th Cir. 2001) (internal citations omitted); *see also Alfred L. Snapp & Sons* v. *Puerto Rico*, 458 U.S. 592, 607 (1982).
[96] *Id.*
[97] *Id.* at 652.
[98] *Missouri*, 58 F. Supp. at 1066.
[99] *Missouri ex rel. Koster*, 847 F.3d at 655.
[100] California Health & Safety Code § 25980, *et seq.*

one of the Ninth Circuit panels reviewing a challenge to the law once called "absolutely cruel" in oral argument,[101] causes the bird's stomach to overfill, overtaxing the liver and causing it to fatten and grow to an unnaturally large size (and causing additional physical injuries and illnesses), before the bird is slaughtered and her liver is sold as foie gras—which many consider a delicacy.[102] Per the terms of the Foie Gras Law, which went into effect in 2012, "[a] product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."[103] California is currently the only state in the United States that bans the sale of these force-fed products, though a variety of countries have banned the practice of force-feeding birds.[104]

Foie gras producers have repeatedly and unsuccessfully alleged that California's ban on the sale of force-fed liver products is preempted by the Poultry Product Inspection Act ("PPIA").[105] The PPIA was enacted in 1957 to ensure that poultry products in the United States "are wholesome, not adulterated, and properly marked, labeled, and packaged."[106] While the PPIA, like the EPIA, is silent as to the on-farm treatment of animals, plaintiffs nevertheless pressed their theory that the federal law precludes California's restriction on in-state sale of liver poultry products based upon whether birds are force-fed on the farms where they are raised. Through eight years (and counting) years of litigation, they advanced several preemption theories, which will each be addressed briefly.[107]

EXPRESS PREEMPTION

A state law is expressly preempted if Congress explicitly withdraws specified powers from state purview by way of a statute with an express preemption clause.[108] By its express terms, the PPIA does not preempt all state regulation of foie gras sales. Much like the EPIA, its express preemption clause, 21 U.S.C. § 476e, only precludes states from imposing requirements on the

[101] Helen Christophi, *Foie Gras Practices Turn Stomachs in Ninth Circuit*, COURTHOUSE NEWS SERVICE (Feb. 6, 2022), https://www.courthousenews.com/ninth-circuit-shows-disdain-for-foie-gras-practices/.
[102] Isaac Spencer Conzatti, *2020 Litigation Review*, 27 ANIMAL L. 115, 136 (2021).
[103] California Health & Safety Code § 25982. Note that the law also contains a provision restricting the in-state production of force-fed products that has not been challenged in any of the foie gras litigation thus far.
[104] *Ass'n des Eleveurs du Quebec v. Harris*, 729 F. 3d 937, 945 (9th Cir. 2013).
[105] 21 U.S.C. § 451, *et seq*.
[106] 21 U.S.C. § 451.
[107] The foie gras plaintiffs also pressed a theory that the Foie Gras Law violates the dormant Commerce Clause. The Ninth Circuit soundly rejected that theory, holding that plaintiffs "failed to raise serious questions concerning their Commerce Clause challenge." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013).
[108] *Arizona* v. *United States*, 567 U.S. 387, 399 (2012).

"premises, facilities, and operations of any official establishment"[109] or the "[m]arking, labeling, packaging, or ingredient[s]" of poultry products that are "in addition to, or different than" the federal requirements. *Id*.[110] And, like AB 1437, the Foie Gras Law regulates only at the point of sale, not at the premises, facilities, or operations of official establishments. Nor does it require anything as to markings, labels or packaging. Thus, the only express preemption argument available to plaintiffs was that the Foie Gras Law imposes "*ingredient requirements* . . . in addition to, or different than, those made under this chapter."[111] The flaw in this argument is that the Foie Gras Law does not impose any requirements on *ingredients* in foie gras at all. It simply regulates sales based on the on-farm *process* (force-feeding) that is traditionally used to make foie gras. The Ninth Circuit agreed, finding that whether the "ingredient" plaintiffs contemplated was force-feeding or foie gras itself, the law regarding treatment of birds while alive does not function as an ingredient requirement.[112]

Importantly, the Ninth Circuit noted that "even if [the Foie Gras Law] results in the total ban of foie gras regardless of its production method, it would still not run afoul of the PPIA's preemption clause."[113] That's because the PPIA does not require that certain poultry products be produced for human consumption, or limit a state's authority to regulate what kinds of poultry can be sold within its borders any more than the EPIA does with eggs. Thus, "[t]he fact that Congress established 'ingredient requirements' for poultry products that *are* produced does not preclude a state from banning products—here, for example, on the basis of animal cruelty—well before the birds are slaughtered."[114] Indeed, in the absence of a federal guarantee of a market for

[109] 21 U.S.C. § 453(p) (defining "official establishment" to include "any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this chapter").
[110] Section 467e provides, in pertinent part:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, . . Marking, labeling, packaging, or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any official establishment in accordance with the requirements under this chapter. . . . 21 U.S.C. § 467e.

[111] *Id*. (emphasis added).
[112] *Ass'n des Eleveurs*, 870 F. 3d at 1149–50.
[113] *Id*. at 1150.
[114] *Id*.

a particular product, courts have found that states may ban whole categories of products.[115] The Foie Gras Law simply and permissibly removes one product from a state's market, for reasons that are outside the scope and the language of the federal law.[116] So, too, AB 1437 simply and permissibly removed products (shell eggs) from the California market that are outside the scope and language of federal law.

IMPLIED PREEMPTION

The foie gras plaintiffs have also argued that the PPIA impliedly preempts the Foie Gras Law under the doctrines of field and obstacle preemption. In other words, they contended that even if the Foie Gras Law was not preempted by the express terms of the PPIA, it is nevertheless improperly intrudes into an area Congress intended to exclusively occupy. Under the doctrine of field preemption, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[117] But, as the Ninth Circuit found, the regulation of poultry is hardly an area in which Congress has regulated so pervasively that field preemption can be inferred.[118] So, too, with the EPIA's contemplation of state involvement in the regulation of eggs.[119]

The Ninth Circuit similarly rejected the foie gras plaintiffs' obstacle preemption argument. Obstacle preemption occurs "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[120] Though the foie gras plaintiffs protested that the Foie Gras Law somehow stands as an obstacle to the PPIA's objectives of ensuring "wholesome, non adulterated, and properly marked, labeled and packaged" products, 21 U.S.C. § 451, the Ninth Circuit found that they failed to explain how that obstacle occurs.[121] Indeed, the Court noted that while the PPIA regulates "official establishments," the Foie Gras law simply "prohibits what California finds to be a cruel feeding practice that occurs far away from the official establishments that the PPIA regulates."[122] It

[115] *See supra* note 11; *Chinatown Neighborhood Ass'n* v. *Harris*, 33 F. Supp. 3d 1085, 1105 (N.D. Cal. 2014); *Empacadora*, 476 F.3d at 336; *Cavel Int'l. Inc.*, 500 F.3d at 556–67.
[116] *Ass'n des Eleveurs*, 870 F.3d at 1150.
[117] *Arizona*, 567 U.S. at 399.
[118] *Ass'n des Eleveurs*, 830 F.3d at 1152 (noting that the PPIA's express preemption clause explicitly contemplates state involvement in poultry regulation and that "[b]ecause the PPIA itself contemplates extensive state involvement, Congress clearly did not intend to occupy the field of poultry products").
[119] See, *infra* note 93.
[120] *Arizona*, 567 U.S. at 399-400 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).
[121] *Ass'n des Eleveurs*, 870 F.3d at 1153.
[122] *Id*.

therefore does not interfere with USDA's authority and "does not stand as an obstacle to accomplishing the PPIA's purposes."[123] Again, the same could be said for AB 1437's prohibition on the sale of cruel and unsafe eggs; because the regulation pertains to conduct outside an official establishment, it could not possibly interfere with federal authority or stand as an obstacle to accomplishing the EPIA's purposes.

IMPOSSIBILITY PREEMPTION

Though the Ninth Circuit firmly held that the Foie Gras Law is not preempted by federal law (and, in a separate opinion, does not violate the dormant Commerce Clause) and the U.S. Supreme Court twice refused plaintiffs' request to review those decisions,[124] the district court nevertheless allowed plaintiffs to file a *third* amended complaint in a last gasp attempt to revive their constitutional claims. To succeed on an impossibility preemption claim, a plaintiff must demonstrate that it is "impossible for a private party to comply with both state and federal requirements."[125] Impossibility preemption "is a demanding defense" requiring "clear evidence" of an "irreconcilable conflict" between federal and state standards.[126]

The foie gras plaintiffs asserted that federal law somehow *requires* them to force-feed birds (such that they cannot comply with both that requirement and the Foie Gras Law's prohibition on force-feeding birds whose livers are sold in California), but their third amended complaint identified no such mandate. Rather than pointing to federal *requirements*, the foie gras plaintiffs pointed to USDA *guidance* documents, asserted that non-force fed foie gras is an adulterated product in contravention of the PPIA, and—perhaps most audaciously— claimed that information they voluntarily placed on their product labels and that USDA approved somehow constituted a federal *mandate* to force-feed birds.[127] The district court disagreed,[128] finding against plaintiffs and mirroring the Ninth Circuit's previous ruling in noting that "through [the] PPIA, Congress has neither unmistakably required the sale of foie gras within every state nor has it regulated which animal cruelty laws a state is permitted to pass."[129]

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[123] *Id*.
[124] *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 574 U.S. 932, 135 S. Ct. 398, 190 L. Ed. 2d 249 (2014); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra*, 139 S. Ct. 862, 202 L. Ed. 2d 567 (2019).
[125] *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64 (2002).
[126] *Wyeth* v. *Levine*, 555 U.S. 555, 573 (2009).
[127] *Ass'n des Eleveurs*, No. 2:12-CV-05735-SVM-RZ at *4.
[128] *Id*. ("Plaintiffs can satisfy both [federal and California] requirements . . . by correctly labeling their products under PPIA and refraining from selling those products in California.").
[129] *Id*.

Together, the *Missouri v. Harris* and *Ass'n des Eleveurs* cases illustrate the importance of carefully analyzing all applicable federal law to ensure that a contemplated farm animal law does not intrude upon any exclusively federally occupied arenas. For example, Proposition 12's prohibitions only pertain to on-farm treatment and in-state sales (neither of which is the exclusive province of federal law). In part to ensure there would be no confusion on this point, drafters included language specifying that the law does not apply at official plants or establishments where mandatory inspection occurs pursuant to the Federal Meat Inspection Act, or the Egg Products Inspection Act,[130]or during slaughter in accordance with the Humane Methods of Slaughter Act.[131] However, even in the absence of an express conflict with federal language, a tenacious plaintiff might bring any number of claims asserting that a state law is nevertheless preempted. While states are generally on solid preemption ground insofar as restricting the sale of products for which there is no federal guarantee of a market, it should be noted that the lengthy foie gras saga is not yet over. In the latest round of litigation, the district court dismissed plaintiffs' constitutional challenges, but granted plaintiffs leave to amend their motion for declaratory relief regarding the application and scope of the Foie Gras Law.[132] Plaintiffs and defendant cross-appealed the decision and the Ninth Circuit once again affirmed that the Foie Gras Law was not preempted.[133] The foie gras producers are seeking Supreme Court review.

Dormant Commerce Clause Challenges

Perhaps some of the most closely watched farm animal-related cases in the past decade have been the dual dormant Commerce Clause challenges to California's Proposition 12. Both were brought by similar meat producer trade associations within a similar timeframe, both challenged Proposition 12 on similar dormant Commerce Clause grounds, and both have, thus far, suffered resounding similar losses.

UH, WHERE IS THE DORMANT COMMERCE CLAUSE?

No doubt many a law student or lawyer has been hazed by being asked to locate the dormant Commerce Clause in the Constitution and has come up empty handed. That is because the

[130] Cal. Health & Safety Code § 25991(i); (o).
[131] Cal. Health & Safety Code § 25992(e).
[132] *Ass'n des Eleveurs*, No. 2:12-CV-05735-SVM-RZ at *6.
[133] *Ass'n des Eleveurs de Canards et d'Oies du Québec v. Bonta*, 33 F.4th 1107 (9th Cir. 2022).

dormant Commerce Clause lies not in the text of the document, but in what the text of the Commerce Clause does *not* say. The Commerce Clause is an express grant of authority to Congress, which states simply that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."[134] The Framers adopted it to address state protectionism and discrimination under the Articles of Confederation.[135] Courts, however, have long recognized that the provision's affirmative grant of Congressional authority also includes an implicit (dormant) limitation on the authority of states to enact legislation that affects interstate commerce.[136] [137]

Importantly, such limitations are "by no means absolute."[138] Pursuant to the dormant Commerce Clause, "states retain authority under their general police powers to regulate matters of legitimate matters of local concern, even though interstate commerce may be affected."[139] Modern Commerce Clause jurisprudence is likewise "driven by concern about 'economic protectionism.'"[140] While it disavows "arbitrary, formalistic distinction[s]" and "eschew[s] formalism" in favor of "a sensitive case-by-case analysis of purposes and effects,"[141] such analysis generally involves two parts. First, a reviewing court must determine if the challenged law "directly regulates or discriminates against interstate commerce" or if "its effect is to favor in-state economic interests over out-of-state interests."[142] If the law regulates equally in regard to in-state and out-of-state interests, and only indirectly affects interstate commerce, the court then examines if there is a substantial burden on interstate commerce that exceeds the putative local benefits.[143] As the Ninth Circuit has noted, "a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce."[144] Rather, laws that do not discriminate in purpose or effect or impermissibly regulate extraterritorially must "be a *substantial burden* on *interstate* commerce" and the burden

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134 U.S. CONST., Art. I, § 8, cl. 3.
135 Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 151 (2016).
136 See *Hughes* v. *Oaklahoma*, 441 U.S. 322, 326 (1979).
137 While the dormant Commerce Clause has long been recognized by the Supreme Court, it has also been questioned by multiple Justices, including the late Justice Scalia, who called the doctrine a "judicial fraud." *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).
138 *Maine v. Taylor*, 477 U.S. 131, 127-38 (1986).
139 *Id*.
140 *Dep't of Revenue* v. *Davis*, 553 U.S. 328, 337 (2008).
141 *S. Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2092, 2094 (2018).
142 *Brown-Forman Distillers Corp*. v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Oregon Waste Systems, Inc.* v. *Dep't of Env't Quality of Oregon*, 511 U.S. 93, 99 (1994).
143 *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
144 *Nat'l Ass'n of Optometrists & Opticians* v. *Harris*, 682 F. 3d 1144, 1148 (9th Cir. 2012).

must be "clearly excessive in relation to the local benefits" to violate the dormant Commerce Clause.[145]

ORIGINS OF THE CURRENT DORMANT COMMERCE CLAUSE CHALLENGES

The meat industry challenges to Proposition 12 were not the first dormant Commerce Clause challenges to farm animal confinement and sales laws. As previously mentioned, the California egg industry attempted a feeble dormant Commerce Clause challenge to Proposition 2 (along with its losing vagueness argument) in *Cramer,* and a coalition of states similarly challenged California's AB 1437 in *Missouri ex. rel. Koster*.[146] A similar coalition of states tried to revive the same dormant Commerce Clause challenge by filing what's called an original jurisdiction action directly in the Supreme Court of the United States. Such cases are exceedingly rare, and the Supreme Court ultimately denied the plaintiff States permission to file suit.[147] Before deciding not to review the case, the Supreme Court invited the United States to express its views, and the Trump Administration's Solicitor General asserted unequivocally that it should not, in part because "the California Egg Laws do not discriminate; California treats alike all eggs sold in that State, without any preference for local producers or local products."[148] And, as will be discussed in more detail below, foie gras producers unsuccessfully challenged the Foie Gras Law on dormant Commerce Clause grounds, in addition to their preemption claims.[149]

In October of 2019, approximately one year after Proposition 12 was enacted, California's humane legal scheme was again challenged on dormant Commerce Clause grounds. The first case was from North American Meat Institute (NAMI)—which represents meat packers and processors—and it filed suit in the Central District of California.[150] NAMI sought injunctive and declaratory relief on the grounds that Proposition 12's sales restriction violated the dormant Commerce Clause by allegedly impermissibly regulating beyond California's borders (extraterritorially), discriminating against interstate commerce and NAMI's out-of-state members, and imposing a substantial burden on interstate commerce.[151] A coalition of animal

[145] *Id*. (emphasis in original).
[146] 847 F.3d 646 (9th Cir. 2017).
[147] *See Missouri* v. *California*, 139 S. Ct. 859, 859 (2019) (denying leave to file bill of complaint).
[148] Brief for the United States as *Amicus Curiae* at 21, *Missouri v. California* No. 148, Original (Nov. 2018).
[149] *See Ass'n des Eleveurs*, 729 F.3d at 937.
[150] *See N. Am. Meat Inst*. v. *Becerra*, No. 2:19-CV-08569, 2020 WL919153 (C.D. Cal. Feb. 24, 2020).
[151] *Id*.

welfare groups including The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Animal Outlook successfully intervened in the case to defend the law alongside California.[152] As the primary drafters and advocates of Proposition 12 and experts in animal protection law, these groups were uniquely positioned to be able to assist the court in understanding the contours and history of the law, as well as where it fits in the scheme of other animal protection laws.

Just two days after the Central District of California court denied NAMI's request for a preliminary injunction of Proposition 12, finding that NAMI "fail[ed] to raise any questions on the merits" of its three commerce clause claims,"[153] the National Pork Producers Council and the American Farm Bureau Federation (collectively "NPPC") brought a nearly identical challenge in the Southern District of California.[154] While that case does not include a claim that Proposition 12 discriminates against interstate commerce, its extraterritoriality and substantial burden claims largely mirror NAMI's—an attempt by the pork industry to get a second bite at the apple. The same coalition of animal welfare groups that intervened in the *NAMI* case again intervened in *NPPC*. Both cases are still open, as described more fully below.

THE DORMANT COMMERCE CLAUSE CASE AGAINST PROPOSITION 12

The remainder of Part V will examine the several types of dormant Commerce Clause claims brought against Proposition 12, how successful they have been, and what the broader implications of the ultimate decisions in these cases could be.

DISCRIMINATION

A state law can discriminate against interstate commerce in three ways: It may facially discriminate (for example, by explicitly favoring in-state interests over out-of-state interests by its very terms); it may have a discriminatory purpose (for example, if there is legislative history indicating that the law was meant to benefit in-state businesses to the detriment of out-of-state

[152] *Id.*
[153] *N. Am. Meat Inst. v. Becerra*, 420 F.Supp.3d 1014, 1022 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020).
[154] *Nat'l Pork Producers Council v. Ross*, 456 F.Supp. 3d 1201 (S.D. Cal. 2020), aff'd 6 F.4th 1021 (9th Cir. 2021).

businesses); or, it may do neither of these things, but nevertheless have a discriminatory effect.[155]

Only the *NAMI* case involves a discrimination claim. NAMI does not contend that Proposition 12 facially discriminates against interstate commerce—nor could it. Recall that Proposition 12's terms apply without regard to where products are produced. Whether you are a pork producer in Nebraska or in California, your covered products must meet the same Proposition 12 standard if you want to sell them in California. Thus, Proposition 12 treats all producers exactly the same and does not facially discriminate. NAMI did briefly pursue a discriminatory purpose argument in which it attempted to superimpose alleged bad intent behind California's prior egg sales law, AB 1437, onto Proposition 12.[156] The district court determined otherwise, noting not only that there was no evidence to justify such an inference, but also that the court was obligated to "assume that the objectives articulated by the legislature are the actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation."[157] Because NAMI could not produce anything to show California voters did not have the goals articulated in Proposition 12's purpose section (discussed further below), NAMI failed to show a discriminatory purpose, and on appeal it abandoned that argument entirely. Instead, on appeal, NAMI contended solely that Proposition 12 has a discriminatory *effect*—operating as a "protectionist trade barrier."[158] This discriminatory effect argument is flawed in multiple respects.

At base, NAMI's discriminatory effects argument is flawed because California producers do not obtain any advantage from Proposition 12 that out-of-state producers do not receive.[159] All the law does is restrict the sale of certain cruelly produced products—regardless of whether they are produced in-state or out-of-state.[160] Therefore, California producers do not have any

[155] *Maine*, 477 U.S. at 138.
[156] *See supra* Part III(B).
[157] *N. Am. Meat Inst.*, 420 F. Supp. at 1025 (citing *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S 456, 463 n.7 (1981)) (internal citation and marks omitted).
[158] *N. Am. Meat Inst.*, 420 F. Supp. at 1025.
[159] Indeed, the very few California pork producers in existence have consistently opposed Proposition 12, and the California Pork Producers Association has been actively involved in trying to delay the implementation of Proposition 12. Surely these in-state producers would have rallied in support of the law if it advantaged them. Lisa Heald, *Is the Pork Industry Using Food Justice to Stall California's New Animal Welfare Law?*, CIVIL EATS (Sept. 27, 2021), https://civileats.com/2021/09/27/is-the-pork-industry-using-food-justice-to-stall-californias-new-animal-welfare-law-prop-12-prop-2-pork-gestation-crates/; *About Food Equity Alliance*, FOOD EQUITY ALLIANCE, https://foodequityalliance.org/about-us-2/ (last visited Feb. 6, 2022).
[160] Cal. Health & Safety Code § 25990(b)(1)-(4).

advantage over producers located anywhere else in the country.[161] NAMI contends that Proposition 12 nevertheless robs its members of a competitive advantage they might have had if out-of-state pork producers were able to sell their products of cruel confinement in California while California producers were not (due to the in-state production provisions those producers were subject to). And, indeed, the loss of a competitive advantage can sometimes constitute a dormant Commerce Clause problem.[162] But while the Supreme Court has found that a state law cannot deprive out-of-state competitors of an advantage they *earned* in the marketplace, NAMI's claimed competitive advantage is nothing but its members' desire to continue using cruel, and less safe (if potentially lower-cost) production methods like gestation crates. Fatal to NAMI's discrimination argument is the fact that the dormant Commerce Clause simply does not "guarantee [litigants] their preferred method of production."[163] [164]

Notably, foie gras producers made a very similar—and losing—discriminatory effects argument in *Ass'n des Eleveurs*—so similar, in fact, that the *NAMI* district court determined that the case was "in every material respect, on all fours with the instant [NAMI] challenge."[165] In *Ass'n des Eleveurs*, the Ninth Circuit held firmly that the Foie Gras Law's "economic impact does not depend on *where* the items were produced, but *how* they were produced" and was therefore not discriminatory.[166] Accordingly, when the Ninth Circuit reviewed the district court's denial of NAMI's request for a preliminary injunction, it found—in an opinion written by George W. Bush appointee Judge Ikuta—that the lower court had not abused its discretion in relying on the foie gras case "to hold that Proposition 12 does not have a discriminatory effect because it treats in-state meat producers the same as out-of-state meat producers."[167]

Much of the rest of NAMI's discriminatory effects argument proceeds from a clear misunderstanding—or misarticulation—of Proposition 12's provisions. NAMI contends, for

[161] *See Clover Leaf Creamery Co.*, 449 U.S. at 471-72 (holding that a state statute that banned the sale of milk in plastic, nonreturnable containers did not effect "simple protectionism," but rather "regulate[d] evenhandedly," because the statute applied "without regard to whether the milk, the containers, or the sellers are from outside the State").
[162] *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350-51 (1977) (in which the Court considered a North Carolina law that unfairly deprived Washington apple producers of a competitive advantage their high quality grading system had earned in the marketplace by prohibiting those producers from conveying truthful information on their product packaging).
[163] *Nat'l Ass'n of Optometrists & Opticians*, 682 F.3d at 1151.
[164] Even if cruelly confining animals could be considered a protectable competitive advantage, NAMI's claim would be problematic due to the very little pork production that occurs in California. Discrimination analysis fundamentally requires comparing a law's impact on in-state competitors with that on out—of-state competitors. *Or. Waste Sys., Inc.* v. *Dep't of Env't. Quality of State of Or.*, 511 U.S. 93, 99 (1994) ("'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.") (internal quotation marks omitted).
[165] *N. Am. Meat Inst.*, 420 F. Supp. at 1026.
[166] *Ass'n des Eleveurs*, 729 F.3d at 948 (emphasis in original).
[167] *N. Am. Meat Inst.*, 825 Fed.Appx. at 519.

example, that California producers had more "lead time" to comply with Proposition 12 than out-of-state entities.[168] That argument improperly conflates the earlier Proposition 2's behavioral standards—which applied only to in-state producers' confinement of covered animals—with the wholly new set of standards established by Proposition 12, including the usable space standards. Proposition 12's terms created a new baseline which meant that even if California producers were fully compliant with Proposition 2, they would need to meet additional requirements to ensure compliance with Proposition. And, crucially, Proposition 12 gave them the same amount of time to comply with this sales standard as any out-of-state producers.

One of the most useful things the animal welfare intervenor groups added to the NAMI litigation was their submission of a declaration by an economist, Devrim Ikizler, during the preliminary injunction phase of the case. Intervenors used the declaration to help the court see that even if NAMI's lead time argument were given any weight, such time could actually be an economic advantage to out-of-state producers rather than a disadvantage.[169] For example, as California producers were transitioning their animal housing systems in the intervening years between Proposition 2 and Proposition 12, industry-wide "costs of transitioning the production facilities [had] actually decreased as the process [became] more efficient."[170] NAMI did not present anything to contradict this point, highlighting how powerful expert declarations can be in combatting industry claims that a court should simply trust that producers best know the facts of their own industry.

EXTRATERRITORIALITY

What exactly does it mean for a law to be impermissibly "extraterritorial," in violation of the dormant Commerce Clause? While the concept is somewhat more amorphous than discrimination, the Supreme Court has been clear that the "mere fact that state action may have repercussions beyond state lines is of no judicial significance as long as the action is not within that domain which the Constitution forbids."[171] And, what the Constitution forbids is those laws that regulate commercial transactions that "take[] place wholly outside of the State's borders."[172] In the Supreme Court's most recent articulation of the extraterritoriality doctrine, a state law is

[168] *N. Am. Meat Inst.*, 420 F. Supp. at 1029.
[169] *See* Declaration of Devrim Ikizler, *North Am. Meat Inst. v. Becerra*, No. 2:19-cv-08569, Dkt. No. 25-10.
[170] *Id.* at ¶ 35.
[171] *Osborn* v. *Ozlin*, 310 U.S. 53, 62 (1940).
[172] *Healy* v. *Beer Inst.*, 49 U.S. 324, 336 (1989).

invalid if it controls wholly out-of-state commerce "by its express terms or by its inevitable effect."[173]

NAMI and NPPC similarly contend that because many out-of-state producers may need to make changes to the way their animals are housed if they want to continue to sell into California after Proposition 12 goes into effect, California is regulating out-of-state conduct. Such an argument confuses permissible upstream effects on out-of-state production with impermissible extraterritorial control, and cannot be squared with judicial precedent. The Supreme Court has stressed that most cases in which courts have found impermissible extraterritoriality generally concern "price control or price affirmation statutes" involving "tying the price of . . . in-state products to out-of-state prices."[174] Proposition 12 is not a statute that sets or controls prices (and neither NAMI nor NPPC has asserted otherwise). The producer groups have spilled much ink over whether or not a statute *must* be a price control or affirmation statute to be impermissibly extraterritorial (and whether the Ninth Circuit has improperly limited the doctrine to such cases), despite the fact that the Ninth Circuit does not limit its consideration of the doctrine to such cases.[175]

Regardless of any theoretical debate over whether the extraterritoriality doctrine should be limited to price-control or price-affirmation statutes, the effects of Proposition 12, even as articulated by NAMI and NPPC, do not stem "expressly" or "inevitably" from regulation of *wholly* out-of-state transactions.[176] Rather, the producer groups primarily complain of allegedly "inevitable" effects that flow from the structure of a pork market of their own making. For example, they allege that the pork industry is highly interconnected: A single pig is frequently butchered and divided into many cuts that are sold all over the country (or beyond), they say, and producers will therefore have to restructure all of their operations to be Proposition 12 compliant in order to ensure end-of-chain suppliers that cuts of meat sold in California meet the law's standards.[177] At most, such allegations simply show that when Proposition 12 goes into effect, the structure of the pork market is such that California-compliant pork *may* be sold elsewhere,

[173] *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 645 (2003).
[174] *Walsh*, 538 U.S. at 669.
[175] See *Sam Francis Found.* v. *Christies*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc), the Ninth Circuit's most recent controlling extraterritoriality decision, which concerned neither price-control nor price-affirmation.
[176] *Walsh*, 538 U.S. at 645; *Healy*, 491 U.S. at 345 (Scalia, J., concurring in part and concurring in the judgment) (noting that "innumerable valid state laws affect pricing decisions in other States—even so rudimentary a law as a maximum price regulation," and cautioning against allowing Commerce Clause jurisprudence to "denigrate into disputes over degree of economic effect").
[177] *See Nat'l Pork Producers Council*, 6 F.4th at 1028.

not that the law requires it to be. Nothing about Proposition 12 forces NPPC or NAMI's members to stop selling cruel and unsafe products outside of California's borders. And the producers' argument that the pork market is too complex to segregate products for different markets—including California's—is belied by their own allegations and the on-the-ground realities since these legal actions were filed.

For example, NPPC directly contemplated that producers may segregate products for separate markets when it noted that Proposition 12 "will likely force their pork suppliers to produce all products in California *or to carefully segregate their products*."[178] And, in the real world, producers have indeed been making the choice to segregate their products for separate markets. For example, Hormel Foods, one of the country's largest meat producers and an NPPC member, recently announced that it "faces no risk of material losses from compliance with Proposition 12" and that it intends to "continue to meet the needs of our consumers and customers throughout the state [of California]," and that it is "*currently working with its supply chain to implement internal processes for segregation*."[179] Ultimately, while a growing number of producers are structuring all or part of their operations to satisfy Proposition 12 standards and sell their products in California, doing so (or not doing so) is a choice and not an inevitable consequence of Proposition 12. As with a Minnesota law upheld by the Supreme Court even though it would affect the chain of commerce preceding the in-state sale of milk containers—including parts of the chain in other states—out-of-state ripple effects are not by themselves direct or inevitable extraterritorial control.[180] And as with fuel standards upheld by the Ninth Circuit, Proposition 12 "says nothing at all about [pork products] produced, sold, and used outside California."[181]

Finally, Proposition 12 does not have any other features that might otherwise flag it as being potentially extraterritorial. For example, contrary to misleading arguments from NAMI and NPPC, Proposition 12 does not require jurisdictions outside of California to adopt reciprocal standards before their products can be sold in the state, or impose any "civil or criminal penalties

[178] *Nat'l Pork Producers Council*, 19-cv-02324 Dkt. No. 1, ¶ 299 (emphasis added).
[179] *See Hormel Foods Company Information About California Proposition 12*, HORMEL FOODS (Oct. 6, 2020), https://www.hormelfoods.com/newsroom/companynews/
hormel-foods-company-information-about-california-proposition-12/ (emphasis added).
[180] *Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (noting that such ripple effects should instead be considered only under the Pike balancing test for potentially impermissible burdens on interstate commerce).
[181] *Rocky Mountain Farmers Union v. Corey*, 730 F. 3d 1070, 1104 (9th Cir. 2013).

on non-compliant transactions completed wholly out of state."[182] To illustrate, even with Proposition 12 in effect, a state is free to pass a law that is at odds with or even the opposite of what California is seeking to accomplish by way of Proposition 12. Perhaps that might involve requiring that bacon sold in Indiana comes from pigs confined in gestation crates. Proposition 12 would not interfere with Indiana's decision to permit only products of cruelty within its borders any more than Indiana's decision would interfere with California's decision to permit only safer, more humane products within its own. And, Proposition 12 permissibly regulates to ameliorate local harms.[183] The law reflects voters' judgment that they want a safer, more humane food supply within their borders—which, as discussed *supra* Part IV, is a longstanding and valid purpose that is well within states' police powers.

SUBSTANTIAL BURDEN

The Supreme Court has explained that there is "no clear line between" a dormant Commerce Clause discrimination analysis and a substantial burden analysis.[184] Indeed, in the very case the test comes from, as in multiple other Supreme Court cases, the court purported to apply the undue burden test, even while the case "arguably turned in whole or in part on the discriminatory character of the challenged state regulations."[185] And, as the Ninth Circuit has repeatedly emphasized, there are only a "small number" of cases invalidating "genuinely nondiscriminatory" state laws under the dormant Commerce Clause, and these cases generally "address state regulation of activities that are inherently national or require a uniform system of regulation—most typically, interstate transportation."[186] Thus, by all accounts, it is exceedingly rare for a substantial burden challenge to succeed.

While the substantial burden standard is relatively easy to articulate, it is more difficult to pinpoint what it means in practice. Laws that "regulat[e] evenhandedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[187] But how does one know when a burden imposed by a law is "substantial"? Is there a dollar amount? A certain number of protesting

[182] *Id*. at 102-03.
[183] *Id*.
[184] *Gen. Motors Corp*. v. *Tracy*, 519 U.S. 278, 299 n. 12 (collecting cases).
[185] *Id*. (*citing Pike* v. *Bruce Church*, 397 U.S. 137, 142 (1970)).
[186] *Chinatown Neighborhood Ass'n* v. *Harris*, 794 F.3d 1136, 1146-47 (9th Cir. 2015) (quotations and citations omitted).
[187] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

states or businesses in an affected industry that must object? And how does one measure the point at which such burdens might outweigh in-state benefits? There is no definitive guidance within the caselaw, nor is there a pound for pound weighing of burden against benefit. Under Ninth Circuit precedent, however, "a plaintiff must *first* show that the statute imposes a substantial burden *before* the court will determine whether the benefits of the challenged law are illusory."[188] As the animal advocate intervenors have consistently argued in both the *NPPC* and *NAMI* cases, the producers have failed to meet their substantial burden showing, and, even if they had, the local benefits of Proposition 12 have long been recognized as legitimate and non-illusory. Indeed, as discussed below, the significance of these benefits only continues to grow as new data emerges.

DEFINING THE BURDEN

Like most dormant Commerce Clause challengers unhappy with a state regulation, NAMI and NPPC focus their substantial burden analysis on alleged economic burdens that are irrelevant to a such an analysis, i.e. impacts on their member companies in the form of supposedly extensive and short-term costly changes to how they house animals.[189] This is manifestly not enough. The Supreme Court has been firm that the Commerce Clause "protects the interstate *market*, not particular interstate firms, from prohibitive or burdensome regulations."[190] In *Exxon*, oil refiners filed a lawsuit complaining that a Maryland law imposed burdens on the oil industry that would cause some refiners to stop selling in Maryland altogether, but the Court instead "focused its concern on the free flow of petroleum into the state, not on who ultimately profited."[191] Thus, what matters in analyzing whether Proposition 12 imposes a substantial burden on interstate commerce is whether it impedes the free flow of pork in interstate commerce.

That is not what the producer groups alleged. Some producers may well decide the expense of converting their facilities to be Proposition-12 compliant is not worth continuing to sell into

[188] *Pharm. Rsch. & Mfrs. of Am.* v. *Cty. of Alameda*, 768 F.3d 1037, 1044 (*citing Eleveurs*, 729 F.3d at 951-52) (emphasis added).
[189] *Nat'l Pork Producers Council*, 6 F.4th at 1033 ("In this case, the crux of the allegations supporting [NPPC's] substantial burden claim is that the cost of compliance with Proposition 12 makes pork production more expensive nationwide. The complaint alleges that . . . producers will have to expend millions in upfront capital costs and adopt a more labor-intensive method of production."). *See also N. Am. Meat Inst.*, 420 F.Supp. at 1033 ("NAMI contends . . . that Proposition 12 will substantially burden interstate commerce because it 'will likely drive many farmers, packers, and processors from the California market' and 'force those who remain to bear increased costs' to comply with California's confinement standards") (internal citation omitted).
[190] *Exxon*, 437 U.S. at 127-28.
[191] *Nat'l Ass'n of Optometrists & Opticians*, 682 F.3d at 1152.

California (choosing to sell to the many other markets for such products that do not have minimal humane standards to do business there). And, it is possible that some producers will choose to exit the pork, veal, or egg markets altogether rather than comply with Proposition 12. However, neither of those scenarios are a Commerce Clause problem.[192] As the Ninth Circuit found in affirming the dismissal of the *NPPC* case, "[e]ven if producers will need to adopt a more costly method of production to comply with Proposition 12, such increased costs do not constitute a substantial burden on interstate commerce . . . Nor do higher costs to consumers qualify as a substantial burden on interstate commerce."[193] And courts have found that a shift in who is selling products is permissible even where the burden falls more heavily on out-of-state parts of the industry.[194]

Moreover, even to the extent that an impact on individual businesses *could* be considered part of a broader burden on interstate commerce, the on-the-ground reality in California since NPPC and NAMI's pleadings predicting apocalyptic and industry-wide harm is telling a much different story. Indeed, major producers are choosing to comply with Proposition 12, and such producers have not reported a material effect on their bottom line. In addition to Hormel's compliance announcement,[195] the CEO of Tyson Foods recently stated that Proposition 12's impact is "not significant" for the company, which "can do multiple programs simultaneously, including" one that complies with Proposition 12.[196] Even a former president and board member of NPPC who submitted a declaration in that case recently publicly stated that he will supply Proposition 12-compliant pork, without converting all of his production facilities.[197] And, a recent publication from the pork industry itself admitted that "[Proposition 12] is not going to present a major disruption to pork distribution and pork pricing."[198]

Such announcements make sense in light of the growing nationwide demand for more humane products.[199] Recent survey data indicates that grocery stores and suppliers are ready to

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[192] *Id*.
[193] *Nat'l Pork Producers Council*, 6 F.4th at 1033.
[194] *Clover Leaf Creamery*, 449 U.S. at 473 ("Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not clearly excessive.") (internal citation omitted).
[195] *See supra* note 179.
[196] *Tyson Foods Third Quarter 2021 Earnings*, Tyson Foods, at 15 (Aug. 9, 2021), s22.q4cdn.com/104708849/files/doc_financials/2021/q3/08-11-21_Tyson-Foods-080921.pdf.
[197] Greta Kaul, *Why California's New Pork Rules Could Mean Big Changes for Minnesota Hog Farmers*, Minn. Post (Aug. 6, 2021), https://www.minnpost.com/economy/2021/08/why-californias-new-pork-rules-could-mean-big-changesfor-minnesota-hog-farmers/.
[198] Dennis W. Smith, *What I'm Seeing, What I'm Hearing, What I'm Expecting,* National Hog Farmer (Dec. 6, 2021), https://www.nationalhogfarmer.com/news/what-imseeing-what-im-hearing-what-im-expecting.
[199] *See supra* note 1.

meet that demand in California.[200] More than a dozen grocery chains have indicated they are prepared to supply California with Proposition 12-compliant pork, and more than a dozen foodservice suppliers and restaurant chains have indicated similar preparedness.[201] At base, what NAMI and NPPC complain of is not a constitutional problem. Rather, they complain of a situation of their own making in which they would prefer to keep operating on their massive scale, without the regard for the concerns of citizens of any particular state. It cannot possibly be the case that industries that operate at such a concentrated and monopolistic degree[202] are not subject to in-state sales restrictions. That, however, is exactly what these producer groups are trying to get the courts to believe.

THE MYRIAD BENEFITS OF PROPOSITION 12

If a court were to examine the benefits of Proposition 12, which it should not need to do given that NAMI and NPPC have not pled a substantial burden on interstate commerce,[203] it would be hard-pressed to find that those benefits were anything other than legitimate and non-illusory. While the well-founded nature of California's cruelty and health and safety interests are discussed in detail, *supra* Part IV, and will not be repeated here, a few additional points are worth noting.

First, Proposition 12's purpose was set forth not only in the ballot initiative language itself,[204] but also in the Official Voters Information Guide[205]—which similarly noted that Proposition 12 would "eliminate . . . inhumane products from these abused animals from the California marketplace."[206] Both are routinely places court look to determine voters' intent in passing an initiative.[207] This underscores once again how crucial it is to have clearly articulated purpose language in a statute or, at the very least, within the legislative history of a statute. Such

[200] See Delcianna Winders, *Survey Says . . . Californians Can Have Their Pork and Let Pigs Move*, Vermont Law School Blog (Dec. 6, 2021), www.vermontlaw.edu/blog/animal-law/survey-says-californianscan-have-pork-let-pigs-move (identifying overlapping membership).
[201] *Id.*
[202] *See supra* note 3.
[203] *Pharm. Rsch. And Mfrs. of America*, 768 F.3d at 1044.
[204] Prevention of Cruelty to Farm Animals Act, Prop. 12 § 2.
[205] Official Voter Information Guide, California General Election, 70 (Nov. 6, 2018), https://vig.sos.ca.gov/2018/general/pdf/complete-vig.pdf.
[206] *Id.*
[207] *See Clover Leaf*, 449 U.S. at 463 n.7 ("[We] will assume the objectives articulated by the legislature are [the] actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation") (quotations and citation omitted); *Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012), *vacated and remanded sub. nom. on other grounds, Hollingsworth v. Perry*, 570 U.S. 693. 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013) (noting that in California, "ballot summaries . . . in the Voter Information Guide are recognized sources of determining voters' intent") (internal citations omitted).

language is essential for, among other things, combatting claims by plaintiffs that a law has a discriminatory purpose or benefits that are merely illusory.

Second, the scientific support for Proposition 12's health and safety purpose has only continued to grow since the law was passed—further undermining NAMI and NPPC's claims that the interest is illusory or otherwise inadequate. For example, while science was still emerging on the public health effects of the extreme confinement of hens when AB 1437's egg sales standard was enacted, the California Department of Public Health (in the context of finalizing implementing regulations for Proposition 12) recently acknowledged that evidence has since indicated that the extreme confinement conditions implicated by the law significantly raise the risk of contamination and harm to public health.[208] So, too, with the growing body of science regarding the threat of infectious disease from intensive animal production. For example, recent research shows that piglets born to sows confined in gestations crates have compromised disease resistance, which, coupled with overcrowding in intensive animal production, creates serious risk factors for both animal and human diseases.[209] And, as recently explained in an article in the journal for Neuroepidemiology related to the COID-19 crisis, "the massive overcrowding of animals for human consumption in industrial 'factory farm' environments" is a "well-recognized source for increasingly lethal human zoonoses."[210] The United Nations also issued a report in the wake of COVID-19, advising that "[a]doption of animal welfare standards for the care, housing, and transport of live animals along the entire supply chain is also needed to reduce risk of zoonotic disease transmission."[211]

Third, in addition to Proposition 12's dual aims of addressing cruelty as well as health and safety, the law contains a mechanism which makes a violation of Proposition 12 constitute a violation of another section of the California code protecting consumers from "unfair or fraudulent business act[s] or practice[s]."[212] This provision provides California consumers with

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[208] See Cal. Dep't Food & Agric., 15-Day Notice of Modified Text and Documents Added to the Rulemaking File Relating to Animal Confinement 74 (Nov. 30, 2021), www.cdfa.ca.gov/ ahfss/pdfs/regulations/ACP15dayCommentPeriodDocuments.pdf.
[209] See Xin Liu et al., *A Comparison of the Behavior, Physiology, and Offspring Resilience of Gestating Sows When Raised in a Group Housing System and Individual Stalls*, 11 Animals no. 7, 2021, at 2076; https://www.doi.org/10.3390/ani11072076.
[210] David O. Wiebers & Valery L. Feigin, "What the COVID-19 Crisis Is Telling Humanity," 54 NEUROEPIDEMIOLOGY 283, 284 (2020), https://www.karger.com/Article/FullText/508654 (last visited Feb. 6, 2022); "Zoonoses" or "zoonotic diseases" are pathogens that can spread between animals and humans. See Zoonotic Diseases, Center for Disease Control, https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html (last visited Feb. 6, 2022).
[211] UNITED NATIONS ENVIRONMENT PROGRAM, PREVENTING THE NEXT PANDEMIC 49 (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/32316/ZP.pdf?sequence=1&isAllowed=y (last visited November 23, 2020).
[212] Cal. Health & Safety Code § 25993(b).

an extra level of protection against unwittingly purchasing products that do not meet the humane and the health and safety standards they overwhelmingly voted into law.

ALL EYES ON CALIFORNIA

Much has happened since the *NAMI* and *NPPC* cases were filed.

In the *NAMI* case, NAMI lost its bid for a preliminary injunction, which would have stopped Proposition 12 from going into effect.[213] NAMI then appealed that decision to the Ninth Circuit, which affirmed the lower court's decision,[214] holding that it was not an abuse of discretion to find that NAMI was unlikely to succeed on the merits of its claims. NAMI petitioned for certiorari in the Supreme Court, which declined to review the case.[215] Thus, the case is now back in the district court for proceedings on the merits.

The *NPPC* case is a different story, due in part to its different procedural posture. Those plaintiffs did not seek a preliminary injunction. After the district court granted California and the intervenor groups' motions to dismiss the case,[216] plaintiffs appealed to the Ninth Circuit, which affirmed the district court's determination and held firmly that Proposition 12 is *not* impermissibly extraterritorial and does not impose a substantial burden on interstate commerce.[217] NPPC appealed the decision to the Supreme Court, and on March 28, 2022, the Court decided to hear the case.[218] Oral argument will be on October 11, 2022.[219] The eventual decision will mark the first time the Supreme Court has weighed in on the constitutionality of the farm animal confinement or sales law.

The amicus briefs filed in support of each side in the *NPPC* case shows that it is not only farm animal advocates invested in the outcomes of these cases. The pork industry is supported by powerful allies. In addition to support from groups like the National Association of Manufacturers, the Canadian Pork Council, and the Iowa Pork Producers Association, a

[213] *N. Am. Meat Inst.*, 420 F.Supp at 1014.
[214] *N. Am. Meat Inst.*, 825 F. App'x at 518.
[215] *N. Am. Meat Inst.*, 141 S. Ct. 2584 (2021).
[216] *Nat'l Pork Producers Council*, 456 F. Supp. at 1204.
[217] *Nat'l Pork Producers Council*, 6 F.4th at1029; 1032 (finding that "[a] state law is not impermissibly extraterritorial unless it directly regulates conduct that is wholly out of state," which Proposition 12 does not do and that even though producers who choose to sell their pork in California might need to "adopt a more costly method of production to comply with Proposition 12, such increased costs do not constitute a substantial burden on interstate commerce.").
[218] *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *cert granted*, 142 S. Ct. 1413 (U.S. Mar. 28, 2022) (No. 21-468).
[219] *Id.*

substantial group of states also filed an amicus brief in support of NPPC—asserting arguments that sound very similar to those which a smaller group of largely the same states made in the cases challenging AB 1437,[220] and repeating pork industry claims that Proposition 12 improperly reaches into their states.[221] In addition, the Biden Administration surprised many by filing a brief in which it walked back some of the more extreme positions the Trump administration had previously taken regarding the case, but still supported NPPC.[222]

NPPC is not the only one with powerful allies, however. An impressive twenty-seven amicus briefs were submitted in support of California and the animal welfare intervenor groups. These allies include veterinarians, nonprofits, public health experts, elected officials and attorneys general, constitutional scholars, economists, and farmers, among others. And they include some potentially unexpected supporters, as well. For example, in an interesting testament to humane progress made since the early days of Proposition 2, the Association of California Egg Farmers—which originally fought tooth and nail against Proposition 2[223]— filed an amicus brief in support of Proposition 12. (Indeed, 33.9% of the egg industry is now cage-free, despite once predicting the same sort of doom to that industry from Proposition 2 and AB 1437 that the pork and veal industries are now predicting for those industries.[224]) Perdue Premium Meat Company Inc., d/b/a Niman Ranch also filed a powerful brief in support of Proposition 12, in which it explained to the Court that "Contrary to [NPPC's] apocalyptic predictions of the impact of Proposition 12, producers can and will adjust to the demands of the California market and raise hogs humanely without sacrificing their ability to earn profits."[225]

The outpouring of support for Proposition 12 highlights the fact that what is at stake in the two cases is potentially broader than just one farm animal law. Depending on exactly how the Proposition 12 decisions come out, product sales laws across the country could be vulnerable. Indeed, California—like all states—has many laws excluding products from its marketplace that

[220] *See supra* Part V(B)(1); note 147.
[221] Brief for the United States as Amicus Curiae Supporting Petitioners, *National Pork Producers Council v. Ross*, No. 21-468 (U.S. June 17, 2022).
[222] Brief for Indiana, et al. as Amicus Curiae Supporting Petitioners, *National Pork Producers Council v. Ross*, No. 21-468 (U.S. June 17, 2022).
[223] *See* discussion *supra* Part V(A).
[224] Brief for United States Department of Agriculture, USDA AMS Livestock & Poultry Program, Livestock Poultry, and Gran Market News Division, Egg Markets Overview, p.4 (Dec. 21. 2021).
[225] Brief for Perdue Meat Company Inc., d/b/a Niman Ranch as Amicus Curiae Supporting Respondents at 2, *National Pork Producers Council v. Ross*, No. 21-468 (U.S. Aug. 15, 2022).

violate its ethical norms, from force-fed livers, to dog and cat pelts.[226] For the Court to start poking holes in states' well-founded police powers to enact such laws would be to reexamine federalism itself.[227] Moreover, and as many of the submitted amicus briefs point out, state and local laws outside of the animal welfare context could also be potentially vulnerable, including those related to food safety, toxic substances in toys and household goods, price-gouging, renewable energy requirements, and predatory lending, among others.[228]

Perhaps one day in the future, with Proposition 12 long in effect and producers reaping the benefits of selling their goods in the California market, pork producers and their allies will look back and wonder why they wasted all of that time and money fighting in court what they lost in the battle of public opinion. Indeed, there are positive indicators in that direction. Proposition 12 went into full effect on January 1, 2022, and as discussed *supra* Part V(C), producers and retailers have been steadily supplying the California market without the crippling harm to their businesses. Moreover, the great California bacon apocalypse predicted by litigants has not come to pass, and pork—pork that meets Californians' heightened standards for animal welfare, as well as health and safety—remains on the shelves.[229] In the near term future, however, a wide swath of stakeholders are waiting to see what the Supreme Court will do with the *NPPC* case.

Conclusion

As this paper has illustrated, courts have thus far consistently upheld states' authority to enact animal confinement and sales laws against constitutional challenges. Courts have found that these laws are not vague, that they are not preempted by federal law, and that they do not improperly discriminate, regulate, or impose a substantial burden on interstate commerce. Such laws are most likely to be upheld if their provisions (and purposes) are clearly articulated (though mathematical precision is not required), if they do not intrude (expressly or otherwise) into an area of regulation occupied exclusively by the federal government, and if they do not discriminate against or impose a substantial burden on interstate commerce—or directly control

[226] *See, e.g.,* Cal. Health & Safety Code § 25980; Cal. Penal Code § 598a.
[227] *See* discussion *supra* Part IV.
[228] *See, e.g.*, Brief for Illinois, et al. as Amicus Curiae Supporting Respondents at 13-26, *National Pork Producers Council v. Ross*, No. 21-468 (U.S. Aug. 15, 2022).
[229] *See, e.g.*; Katharine Gammon, *Why California's 'great bacon crisis' has yet to arrive*, the Guardian, *available at* https://www.theguardian.com/environment/2022/jan/23/california-bacon-crisis-animal-welfare-standards.

wholly out-of-state commerce. And, the farm animal confinement and sales laws are on strong footing, premised on interests states have historically regulated—which include both animal welfare and the health and safety of residents. Enacting and maintaining such laws is presently at the forefront of animal advocacy because they fill a federal void in regulation of on-farm animal treatment. Though there are options for their location other than in civil codes, such options are often complicated by things like regulatory capture by the agricultural industry and concerns over criminalizing aspects of food production.

For all of these reasons, animal advocates and their allies are confident that California's Proposition 12—currently under attack on multiple fronts—will be upheld. Californians overwhelmingly voted to have safer and more humane products in their marketplace, and substantial legal precedent backs up this determination. Of course, a decision by the Supreme Court that Proposition 12 is constitutional will not by itself guarantee a better future for farm animals. As discussed, however, Proposition 12 reflects a growing national trend in increased care for the plight of animals that end up on our plates. Consumers are asking for more humane products on grocery store shelves, corporations are demanding them from their suppliers, producers themselves are increasingly meeting this demand, and states across the country are pass laws like Proposition 12. Though agents hostile to humane change will likely continue to fight farm animal confinement and sales laws in court, the arc of progress is increasingly bending away from cruel and unsafe confinement and toward better on-farm treatment of farm animals.