PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 49 | Issue 2 Article 4

2-15-2022

The United States of California: Ninth Circuit Tips the Dormant Commerce Clause Scales in Favor of the Golden State's Animal Welfare Legislation

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Abstract

In November 2018, California voters overwhelmingly passed Proposition 12, the Prevention of Cruelty to Farm Animals Act. This law requires in-state and out-of-state farmers to provide additional living space for egg-laying hens, breeding pigs, and calves raised for veal by 2022 if the farmers wish to continue doing business within the state. In response, North American Meat Institute (NAMI), whose members account for approximately 95% of the country's output of various meat products, filed a lawsuit in federal district court seeking a preliminary injunction against Proposition 12's enforcement. NAMI contended Proposition 12 violated the Dormant Commerce Clause, a legal doctrine stemming from Congress's commerce powers under Article I, Section 8 of the Constitution, prohibiting states from passing laws discriminating against interstate commerce. Ultimately, the district court declined to grant NAMI's request for a preliminary injunction, which the Ninth Circuit affirmed was not an abuse of judicial discretion.

The Ninth Circuit correctly held Proposition 12 does not clearly discriminate against interstate commerce. However, the Ninth Circuit erred in holding the law was not extraterritorial legislation because this decision contravened Supreme Court decisions prohibiting states from regulating conduct occurring outside of their borders. As a result, the Ninth Circuit decision opens the floodgates for California to enact similar legislation essentially controlling the national economy. The best solution to this issue, particularly regarding animal welfare reform, is for Congress to establish national guidelines that meaningfully improve the lives of farm animals while prohibiting individual states from controlling the conduct of the other forty-nine state actors.

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I. INTRODUCTION

> Absent a preliminary injunction, NAMI's members and countless farmers throughout the country will suffer severe irreparable harm. . . . [T]he Sales Ban irreparably harms veal and pork producers by putting them to a Hobson's choice: either spend millions of dollars to comply with California's confinement requirements . . . or be excluded from the California market and suffer the resulting loss of revenues and customer goodwill. Either way, Proposition 12 subjects veal and pork producers to tremendous costs, none of which can be recovered post-trial because California's sovereign immunity precludes a damages action against the State.[1]

In *Nami v. Becerra*, the question of whether California overstepped its commerce-impacting authority or simply exercised its police powers to promote the public health, general welfare, safety, and morals of its citizens[2] came before the Ninth Circuit Court of Appeals.[3] In short, appellant, the North American Meat Institute (NAMI), and amici, including several states[4] and business entities,[5] sought a preliminary injunction against California's

1. Brief for Appellant at 11, N. Am. Meat Inst. v. Becerra, 825 F. App'x 518 (9th Cir. 2020) (No. 19-56408), *cert. denied*, 141 S. Ct. 2854 (2021) [hereinafter NAMI Opening Brief]. NAMI member companies account for more than 95% of the United States' output of beef, pork, lamb, veal, turkey, and processed meat products. *See* Complaint for Declaratory & Preliminary & Permanent Injunctive Relief at 2, N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019) (No. 19-08569), *aff'd*, 825 F. App'x 518 (9th Cir. 2020). For clarity purposes, this Note uses the term "*Nami*" in the main text to refer to the Ninth Circuit preliminary injunction suit on appeal and uses the term "NAMI" to refer to the North American Meat Institute.

2. *See* Lochner v. New York, 198 U.S. 45, 53 (1905), *overruled by* Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) ("There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.").

3. *See N. Am. Meat Inst.*, 825 F. App'x 518.

4. *See* Brief of Ind. et al., as Amicus Curiae in Support of Plaintiff-Appellant at 1, 16, *N. Am. Meat Inst.*, 825 F. App'x 518 (No. 19-56408) [hereinafter Amici States Brief]. Eleven states are included as amici curiae in this brief: Indiana, Alabama, Arkansas, Kansas, Louisiana, Missouri, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia. *Id.*

5. *See* Brief for the Nat'l Ass'n of Mfrs. et al., as Amicus Curiae in Support of Appellant at 1–2, 27, *N. Am. Meat Inst.*, 825 F. App'x 518 (No. 19-56408) [hereinafter Amici Commerce Brief]. Three

Proposition 12.[6] Appellant argued that Proposition 12's sales ban on meat sold within California produced below certain minimum space requirements would irreparably harm its members because the law impermissibly discriminates against interstate commerce, operates as a protectionist trade barrier, and controls extraterritorial commerce in violation of the Dormant Commerce Clause.[7] In opposition, appellee Xavier Becerra, then-Attorney General of California, and intervenor-appellees, Humane Society of the United States,[8] argued that the Ninth Circuit should affirm the denial of the preliminary injunction.[9] They contended that Proposition 12 does not discriminate against interstate commerce, regulate extraterritorial conduct, or substantially burden interstate commerce, and even if it did, any burden on interstate commerce would not exceed the benefits to California.[10]

As animal welfare continues to grow into a national issue, *Nami* is important not only because case law remains unsettled on whether preventing animal cruelty is a sufficient basis to permit burdening interstate commerce but also because *Nami* impacts state actors and animal rights organizations seeking to promote animal welfare legislation in the future that will substantially impact interstate commerce.[11] This Note argues that *Nami* correctly held that the district court did not abuse its discretion in holding Proposition 12 is not discriminatory and does not substantially burden interstate commerce given the case's procedural posture.[12] However, this Note contends that *Nami* erred when deciding the extraterritorial legislation

parties are included as amici curiae in this brief: the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Food Marketing Institute. *Id.*

6. *See N. Am. Meat Inst.*, 825 F. App'x at 1–2; *see also infra* note 8 and accompanying text.

7. *See* NAMI Opening Brief, *supra* note 1. *See generally* Reply Brief for Appellant at 1–28, *N. Am. Meat Inst.*, 825 F. App'x 518 (No. 19-56408) [hereinafter NAMI Reply Brief]. In essence, the Dormant Commerce Clause is a legal doctrine inferred from Congress's commerce authority under Article 1, Section 8 of the Constitution, which prohibits states from enacting legislation that discriminates against or unduly burdens interstate commerce, even when Congress has not specifically enacted legislation that is designed to regulate interstate commerce within that particular area. *See* U.S. CONST. art. I, § 8, cl. 3; *see also* discussion *infra* Part II.

8. *See* Answering Brief for Appellee-Intervenors at 1, 42, *N. Am. Meat Inst.*, 825 F. App'x 518 (No. 19-56408) [hereinafter Humane Society Brief].

9. *See* Answering Brief of State Defendants at 1–2, *N. Am. Meat Inst.*, 825 F. App'x 518 (No. 19-56408) [hereinafter State Defendants Brief]; *see also infra* note 11 and accompanying text.

10. *See* State Defendants Brief, *supra* note 9, at 10–33; Humane Society Brief, *supra* note 8, at 28–35.

11. *See* discussion *infra* Part V.

12. *See* discussion *infra* Section IV.A.

issue because Proposition 12 conflicts with the Supreme Court's Dormant Commerce Clause jurisprudence prohibiting "economic [b]alkanization."[13] Even as an unpublished opinion, *Nami* is problematic because its holding encourages economic powerhouse states like California to manipulate other states and businesses to bend to its public policy determinations, or else face significant economic losses.[14]

Part II provides an overview of the Dormant Commerce Clause and unpacks California Propositions 2 and 12, which set the stage for *Nami*.[15] Part III discusses *Nami*'s facts, procedural history, and decision, which held that NAMI failed to show a likelihood of success on the merits in proving that Proposition 12 violated the Dormant Commerce Clause.[16] Section IV.A argues that *Nami* correctly held the district court did not abuse its discretion on the discrimination and substantial burden claims, while Section IV.B asserts that *Nami* erred in not recognizing that Proposition 12 conflicts with Supreme Court Dormant Commerce Clause principles prohibiting extraterritorial legislation.[17] Part V explores *Nami*'s implications for animal welfare, the national economy, and economic powerhouse states, which reflect the need for the Supreme Court's guidance as to the extent states can burden interstate commerce in promoting animal welfare reform.[18] Part V also suggests Congress could be the solution to this growing animal welfare versus interstate commerce issue.[19] Part VI briefly summarizes and concludes.[20]

13. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018). "Economic balkanization" is succinctly described as "an economy so clogged by customs barriers, tariffs, embargoes, quotas and regulations as to remove all semblance of a freely trading capitalistic society." Paul S. Kline, *Publicly-Owned Landfills and Local Preferences: A Study of the Market Participation Doctrine*, 96 DICK. L. REV. 331, 356 (1992). As discussed below, the consolidation of federal economic power through the Commerce Clause was designed to counteract the selfish nature of states looking out solely for their own interests by striking down state regulations significantly impeding interstate commerce. *See* discussion *infra* Part II.

14. *See* discussion *infra* Sections V.B, V.C.

15. *See* discussion *infra* Part II.

16. *See* discussion *infra* Part III.

17. *See* discussion *infra* Part IV.

18. *See* discussion *infra* Part V.

19. *See* discussion *infra* Section V.E.

20. *See* discussion *infra* Part VI.

II. THE DORMANT COMMERCE CLAUSE REVISITED

In the wake of the failures of the Articles of Confederation, the Founding Fathers, when drafting the United States Constitution, were concerned that states would selfishly impose protectionist measures, such as tariffs, to promote the well-being of their citizens to the detriment of out-of-state individuals.[21] In practice, this would cause other states to retaliate with similar measures, ultimately to the detriment of the national economy.[22] To address this potential problem of economic infighting, the Framers drafted the Commerce Clause of the Constitution, which grants Congress the power to "regulate Commerce . . . among the several States."[23]

Since the Commerce Clause does not explicitly impose restrictions on a state's legislative authority to regulate commerce when Congress is silent on a particular issue, the Supreme Court assumed the mantle of adjudicating these disputes under the Commerce Clause's goal of promoting national economic unity, known as the Negative or Dormant Commerce Clause (DCC).[24] Although the Supreme Court has struck down congressional legislation with commendable goals—preventing gun violence within

21. *See* Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 845–46 (2004) (footnote omitted) ("A primary concern of the Founding Fathers was, in order to prosper, the [n]ation's economy needed to be centrally regulated. . . . Consequently, this worry caused the Founding Fathers to draft the Constitution to prevent [s]tates from harming interstate commerce. James Madison wrote that the 'Commerce Clause "grew out of the abuse of the power by the importing [s]tates in taxing the non-importing[] and was intended as a negative and preventive provision against injustice among the [s]tates themselves."'" (quoting 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (Max Farrand ed., Yale Univ. Press 1911))).

22. *See id.*

23. U.S. CONST. art. I, § 8, cl. 3; *see* John Schreiner, *The Irony of the Ninth Circuit's Expanded (Ab)use of the Commerce Clause*, 33 W. ST. U. L. REV. 13, 16 (2005).

24. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018). As mentioned in the accompanying main text, Supreme Court jurisprudence describing the Commerce Clause as grounds to invalidate state legislation on matters substantially affecting interstate commerce when Congress is silent is known as the "[N]egative Commerce Clause," *see id.* at 2100 (Thomas, J., concurring), or the "[D]ormant [C]ommerce [C]lause," *see id.* (Gorsuch, J., concurring). Interpreting the Commerce Clause as passively restricting state legislative authority is not without criticism. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring) ("The [N]egative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. . . . Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.").

schools[25] and criminalizing gender-based violence[26]—that are not substantially related to its enumerated commerce powers, the Court has refrained from clearly articulating the restrictive scope of the DCC on states' authority to enact legislation affecting interstate commerce.[27] The Court's only guidance has been to prohibit states from exercising their power in a way that substantially impedes interstate commerce.[28]

A. The DCC Foundation: Three Cases and Three Principles

1. Three Cases: *Gibbons*, *Willson*, and *Cooley*

In *South Dakota v. Wayfair*, the Supreme Court succinctly described the judicial origins of the framework giving rise to the DCC as stemming from three cases: *Gibbons v. Ogden*, *Willson v. Black Bird*, and *Cooley v. Board of Wardens*.[29] In *Gibbons v. Ogden*, Chief Justice Marshall illuminated the scope of Congress's power to regulate commerce under the Commerce Clause, which includes the power to regulate both "the interchange of commodities" and "commercial intercourse."[30] Chief Justice Marshall contended that this commerce power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges

25. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. . . . To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the [s]tates.").

26. *See* United States v. Morrison, 529 U.S. 598, 617–18 (2000) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.").

27. *See generally Wayfair*, 138 S. Ct. 2080.

28. *See id.* at 2090; *see also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) ("[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

29. *See Wayfair*, 138 S. Ct. at 2090.

30. *Id.* (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 89, 125 (1824)). The "interchange of commodities," as mentioned by the Court, referred strictly to the buying and selling of goods, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824), while "commercial intercourse" refers to the physical exchanging of goods between nations, including the navigation of said goods during an exchange, *id.* at 190. *Gibbons* noted that the Commerce Clause undoubtedly granted Congress the power over both aspects of commerce. *See id.* at 189–90.

no limitations, other than [as] are prescribed in the [C]onstitution."[31] However, Marshall conceded that states concurrently share power to regulate certain avenues of commerce, such as inspection laws, which Congress should only reach when invoking a national purpose.[32]

Five years later in *Willson v. Black Bird*, Chief Justice Marshall held a dam built by the Black Bird Creek Marsh Company, which controlled waters from a stream forming part of an interstate waterway system in Delaware, did not violate the Commerce Clause.[33] Marshall noted that "[C]ongress has passed no such act" regarding federal authority to regulate "those small navigable creeks into which the tide flows."[34] *Willson* implied that individual states, like Congress, held power to regulate commerce, particularly in the absence of conflicting federal legislation.[35]

In *Cooley v. Board of Wardens*, the Supreme Court upheld a Pennsylvania law requiring vessels that refused to board a local pilot to pay a travel fee to a fund for widows and children of deceased pilots as consistent with the Commerce Clause.[36] Here, the Court affirmed that the power to regulate commerce is shared between Congress and the states, holding that certain subjects "imperatively demand[] a single uniform rule" when operating equally on national commerce.[37] However, *Cooley* recognized that other subjects "demand[] that diversity, which alone can meet the local necessities

31. *Gibbons*, 22 U.S. at 196.

32. *See id.* at 203–04. In his concurring opinion, Justice Johnson took a different view on whether commerce powers should be shared between Congress and the states, positing that Congress held the exclusive power to regulate commerce. *Id.* at 236 (Johnson, J., concurring). Justice Kennedy, weighing in on the potential ramifications of Justice Johnson's concurrence, contended that had Justice Johnson "prevailed and [s]tates been denied the power of concurrent regulation, history might have seen sweeping federal regulations at an early date that foreclosed the [s]tates from experimentation with laws and policies of their own, or, on the other hand, proposals to reexamine *Gibbons'* broad definition of commerce to accommodate the necessity of allowing [s]tates the power to enact laws to implement the political will of their people." *Wayfair*, 138 S. Ct. at 2090.

33. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

34. *Id.*

35. *See Wayfair*, 138 S. Ct. at 2090. In essence, these cases established the basic analytical framework that the Commerce Clause would not be interpreted to grant Congress exclusive power over commerce, but rather that the power over interstate commerce would be shared concurrently at times between Congress and states, except in cases where certain commerce requires a "single uniform rule." *See id.* In those specific instances, the Commerce Clause would resolve any conflicts between state legislation and federal legislation in favor of Congress. *See id.*

36. *See* Cooley v. Bd. of Wardens *ex rel.* Soc. for Relief of Distressed Pilots, 53 U.S. (12 How.) 299, 319 (1851).

37. *Id.*

of navigation[,] . . . drawn from local knowledge and experience, and conformed to local wants."[38] These three cases were vital for providing the foundation informing our current DCC jurisprudence.[39] The Supreme Court recognized that states and Congress can both regulate interstate commerce, but courts can find that states impermissibly burden interstate commerce even when Congress is silent.[40]

2. Three Principles: Nondiscrimination, Undue Burdens, and Extraterritoriality

Three key principles reflected in Supreme Court jurisprudence regarding the DCC—promoting nondiscriminatory legislation, preventing undue burdens, and prohibiting extraterritorial regulations—are important in illuminating the Court's rationale for its decisions concerning the constitutionality of state laws affecting interstate commerce.[41] These principles in turn guide lower courts when assessing the constitutionality of state legislation impacting interstate commerce.[42]

Regarding the first principle—promoting nondiscriminatory legislation—the Supreme Court has concluded that state laws discriminating against interstate commerce face "a virtually *per se* rule of invalidity."[43] The

38. *Id.* at 319–20.

39. *See Wayfair*, 138 S. Ct. at 2090 ("Though considerable uncertainties were yet to be overcome, these precedents still laid the groundwork for the analytical framework that now prevails for Commerce Clause cases.").

40. *See id.* at 2090–91; *see also* discussion *supra* Part II.

41. *See Wayfair*, 138 S. Ct. at 2090–91; *see also infra* note 43 and accompanying text.

42. *See* discussion *infra* Section II.B; Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (holding that the Court's DCC jurisprudence "reflect[s] a central concern of the Framers . . . that in order to succeed, the new Union would have to avoid the tendencies toward economic [b]alkanization that had plagued relations among the [c]olonies and later among the [s]tates under the Articles of Confederation"); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705 (1984) ("Under current doctrine, the [D]ormant [C]ommerce [C]lause is aimed primarily at measures taken out of a desire to improve the economic position of in-staters at the expense of out-of-staters."). One of the first cases in which the Supreme Court invalidated a discriminatory state law on DCC was in 1877, where a Missouri law excluding the transportation of Texas, Mexican, or Indian cattle into the state during eight months of the year, among other limitations, was found to be unconstitutional because "[t]he police power of [Missouri] cannot obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise." *See* Hannibal & St. J.R. Co. v. Husen, 95 U.S. 465, 473–74 (1877).

43. *Wayfair*, 138 S. Ct. at 2091 (quoting Granholm v. Heald, 544 U.S. 460, 476 (2005)). For a helpful explanation of the Court's theoretical reasons for holding these laws as per se invalid, see

Court has defined discriminatory laws as those treating "in-state and out-of-state economic interests" in a manner "benefit[ting] the former and burden[ing] the latter."[44] Indeed, the only way a discriminatory state law can survive judicial scrutiny is if it is narrowly tailored to advance "a legitimate local purpose."[45] The Court has reasoned that striking down laws that burden interstate commerce in a discriminatory manner is fundamental to prohibiting protectionist legislation and promoting national economic unity.[46]

Sunstein, *supra* note 42, at 1705–06 ("When discrimination is worked against persons outside the state, ordinary avenues of political redress are unavailable to the burdened class, which does not have access to the state legislature. . . . [T]he prohibition of protectionism results from a perception that the [D]ormant [C]ommerce [C]lause reflects an authoritative judgment that a state may not prefer its own citizens over out-of-staters simply because it values their welfare more highly. In this respect, the [D]ormant [C]ommerce [C]lause forbids a conclusion that a preference for in-staters over out-of-staters is a permissible public value.").

44. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (quoting Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 99 (1994)). In this case, the Court upheld a New York ordinance requiring the processing of waste at specific public facilities as not discriminating against interstate commerce because it treated all private companies in the same manner and because disposing of waste is a traditional state function. *Id.* at 344–45.

45. Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (quoting Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 93 (1994)); *see* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 353 (1977) ("When discrimination . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (holding discriminatory laws do not violate the DCC when the State shows "it ha[d] no other means to advance a legitimate local interest"). For examples of discriminatory laws that the Court held were not narrowly tailored to a legitimate local purpose, see *Hughes*, 441 U.S. at 338–39 (invalidating Oklahoma's law, which limited the number of minnows allowed to be sold out of state, as not sufficiently related to the law's alleged purpose of promoting wild animal life within the state) and *Hunt*, 432 U.S. at 353–54 (affirming the invalidation of North Carolina's law insofar as it prohibited displaying Washington State apple grades on containers shipped into North Carolina as discriminatory and not narrowly tailored to the state's interest in protecting consumers from fraud and deception). For examples of laws which served a legitimate local purpose, see *Mintz v. Baldwin*, 289 U.S. 346, 348–49 (1933) (denying a suit requesting injunctive relief against a New York importation order requiring imported cattle to be certified as free from Bang's disease because although the law burdened interstate commerce, preventing the spread of disease was a legitimate state interest) and *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986) (upholding Maine's statute that banned importing baitfish as not violating the Commerce Clause because it served a legitimate state purpose of protecting in-state fisheries from parasites, which could not be served as well by nondiscriminatory measures).

46. *See* Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 479 (2003) (footnotes omitted) ("The Court has repeatedly stated that free market access and national solidarity are fundamental ideals under the Commerce Clause. Presumably, the Court's concern with state actions designed to favor in-state interests over out-of-state interests is that if such initiatives were allowed, a return to the 'economic [b]alkanization' under the Articles of Confederation would be

The second principle—preventing undue burdens on interstate commerce—is best exemplified through the test formulated by the Court in *Pike v. Bruce Church, Inc*.[47] In this case, the Court, when evaluating the constitutionality of state laws that affect both intrastate and interstate commerce, reasoned that the following balancing approach should be applied:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[48]

Some scholars are critical of this "undue burden" balancing approach because it requires courts to evaluate the legitimacy of a state's interest in burdening interstate commerce, which in turn requires policy determinations that courts may be less equipped to make than legislators.[49]

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inevitable. Consequently, where a state regulation inhibits free market access by erecting unreasonable barriers to commerce solely based on origin, the Court has consistently held that the state regulation will be subject to the most exacting scrutiny.").

47. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

48. *Id.* at 142 (citation omitted). In this case, the Supreme Court reasoned that Arizona's law that required companies to operate a $200,000 packing plant within Arizona borders was unconstitutional despite the state's interest in identifying its local products for their allegedly superior quality because the interest was not compelling enough to justify burdening interstate commerce to such an extent. *See id.* at 145–46. There are other cases that provide helpful illustrations of the undue burden principle, which is also sometimes referred to as the clearly excessive principle. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471–74 (1981) (upholding the constitutionality of Minnesota's law banning the sale of plastic, nonreturnable milk containers as being evenhanded and purposed toward the state's legitimate interest of conserving natural resources, ultimately concluding that a "nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry").

49. *See* Felmly, *supra* note 46, at 482 ("Critics are particularly opposed to the Court's modern approach of employing the *Pike* balancing test to invalidate facially neutral state legislation. The argument raised most often by those challenging the use of balancing in cases involving evenhanded statutes is that the weighing of legitimate competing interests is best left either to the legislatures of

The third DCC principle—prohibiting extraterritorial regulations—holds that the DCC should invalidate a state law if the law "expressly applies to out-of-state commerce or if it has that practical effect, regardless of the legislature's intent."[50] This principle is detailed in the Supreme Court's decision in *Healy v. Beer Institute*, where the Court, when considering whether the amended beer price affirmation provisions of the Connecticut Liquor Control Act violated the Commerce Clause, reasoned that this "extraterritorial effects" framework has two components.[51] First, *Healy* asserted that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the [s]tate's borders, whether or not the commerce has effects within the [s]tate."[52] Second, *Healy* contended that "a statute that directly controls commerce occurring wholly outside the boundaries of a [s]tate exceeds the inherent limits of the enacting [s]tate's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[53] The extraterritoriality principle promotes national economic unity but also recognizes the inherent sovereignty of each individual state.[54]

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the states or to Congress."). Another scholar, Professor James McGoldrick, Jr., illuminates the complex nature of the balancing approach when explaining that the *Pike* balancing test, derived from an earlier Supreme Court decision in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770 (1945), requires an evaluation of eight factors to determine whether the law is unduly burdensome. *See* James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Endgame—From Southern Pacific to Tennessee Wine & Spirits—1945 to 2019*, 40 PACE L. REV. 44, 59–62 (2019). These factors include, among others, "the 'nature and extent of the burden' on interstate commerce," the "nature and extent of the state and local interests burdening interstate commerce," whether "state and local laws [are] politically self-correcting," federal legislation from Congress indicating its desires concerning the specific field, and the existence of "reasonable alternatives to advance[] the legitimate state interest without undue harm to interstate commerce." *Id.* at 60–61. Unlike Felmly's concerns, McGoldrick believes the Court is skilled at evaluating the factors in the *Pike* or *Southern Pacific* tests. *See id.* at 125.

50. Stephen McConnell, *Don't Sleep on the Dormant Commerce Clause*, DRUG & DEVICE L. (Apr. 25, 2018), https://www.druganddevicelawblog.com/2018/04/dont-sleep-on-the-dormant-commerce-clause.html.

51. *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989); *see also infra* notes 53–54 and accompanying text.

52. *Healy*, 491 U.S. at 336 (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982)).

53. *Id.* In *Healy*, the Supreme Court ultimately concluded that the Connecticut statute undeniably had the extraterritorial effect of controlling activity occurring wholly outside the State's boundary and was consequently struck down as unconstitutional. *See id.* at 337, 343.

54. *See id.* at 335–36 (footnote omitted) (holding that state regulations that have extraterritorial effects run contrary to the Constitution's "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the

Collectively, these three principles—promoting nondiscriminatory legislation, preventing undue burdens, and prohibiting extraterritorial regulations—guide the Supreme Court's decision-making in its DCC jurisprudence, which in turn guides lower courts.[55]

B. Ninth Circuit Applying the DCC in the Twenty-First Century

The Ninth Circuit addressed several DCC challenges related to California's legislative decisions in the past decade, which illuminate the court's recent decisions concerning California Proposition 12's legitimacy.[56] In *National Ass'n of Optometrists & Opticians v. Harris*, the Ninth Circuit upheld California's law against a DCC challenge.[57] The law prohibited opticians and optical companies from offering prescription eyewear and from advertising the availability of eyewear and examinations at the same location.[58] Notably, *National Optometrists* reasoned that in "the absence of discrimination or another substantial burden on interstate commerce, [courts] need not determine if the benefits of a statute are illusory."[59] This conclusion confined *Pike* to examining the law's alleged benefits only if there is a significant burden on interstate commerce without considering its extraterritorial effects.[60]

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autonomy of the individual [s]tates within their respective spheres").

55. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *Healy*, 491 U.S. at 336; *see also* discussion *infra* Section II.B.

56. *See* discussion *infra* Sections II.B, II.C. There were other DCC challenges in other states within the Ninth Circuit's jurisdiction during this period, but they are not the focus of this Note. *See, e.g.*, Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health, 731 F.3d 843, 847, 849 (9th Cir. 2013) (upholding Washington's regulation permitting hospitals to perform certain nonsurgical procedures to treat coronary heart disease only if they have a minimum volume of 300 procedures as not in conflict with the DCC because any loss of business does not unduly burden interstate commerce and the regulation promotes the state's legitimate interest of patient safety).

57. *See* Nat'l Ass'n of Optometrists & Opticians v. Harris (*National Optometrists*), 682 F.3d 1144, 1145–46 (9th Cir. 2012).

58. *See id.*

59. *Id.* at 1156.

60. *See id.* at 1155 ("[*Pike*] does not mention actual benefits as part of the test for determining when a regulation violates the [D]ormant Commerce Clause. Even if *Pike*'s 'clearly excessive' burden test were concerned with weighing actual benefits rather than 'putative benefits,' we need not examine the benefits of the challenged laws because, as discussed above, the challenged laws do not impose a significant burden on interstate commerce. . . . Accordingly, where, as here, there is no discrimination and there is no significant burden on interstate commerce, we need not examine the actual or putative benefits of the challenged statutes."). In its reasoning, *National Optometrists*, 682 F.3d at 1155, drew

In particular, several of California's environmental and animal laws have been placed under the Ninth Circuit's DCC microscope.[61] In *Rocky Mountain I* and *Rocky Mountain II*, the Ninth Circuit considered several challenges to California's Low Carbon Fuel Standard (LCFS) laws as allegedly discriminating against interstate commerce.[62] In *Rocky Mountain I*, the Ninth Circuit upheld California's LCFS laws, which imposed an annual cap on the average carbon intensity of fuel sold within the state, reasoning that the regulations did not benefit in-state interests at the expense of out-of-state interests.[63] In *Rocky Mountain II*, the Ninth Circuit considered a similar challenge to California's LCFS laws, which had been amended slightly regarding the process of assigning carbon intensity values to non-crude oil fuels.[64] The court upheld the law in part because California's regulation both was nondiscriminatory and was "aimed at salient environmental differences between different types of fuels . . . which genuinely reflect[ed] legitimate state interests . . . [rather than] disguised economic protectionism."[65]

The Ninth Circuit also addressed two DCC challenges to animal welfare legislation in the past ten years in *Chinatown Neighborhood Ass'n v. Harris*

support from *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125–29 (1978), for the notion that it need not consider the statute's purported or actual benefits when the statute is not discriminatory or unduly burdensome. But *Exxon Corp.*, at least at a cursory level, considered the legitimacy of benefits gained under Maryland's new statute, holding that "it bears a reasonable relation to the State's *legitimate* purpose in controlling the gasoline retail market," even though the law was not discriminatory or impermissibly burdensome. 437 U.S. at 125, 127 (emphasis added). Moreover, the *Pike* test, when using "legitimate local public interest" language, undoubtedly assesses the law's potential benefits, even if superficially, when the law is evenhanded and not "clearly excessive." *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

61. *See infra* notes 62–79 and accompanying text.

62. *See* Rocky Mountain Farmers Union v. Corey (*Rocky Mountain I*), 730 F.3d 1070, 1077–78 (9th Cir. 2013); Rocky Mountain Farmers Union v. Corey (*Rocky Mountain II*), 913 F.3d 940, 944–45 (9th Cir. 2019).

63. *See Rocky Mountain I*, 730 F.3d at 1089. Further, *Rocky Mountain I* held the law did not discriminate against out-of-state ethanol because it "does not base its treatment on a fuel's origin but on its carbon intensity." *Id.* The court also held the law did not have an extraterritorial effect because it simply "encourages the use of cleaner fuels through a market system of credits and caps." *Id.* at 1103 (quoting Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042, 1065 (E.D. Cal. 2011)). Unlike in *National Optometrists*, *Rocky Mountain I* reasoned that even if the ethanol provisions do not discriminate in purpose or effect, the *Pike* balancing test should be applied. *See id.* at 1107. A request for rehearing *Rocky Mountain I* en banc was denied, 740 F.3d 507, 508 (9th Cir. 2014), and a petition for certiorari was also denied. *See* Rocky Mountain Farmers Union v. Corey, 573 U.S. 946, 946 (2014).

64. *See Rocky Mountain II*, 913 F.3d 940; *see also infra* note 65 and accompanying text.

65. *Rocky Mountain II*, 913 F.3d at 957.

and *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*.[66] In *Chinatown*, the Ninth Circuit rejected a challenge to California's Shark Fin Law, "which makes it a misdemeanor to possess, sell, trade, or distribute detached shark fins in California."[67] The court ultimately held that the law was not preempted under federal law and did not violate the DCC.[68] *Chinatown* first reasoned the Shark Fin Law was not preempted because "no provision of federal law affirmatively guarantees the right to use or sell shark fins onshore."[69] It then concluded that the law did not violate the DCC, either by regulating extraterritorially or substantially burdening interstate commerce, because the law was found only to regulate in-state conduct.[70] Further, the law was not unduly burdensome and did not require a uniform system of regulation because "conserv[ing] state resources, prevent[ing] animal cruelty, and protect[ing] wildlife and public health" are, according to the Ninth Circuit, "legitimate matters of local concern."[71]

In *Canards I*, the Ninth Circuit considered an appeal denying a preliminary injunction against California's Force Fed Birds statute.[72] In this case, appellants contended California's sales ban of products created through the force feeding of birds to enlarge their livers violated the DCC by

66. *See* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015); Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris (*Canards I*), 729 F.3d 937 (9th Cir. 2013). While there are multiple district court decisions, appeals, and motions for reconsideration stemming from challenges to the California statute in question in *Canards I*, only three will be discussed for purposes of this Note: *Canards I* will refer to the first Ninth Circuit decision; *Canards II* will refer to the second Ninth Circuit decision, Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra, 870 F.3d 1140 (9th Cir. 2017), which held that the California statute was not expressly or impliedly preempted by federal law; and *Canards District* will refer to a recent district court decision regarding this statute, which in part granted plaintiff's motion for declaratory judgment interpreting the statute's scope, but the decision has been appealed as of September 10, 2020. *See* Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, No. 12-cv-05735-SVW-RZ, 2020 WL 5049182, at *1 (C.D. Cal. July 14, 2020), *appeal docketed*, No. 20-55944 (9th Cir. Sept. 10, 2020).

67. *Chinatown*, 794 F.3d at 1140; *see also infra* note 68 and accompanying text.

68. *See Chinatown*, 794 F.3d at 1139. This was not the first appeal in this case, as the Ninth Circuit two years prior in *Chinatown Neighborhood Ass'n v. Brown*, affirmed the denial of a preliminary injunction against the enforcement of the Shark Fin Law. 539 F. App'x 761, 763 (9th Cir. 2013). The court held the district court did not abuse its discretion when ignoring broader arguments as to how the challenged law burdens interstate commerce, concluding that "[t]he district court can consider the broader [D]ormant Commerce Clause arguments when deciding whether to issue a permanent injunction." *Id.*

69. *Chinatown*, 794 F.3d at 1145.

70. *See id.* at 1145–47.

71. *Id.* at 1147.

72. *See Canards I*, 729 F.3d 937 (9th Cir. 2013); *see also infra* note 73 and accompanying text.

discriminating against interstate commerce, substantially burdening interstate commerce, and regulating extraterritorial conduct.[73] Applying the abuse of discretion standard of review,[74] the Ninth Circuit held the district court did not abuse its discretion because it was not discriminatory in banning the sale of "both intrastate and interstate products that are the result of force feeding a bird."[75] Further, the court reasoned the statute is not extraterritorial legislation, because it bans the sale of products by all producers, and contended it does not substantially burden interstate commerce.[76] The court concluded plaintiffs had not shown the statute completely bans foie gras or that foie gras required national, uniform production.[77]

As seen above, the Ninth Circuit is relatively deferential to California's

73. *See Canards I*, 729 F.3d at 947, 949. The law in question, section 25982 of the California Health and Safety Code, states the following: "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." CAL. HEALTH & SAFETY CODE § 25982 (West 2012); *Canards I*, 729 F.3d at 942.

74. *See Canards I*, 729 F.3d at 944 ("We review a district court's grant or denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo."). *Canards I* articulated the preliminary injunction factors from the Supreme Court's *Winter* decision, which held that a plaintiff seeking a preliminary injunction must establish that "(1) he is 'likely to succeed on the merits'; (2) he is 'likely to suffer irreparable harm in the absence of preliminary relief'; (3) 'the balance of equities tips in his favor'; and (4) 'an injunction is in the public interest.'" *Id.* (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). Notably, *Canards I* held that if the plaintiff cannot satisfy the first *Winter* factor, the remaining three do not need to be considered. *Id.*

75. *Id.* at 948.

76. *See id.*

77. *See id.* at 948–52. Significantly, *Canards I* narrowed the application of the Supreme Court's decisions in *Healy* and *Baldwin*, both of which examined laws that had practical effects of controlling conduct outside of the respective state's borders, stating that "the Court has held that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 'tie the price of its in-state products to out-of-state prices.'" *Id.* at 951. Other authors note how the foie gras ban, while encouraging healthy discussion, has not been readily enforced and thus may be more symbolic than practical in prohibiting animal cruelty. *See* Max Shapiro, *A Wild Goose Chase: California's Attempt To Regulate Morality by Banning the Sale of One Food Product*, 35 LOY. L.A. INT'L & COMPAR. L. REV. 27, 52–53 (2012) (footnotes omitted) ("The California foie gras ban went into effect July 1, 2012. However, this has not stopped Californians from eating foie gras. One restaurant is still serving foie gras because it claims that the ban does not apply to restaurants on federal property. Some restaurants are serving foie gras for free, and others are preparing foie gras that customers bring in themselves. These restaurants claim they can do this because the ban does not expressly prohibit distribution. There are also practical barriers to enforcement. For example, it is unclear who is charged with enforcing the ban. Thus, state agencies have little power to control defiant chefs and diners because of tight budgets and unclear statutory wording."). As discussed later, *Canards I* is an example of the significant narrowing of extraterritoriality doctrine reflected within the Ninth Circuit's jurisprudence that potentially undermines the DCC's goal of prohibiting economic balkanization. *See* discussion *infra* Section V.B.

legislative decisions, but it has invalidated laws on DCC grounds when California's legislation clearly attempts to regulate conduct outside of its borders.[78] Nevertheless, California's legislation concerning farm animals, such as Propositions 2 and 12, continues to raise complicated questions of whether animal welfare is a legitimate local interest to burden interstate commerce.[79]

C. Animal Welfare Legislation Gives Rise to New Commerce Challenges in California

In the past twenty years, animal welfare has become a popular topic due to the proliferation of documentaries and films exposing inhumane practices in the farming industry.[80]

78. *See, e.g.*, Daniels Sharpsmart, Inc. v. Smith, 889 F.3d 608, 614 (9th Cir. 2018); Sam Francis Found. v. Christies, Inc. (*Christie's*), 784 F.3d 1320, 1322 (9th Cir. 2015) (en banc). In *Christie's*, the Ninth Circuit invalidated a portion of California's Resale Royalty Act royalty provision, which requires fine art sellers to pay the artist a 5% royalty fee if the seller resides in California or the sale occurs within the state, as violating the DCC's exterritoriality principles as to the extent that the law regulates sales outside of its borders. 784 F.3d at 1322. Further, the court reasoned that under *Healy*, this portion of the Act is unconstitutional because "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the [s]tate's borders." *Id.* at 1323–25 (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989)). In *Sharpsmart*, the Ninth Circuit affirmed the district court's granting of a preliminary injunction against California's Medical Waste Management Act, which required medical waste transported outside of the state to be "consigned to a permitted medical waste treatment facility in the receiving state." 889 F.3d at 612. The court's affirmance was based on extraterritorial grounds that "California has attempted to regulate waste treatment everywhere in the country," ultimately concluding that "[California] cannot be permitted to dictate what other states must do within their own borders." *Id.* at 615–16. However, the court reversed as to the qualified immunity question for the state officials, holding that since it was not clearly established that this challenged law violated the DCC, a reasonable official could reasonably believe "that the Department could control what was done with California waste in another state." *Id.* at 617–18. This ultimately leaves plaintiffs with no financial recourse, an important fact to the *Nami* implications below. *See* discussion *infra* Section V.B.

79. *See* CAL. PROP. 2, § 2 (2008); CAL. PROP. 12, § 2 (2018); *see also* discussion *infra* Part III.

80. *See, e.g.*, Josephine Yurcaba, *Watch This Powerful Documentary Featuring One Perdue Chicken Farmer Taking on a Cruel Industry*, ONE GREEN PLANET (2014), https://www.onegreenplanet.org/news/perdue-chicken-farmer-documentary-battles-the-industry/ (last visited Oct. 7, 2021); Mercy for Animals, *Farm to Fridge - The Truth Behind Meat Production*, YOUTUBE (Feb. 3, 2011), https://www.youtube.com/watch?v=THIODWTqx5E; POV, *Food, Inc.-Documentary Film* Trailer, YOUTUBE (Feb. 1, 2010), HTTPS://WWW.YOUTUBE.COM/WATCH?V=OQZJC-ENRL8.

1. Proposition 2: California Becomes Pro-Hens

In 2008, California voters overwhelmingly passed Proposition 2, The Prevention of Farm Animal Cruelty Act, by a margin of approximately 63–37%,[81] which added Sections 25990 through 25994 to California's Health and Safety Code.[82] This proposition limited the cruel confinement of farm animals within California's borders, with particular protections for pigs, calves, and egg-laying hens.[83] On its face, Proposition 2 was purposed "to prohibit the cruel confinement of farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs," and the law imposed requirements on noncompliant California farmers to restructure their current confinement practices by 2015.[84] While Proposition 2's fiscal impact was speculative when enacted, it was clear that this legislative proposal would have a particularly significant impact on the egg industry.[85] Proposition 2 was fiercely debated, which might explain why this proposition received the highest ballot initiative voter turnout in American history.[86]

81. *Proposition 2*, UNIV. OF CAL., BERKELEY INST. OF GOVERNMENTAL STUD., https://www.igs.berkeley.edu/library/elections/proposition-2 (last visited Oct. 7, 2021).

82. *See* CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West 2015 & 2018).

83. *See id.*; *Proposition 2 Treatment of Farm Animals*, LEGIS. ANALYST'S OFF. (June 30, 2008, 10:40 AM), https://lao.ca.gov/ballot/2008/2_11_2008.pdf ("Beginning January 1, 2015, this measure prohibits with certain exceptions the confinement on a farm of pregnant pigs, calves raised for veal, and egg-laying hens in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs. Under the measure, any person who violates this law would be guilty of a misdemeanor, punishable by a fine of up to $1,000 and/or imprisonment in county jail for up to six months."). Egg-laying hens under this legislation included female domesticated chickens, turkeys, ducks, geese, and guinea fowls. *See* CAL. HEALTH & SAFETY CODE § 25991 (West 2018).

84. CAL. PROP. 2, § 2 (2008); *see Proposition 2 Treatment of Farm Animals*, *supra* note 83.

85. *See Proposition 2*, *supra* note 81 ("[Proposition 2] would principally apply to the state's 18 million egg-laying hens. . . . Currently 5 to 8 percent of the eggs produced in the state come from cage-free chickens. California is responsible for about 6 percent of all of the nation's table eggs, a $330 million industry in 2007."); *see also* Valerie J. Watnick, *The Business and Ethics of Laying Hens: California's Groundbreaking Law Goes into Effect on Animal Confinement*, 43 B.C. ENV'T. AFF. L. REV. 45, 49 (2016) ("In 2013, nearly eighteen million California hens laid 5.4 billion eggs at a commercial value of $380 million.").

86. *See generally* Paige M. Tomaselli, *California's Proposition 2: Good for Chickens and Good for You*, CTR. FOR FEED SAFETY (Jan. 8, 2015), https://www.centerforfoodsafety.org/blog/3688/californias-proposition-2-good-for-chickens-and-good-for-you ("At the time, [Proposition 2] received more votes than any other [ballot initiative] in American history. . . . California's animal welfare laws reflect a growing concern on the part of consumers about both the welfare of farm animals and the quality of their food purchases. . . . An American Humane Association survey revealed that nearly ninety percent of the 2,600 participants were concerned about farm animal welfare and seventy-four percent of participants were willing to

Despite the widespread popularity of The Prevention of Farm Animal Cruelty Act, California legislators did not want the Golden State to simply serve as a beacon for preventing animal cruelty.[87] In 2010, the California legislature enacted Assembly Bill 1437, which in part extended Proposition 2's confinement requirements to out-of-state farmers by banning the sale of egg-laying hens within California that were not confined in accordance with Proposition 2's standards.[88] Although the bill's stated purpose was to "protect California consumers" from foodborne pathogens,[89] its legislative history reveals its true purpose was economic in nature: "to level the playing field" so out-of-state competitors were subjected to the same confinement standards as in-state farmers.[90] Given the economic ramifications of Proposition 2 and its progeny, Assembly Bill 1437, both pieces of legislation were placed under the Ninth Circuit's microscope.[91]

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spend more for meat, dairy, and eggs that were labeled humanely-raised."). However, there were critics. *See* Daniel A. Sumner et al., *Economic Effects of Proposed Restrictions on Egg-laying Hen Housing in California*, U.C. AGRIC. ISSUES CTR. (July 2008), https://aic.ucdavis.edu/publications/eggs/egginitiative.pdf ("Based on our analysis reported above, there would be two major consequences of an effective national ban on eggs produced from hens in conventional cage housing. First, the cost of egg production would increase substantially throughout the United States. Second, the implication of higher costs for all producers would be higher farm prices and a significant increase in wholesale and retail prices facing buyers. . . . With some 18 million hens in cage housing in California, about 600 new or retrofitted buildings at about 30,000 birds each would be needed to be constructed within six years. The capital investment required to provide approved housing for those hens is between $200 million and $800 million dollars. Producers would also need access to more land. Further, they would face zoning and other regulations that have limited relocating or expanding facilities for animal agriculture in California."); George Skelton, *Prop. 2 Is for the Birds*, L.A. TIMES (Oct. 20, 2008, 12:00 AM), https://www.latimes.com/archives/la-xpm-2008-oct-20-me-cap20-story.html ("Ryan Armstrong, a third-generation egg farmer in San Diego County, says he'd be forced out of business if Proposition 2 passes. He currently has 650,000 birds[,] 50,000 cage-free and 600,000 in cages. 'I don't have all my eggs in one basket.' He estimates that going completely cage-free would cost $20 million for additional land and barns.").

87. *See Proposition 2*, *supra* note 81; *see also infra* notes 88–91 and accompanying text.

88. *See* A.B. 1437, 2010 Leg., Reg. Sess. (Cal. 2010). As mentioned in the accompanying main text, part of this enacted bill applied Proposition 2's requirements to out-of-state farmers, requiring all shelled eggs to be produced from egg-laying hens in compliance with farming practices set forth in Proposition 2. *See* CAL. HEALTH & SAFETY CODE § 25996 (West 2014).

89. CAL. HEALTH & SAFETY CODE § 25995(e) (West 2011).

90. *Bill Analysis AB 1437*, ASSEMBLY COMM. ON APPROPRIATIONS (May 13, 2009), http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401 1450/ab_1437_cfa_20090512_182647_asm_comm.html. As discussed later, there is reason to suspect that similar legislation, such as Proposition 12, was designed not to solely promote farming practices that reduce animal suffering but with an economic focus in mind. *See* discussion *infra* Section V.B.

91. *See* CAL. PROP. 2, § 2 (2008); Cal. A.B. 1437; *see also infra* notes 92–98 and accompanying

In *Cramer v. Harris*, the Ninth Circuit considered an appeal from a dismissal of a complaint seeking to invalidate Proposition 2 as unconstitutionally vague for not specifically providing minimum cage specifications for egg-laying hens.[92] Here, the Ninth Circuit affirmed the district court's ruling dismissing the complaint, holding that Proposition 2 "give[s] people of 'ordinary intelligence' a 'reasonable opportunity' to understand its requirements."[93] While Proposition 2 did not provide a specified minimum space requirement for each hen, the Ninth Circuit reasoned the law did not violate the Due Process Clause because the amount of space each hen needed for farmers to comply with Proposition 2 could be "readily discerned with objective criteria."[94]

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text. Besides the Ninth Circuit appeals, Missouri, Nebraska, Alabama, Oklahoma, Iowa, Arkansas, Indiana, Louisiana, Nevada, North Dakota, Oklahoma, Texas, Utah, and Wisconsin filed an original jurisdiction action in the Supreme Court, alleging AB 1437 violated the DCC because it was protectionist legislation designed solely to regulate conduct outside of California. *See* Motion for Leave to File Bill of Complaint at 1–2, Missouri v. California, 138 S. Ct. 1585 (2018) (No. 22O148). While the Supreme Court invited the Solicitor General to express the government's views on the case in *Missouri v. California*, 138 S. Ct. 1585 (2018), the motion for leave to file a bill of complaint was denied, although Justice Thomas would have granted the motion. *See* Missouri v. California, 139 S. Ct. 859 (2019); Louis Cholden-Brown, *Symposium: The Commerce Clause and the Global Economy: Missouri and Indiana Lay an Egg: Why the Latest Attempt at Invalidating State Factory Farm Regulations Must Fail*, 22 CHAP. L. REV. 161, 176–77 (2019).

92. *See* Cramer v. Harris, 591 F. App'x 634, 634–35 (9th Cir. 2015) (mem.). The Ninth Circuit held the standard to be applied for a vagueness challenge was that Proposition 2 "must 'give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Id.* at 635 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)); *see* Carla Hall, *Opinion: Egg-laying Hens in California Win Another Court Battle*, L.A. TIMES (Feb. 4, 2015, 2:25 PM), https://www.latimes.com/opinion/opinion-la/la-ol-egg-hens-california-court-20150204-story.html ("[I]nstead of retrofitting barns to insure they can comply, farmers—and state attorneys general from other states—have spent time and money in court railing against this new law (and a companion law, AB 1437, which requires eggs from out-of-state that are sold in California must come from hens housed under conditions that comply with Proposition 2). Yes, it is costly to retrofit farms, but they're being retrofitted only to a fairly modest new standard of humane treatment. The older method left hens barely able to move in tiny cages.").

93. *Cramer*, 591 F. App'x at 635. The Ninth Circuit reasoned that since the law provided clear requirements that "'a person shall not tether or confine' chickens in a manner that prevents them from either 'fully spreading both wings without touching the side of an enclosure or other egg-laying hens' or 'turning in a complete circle without any impediment, including a tether, and without touching the side of an enclosure,'" it was not unconstitutionally vague. *Id.* (quoting CAL. HEALTH & SAFETY CODE §§ 25990–25991 (West 2018)).

94. *Id.* ("All Proposition 2 requires is that each chicken be able to extend its limbs fully and turn around freely. . . . Because hens have a wing span and a turning radius that can be observed and measured, a person of reasonable intelligence can determine the dimensions of an appropriate confinement that will comply with Proposition 2.").

Less than two years later, the Ninth Circuit considered a challenge from six states—Missouri, Nebraska, Alabama, Kentucky, Oklahoma, and Iowa—seeking to prohibit the enforcement of AB 1437 and Section 1350(d)(1) of the California Code, collectively known as the "Shell Egg Laws."[95] The states argued that the laws violated the DCC and were preempted by federal law.[96] In this case, *Missouri ex rel. Koster v. Harris*, the Ninth Circuit affirmed dismissal of the states' complaint, holding that the state actors lacked *parens patriae* standing to bring the challenged action in part because the alleged harm to egg companies could be remedied through a private suit, any fluctuations in egg prices were merely speculative, and the law was not so discriminatory as to violate the Commerce Clause.[97] Proposition 2's survival undoubtedly encouraged similar legislation in other states, like Massachusetts, and more extensive reform within California, to mandate more robust reform to living conditions for farm animals.[98]

95. *See* Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 650 (9th Cir. 2017); *see also infra* note 97 and accompanying text.

96. *See Koster*, 847 F.3d at 650.

97. *See id.* at 651–55. In order to establish *parens patriae* standing, petitioners needed to satisfy the three Article III standing requirements (i.e., concrete injury, traceable to the challenged action, and redressable by a favorable ruling), plus two additional requirements: the State must be more than a nominal party, meaning the State must "articulate an interest apart from the interests of particular private parties," and "must express a quasi-sovereign interest." *Id.* at 651. Because petitioners failed to articulate a distinguishable interest apart from private parties, the court did not consider issues of ripeness or a quasi-sovereign interest. *See id.* Particularly relevant for purposes of this Note, this court held that these challenged statutes were not discriminatory against interstate commerce, citing to *Canards I* for the notion that "[a] statute that treats 'both intrastate and interstate products' alike 'is not discriminatory.'" *Id.* at 655 (quoting *Canards I*, 729 F.3d 937, 948 (9th Cir. 2013)).

98. *See* Cholden-Brown, *supra* note 91, at 177 (footnotes omitted) ("On November 8, 2016, Massachusetts, at a public referendum by a margin of 77.7% to 22.3%, adopted 'An Act to Prevent Cruelty to Farm Animals[,]' which prohibited the sale in Massachusetts, after January 1, 2022, of certain eggs, veal, and pork based on the conditions in which the animals were confined. The stated primary purpose of the legislation was 'to prevent animal cruelty by phasing out extreme methods of farm animal confinement which also threaten the health and safety of Massachusetts consumers, increase the risk of foodborne illness, and have negative fiscal impacts on the Commonwealth of Massachusetts.'"); David A. Lieb, *Supreme Court Won't Preside over Challenge to State Egg Laws*, WFYI INDIANAPOLIS (Jan. 8, 2019), https://www.wfyi.org/news/articles/supreme-court-wont-preside-over-challenge-to-state-egg-laws ("California voters in November approved an even more aggressive law. It will require all eggs sold in the state to come from cage-free hens by 2022. It also bans the sale of pork and veal from animals that are not raised according to new minimum living space requirements.").

2. Proposition 12: Expanding Animal Protections and Problems

In 2018, California voters expanded on the provisions of Proposition 2 by passing Proposition 12, The Prevention of Cruelty to Farm Animals Act, which amended Sections 25990 through 25993 of the California Health and Safety Code and introduced Section 25993.1.[99] Like Proposition 2, Proposition 12 was popular among voters, with almost 63% voting in favor of it.[100] Its stated purpose was "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."[101]

Proposition 12 codified minimum space requirements based on square feet for calves raised for veal, breeding pigs, and egg-laying hens, as well as banned the sale of veal from calves, pork from breeding pigs, and eggs from hens, inside or outside of California's borders, when such animals were confined to areas below the legislation's minimum square feet requirements.[102] The legislation was designed to be implemented within a two-tier system, where starting in 2020, farmers selling egg products and veal products in California were required to provide a minimum of one square foot of usable floor space for their egg-laying hens and forty-three square feet of usable floor space for calves raised for veal; starting in 2022, farmers can only sell whole pork meat in California if they provide twenty-four square feet of usable floor space for each breeding pig and egg products in California if the farmers provide cage-free housing for egg-laying hens.[103] However,

99. *See* CAL. PROP. 12, § 2 (2018); N. Am. Meat Inst. v. Becerra, No. 219CV08569CASFFMX, 2020 WL 919153, at *2 (C.D. Cal. Feb. 24, 2020).

100. *See* SEC'Y OF STATE ALEX PADILLA, STATEMENT OF VOTE: NOVEMBER 6, 2018 GENERAL ELECTION 16 (2018), https://elections.cdn.sos.ca.gov/sov/2018-general/sov/2018-complete-sov.pdf.

101. CAL. PROP. 12, § 2 (2018). Despite this claim, Proposition 12 did not include any scientific studies or legislative findings demonstrating a link between these legislative changes and a reduced risk of foodborne illness in California. *See* NAMI Opening Brief, *supra* note 1, at 5–6.

102. *See* CAL. HEALTH & SAFETY CODE §§ 25990–25993.1 (West 2018). For a helpful document showing the differences between Proposition 2 and Proposition 12, see Cheri Shankar, *Request for Title and Summary for Proposed Initiative Statute*, INITIATIVE COORDINATOR ATT'Y GEN.'S OFF., (Aug. 29, 2017), https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29_0.pdf.

103. *See* CAL. HEALTH & SAFETY CODE § 25991(e) (West 2018). Under this chapter, a "cage-free housing system" must permit the hens to live in an indoor or outdoor controlled environment where they "are free to roam unrestricted" and are "provided enrichments that allow them to exhibit natural behavior," among other things. *Id.* § 25991(c). Usable floorspace is calculated by dividing the total

California, at the time the legislation was enacted, "ha[d] yet to issue regulations implementing Proposition 12 despite the statutory deadline to do so by September 1, 2019."[104] In 2021, the California Department of Agriculture finally released the proposed implementation details for Proposition 12, nearly two years after the statutory deadline.[105]

Proposition 12, like its Proposition 2 predecessor, was subject to fierce debate, but in this case, both sides received support from animal welfare groups.[106] Although the Humane Society saw Proposition 12 as a commendable step towards improving the livelihood of farm animals,[107] People for the Ethical Treatment of Animals (PETA) contended that Proposition 12 did not go far enough because it ultimately misleads California voters into thinking they are meaningfully improving the lives of farm animals.[108] As with Proposition 2, some opponents took their disapproval with Proposition 12 further by filing lawsuits seeking to invalidate the legislation.[109]

On December 5, 2019, the National Pork Producers Council (NPPC) filed a declaratory judgment action against Karen Ross, California Secretary of the

square footage of floorspace by the number of animals in said enclosure. *See id.* § 25991(s). For the official language of the sales ban, which is the main component challenged in *Nami*, see discussion *infra* Part III.

104. *N. Am. Meat Inst*., 2020 WL 919153, at *3.

105. *See* Tyne Morgan, *Report Shows California's Prop 12 Could Increase Sow Deaths, Create Costly Pork for Consumers*, AG WEB (June 8, 2021), https://www.agweb.com/news/livestock/pork/report-shows-californias-prop-12-could-increase-sow-deaths-create-costly-pork ("CDFA released the details of Prop 12 in a notice posted nearly two years after it was originally due. It goes back to a ballot initiative passed in California in 2018. The new guidelines are set to take effect in 2022. The Meat Institute said after reviewing the details, the proposed rule could not only increase mortality rates but may add nearly $100,000 in costs per year for a typical breeding farm.").

106. *See* PROP. 12, § 2; *infra* notes 107–08 and accompanying text.

107. *See* Andrew O'Reilly, *California Ballot Measure on Cage-Free Rules Divides Activists, Farmers*, FOX NEWS (Oct. 22, 2018), https://www.foxnews.com/politics/california-ballot-measure-seeks-to-define-what-it-means-to-be-cage-free ("The Humane Society, which spearheaded the push for Proposition 12, argues that minimum space standards for the chickens—along with those for breeding pigs and calves raised for veal—would mark a huge step in animal welfare.").

108. *See id.* ("More hardline animal rights groups like People for the Ethical Treatment of Animals, better known as PETA, say that the measure is a step backward at a time when more and more companies are already requiring hens to be cage-free amid a rising demand from consumers. The organization argues that the measure would only represent a small improvement over current conditions and misleads consumers who buy cage-free eggs into thinking they're doing something humane for animals.").

109. *See* PROP. 12, § 2; *infra* notes 110–16 and accompanying text.

Department of Food and Agriculture, among other officials.[110] In their complaint, NPPC alleged that Proposition 12's amendment of California's Health and Safety Code to forbid sales of pork from sows not housed in conformity with the code's requirements violates the Commerce Clause.[111] In response, several animal organizations, led by the Humane Society of the United States, intervened as defendants in the *National Pork* litigation.[112] The district court ultimately granted the Defendant's later motion to dismiss the complaint, concluding, "Proposition 12 does not regulate extraterritorially because it does not target solely interstate commerce and . . . regulates in-state and out-of-state conduct equally. Although there are upstream effects on out-of-state producers, those effects are a result of regulating in-state conduct."[113] The *National Pork* lawsuit was appealed to the Ninth Circuit, where appellants and several amici, including the United States and twenty state attorneys general, argued that Proposition 12 should be invalidated for violating the DCC, but the Ninth Circuit affirmed the dismissal of the complaint.[114]

110. *See* Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201, 1204 (S.D. Cal. 2020), *aff'd*, 6 F.4th 1021 (9th Cir. 2021), *petition for cert. filed*, No.21-468 (U.S. Sept. 29, 2021); *see also infra* note 112 and accompanying text.

111. *See* Complaint for Declaratory and Injunctive Relief at 70, *Nat'l Pork*, 456 F. Supp. 3d 1201 (No. 19-02324); *see also NPPC, AFBF File Legal Challenge to California's Proposition 12*, FARM BUREAU (Dec. 6, 2019), https://www.fb.org/newsroom/nppc-afbf-file-legal-challenge-to-californias-proposition-12 ("California represents approximately 15% of the U.S. pork market, and Proposition 12 will force hog farmers who want to sell pork into the populous state to switch to alternative housing systems, at a significant cost to their business. . . . Currently, less than 1% of U.S. pork production meets Prop 12's requirements.").

112. *See* Proposed Defendant-Intervenors' Memorandum of Points & Authorities in Support of Unopposed Motion to Intervene at 1, *Nat'l Pork*, 456 F. Supp. 3d 1201 (No. 19-02324). In their motion to intervene, the Humane Society argued that they have a "significant protectable interest" in upholding Proposition 12 as the "architects, supporters, and chief proponents of the initiative." *Id.* at 10. Further, they contended that their interests in their broader campaign to "eradicate extreme confinement practices" of animals would be impaired if the legislation was invalidated, *see id.* at 11, and argued their interests would not be adequately protected by the State defendants because their interest is solely for "prevention of cruelty to animals and the interests of their members," *id.* at 13.

113. *Nat'l Pork*, 456 F. Supp. 3d at 1208. The district court also held that "[p]laintiffs have failed to demonstrate that there is a substantial burden on interstate commerce. As such, the Court need not determine whether the benefits of the challenged law are illusory." *Id.* at 1210.

114. *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021); *see also* Todd Neeley, *Commerce Clause on Center Stage: 20 States, Industry Groups Join Appeal Against California's Proposition 12*, PROGRESSIVE FARMER (Oct. 7, 2020, 10:50 AM), https://www.dtnpf.com/agriculture/web/ag/news/article/2020/10/07/20-states-industry-groups-join-12 ("The ag groups have been joined in the lawsuit by the states of Indiana, Alabama, Alaska, Arkansas, Georgia, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South

Concurrently with the *National Pork* lawsuit, NAMI filed a suit that challenged the validity of Proposition 12 on multiple DCC grounds.[115] The *Nami* decision is significant due to its bearing on the competing interests of state sovereignty, federalism, and economic unity on an unsettled topic—whether states can burden interstate commerce to promote animal welfare legislation.[116]

III. NAMI: MEAT PRODUCERS SEEK TO PREEMPTIVELY GUT CALIFORNIA LEGISLATION

NAMI, an organization whose members account for more than ninety-five percent of the United States' output of beef, pork, lamb, veal, turkey, and processed meat products, filed a lawsuit in the Central District of California.[117] NAMI's complaint sought declaratory, preliminary, and permanent injunctive relief against Proposition 12 primarily on the basis that the legislation violates the DCC.[118] In its complaint, NAMI noted that while Proposition 12 was

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Dakota, Texas, Utah, West Virginia[,] and Wyoming. . . . Amici have a strong interest in this case because Proposition 12 regulates the conduct of farmers, processors, wholesalers, and retailers nationwide[, as] . . . California has proposed regulations that would permit California officials to conduct on-site inspections in other states and would impose onerous record-keeping requirements on out-of-state farmers. . . . [California] needs about 700,000 sows to satisfy its pork demand. About 1,500 out of California's 8,000 sows are used in commercial breeding housed in small farms. The NPPC has argued because the state has to import most of its sows, Proposition 12 essentially regulates farmers beyond state borders."); Ryan McCarthy, *NPPC, AFBF Head to Appeals Court Over Prop 12*, MEAT + POULTRY (Sept. 29, 2020), https://www.meatpoultry.com/articles/23861-nppc-afbf-head-to-appeals-court-over-prop-12 ("Proposition 12 . . . achieves no consumer-health benefit at all—though that was touted to voters as one of its goals—and far exceeds any right of California to determine what its own citizens eat by regulating as a practical matter how pork is produced nationwide."). In its decision, the Ninth Circuit predicted that the DCC will ultimately become a legal fiction of the past that will no longer be applicable to bind state legislative authority. *See Nat'l Pork*, 6 F.4th at 1033 ("While the [D]ormant Commerce Clause is not yet a dead letter, it is moving in that direction.").

115. *See* N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1017 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021); *see also infra* note 116 and accompanying text.

116. *See N. Am. Meat Inst.*, 420 F. Supp. 3d 1014; *see also* discussion *infra* Parts III, IV, V.

117. *See N. Am. Meat Inst.*, 420 F. Supp. 3d 1014; *see also infra* note 118 and accompanying text.

118. *See* Complaint for Declaratory & Preliminary & Permanent Injunctive Relief at 14, *N. Am. Meat Inst.*, 420 F. Supp. 3d 1014 . All of the Complaint's arguments were focused on the application of Proposition 12 to the sale of pork and veal from outside of California as being unconstitutional while not addressing the sales ban as applied to shelled or liquid eggs. *See id.* The specific relief requested in the Complaint was:

> A declaratory judgment, pursuant to 28 U.S.C. § 2201, that Proposition 12's sales ban, as applied to veal and pork from outside California, violates the

framed as an attempt to prevent animal cruelty by eliminating confinement methods that threaten the health of California consumers and increase the risk of foodborne illness, the legislation was not accompanied by any supporting evidence.[119] The main portion of Proposition 12 under scrutiny is the "sales ban," Section 25990(b) of the California Health and Safety Code:

> (b) A business owner or operator shall not knowingly engage in the sale within the State [of California] of any of the following: (1) Whole veal meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner. (2) Whole pork meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner. (3) Shell egg that the business owner or operator knows or should know is the product of a covered animal who was confined in a cruel manner. (4) Liquid eggs that the business owner or operator knows or should know are the product of a covered animal who was confined in a cruel manner.[120]

> United States Constitution and is unenforceable; [a] preliminary and permanent injunction enjoining the Defendants from implementing or enforcing the sales ban as applied to veal or pork from outside of California; [a]n order awarding Plaintiff its costs and attorneys' fees pursuant to 42 U.S.C. § 1988; and [s]uch other and further relief as the Court deems just and proper.

Id. at 14–15. Furthermore, the complaint alleged that injunctive relief was proper because "[t]he Meat Institute [had] no adequate remedy at law." *Id.* at 12.

119. *See id.* at 4–5. Additionally, the Complaint drew a comparison between Proposition 12 and the assembly hearing for AB 1437, the Shell Egg Law, which noted that the law was seeking to apply the egg-laying hen confinements of Proposition 2 to out-of-state producers to level the economic playing field. *See id.* at 4. The purpose of this comparison was to make the subtle assertion that Proposition 12 is similarly economic protectionist legislation, rather than truly concerned with the well-being of animals. *See id.*

120. CAL. HEALTH & SAFETY CODE § 25990(b) (West 2018). Under this revision of the California Code, which is designed to avoid federal preemption, a sale refers to "a commercial sale by a business that sells any item covered by this chapter, but does not include any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act," which likely reflects its desire to avoid preemption by federal law. *Id.* § 25991(o). In terms of the location of a sale, this amendment provides that a sale is "deemed to occur at the location where the buyer takes physical possession of [a covered] item." *Id.* A covered item refers to covered animals, meaning "any calf raised for veal, breeding pig, or egg-laying hen who is kept on a farm." *Id.* § 25991(f).

NAMI contended that Proposition 12's sales ban should be rendered unconstitutional for three reasons.[121] First, Proposition 12 violated the DCC because it discriminates against "out-of-state producers, distributers and sellers of pork and veal."[122] Second, Proposition 12's sales ban violated the DCC because the legislation conflicts with the Clause's "prohibition on extraterritorial state legislation."[123] Third, Proposition 12's sales ban violated the DCC by "imposing unreasonable burdens on interstate and foreign commerce that are clearly excessive when measured against any legitimate local benefits."[124]

Shortly after the complaint was filed, the Humane Society of the United

121. *See* Complaint for Declaratory & Preliminary & Permanent Injunctive Relief, *supra* note 118, at 8–14; *see also infra* notes 122–24 and accompanying text.

122. Complaint for Declaratory & Preliminary & Permanent Injunctive Relief, *supra* note 118, at 8. In particular, NAMI contended that the sales ban is discriminatory:

> [The sales ban] operates as an impermissible protectionist trade barrier, blocking the flow of goods in interstate commerce unless out-of-state producers comply with California's regulations. . . . California has no legitimate local interest in how farm animals are housed in other [s]tates and countries. . . . If [California] is concerned that the prohibited sales pose a health and safety risk not already adequately addressed by the [Federal Meat Inspection Act], it can subject whole pork and veal meat imported into the [s]tate to additional inspection at the point of sale to consumers.

Id. at 8–11.

123. *Id.* at 11. In particular, the complaint contended that the challenged legislation constitutes impermissible extraterritorial legislation:

> Proposition 12 dictates farming practices in other [s]tates by conditioning the sale of imported pork and veal in California on adherence to California's confinement requirements upon pain of criminal or civil penalty. . . . California cannot use the in-state sale of a product as a jurisdictional "hook" to regulate upstream commercial practices that occur in other [s]tates simply because California finds those practices objectionable. The unconstitutionality of Proposition 12's sales ban is further confirmed because if every [s]tate enacted a similar sales ban, producers would be forced to choose between complying with the most restrictive confinement regulation, segregating their operations to serve different [s]tates, or abandoning certain markets altogether.

Id. at 11–12.

124. *Id.* at 13. The complaint further alleged that Proposition 12's sales ban

> will cost the veal and pork industries hundreds of millions of dollars . . . and may close off the California market to a large swath of integrated producers and the independent farmers upon which they rely to provide whole pork to their customers in California. . . . California has no legitimate local interest in regulating farming conditions in other [s]tates and countries.

Id. at 13–14.

States and others moved to intervene as defendant-intervenors, contending that they would be directly impacted by the outcome of the lawsuit.[125] At a hearing, the district court granted the Humane Society's motion to intervene, as well as addressed NAMI's motion for a preliminary injunction.[126]

In its opinion addressing NAMI's motion for preliminary injunctive relief, the district court articulated the applicable standard as follows: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[127] Addressing the Commerce Clause arguments, the district court was unpersuaded by NAMI's argument that Proposition 12, like AB 1437, has a discriminatory purpose because it is designed to level the economic playing field.[128] The court noted that the committee's stated purpose is primarily to promote animal welfare and prevent foodborne bacteria.[129] The district court also rejected NAMI's discriminatory effect claim that Proposition 12 operates as a protectionist trade barrier, holding that "what NAMI characteriz[ed] as a competitive advantage [was] ultimately just a preferred method of production."[130]

Addressing the extraterritoriality claim, the district court contended that the Supreme Court has held that the extraterritoriality principle is generally only applicable to cases involving price-setting statutes, such as in *Baldwin v. G.A.F. Seelig*, *Brown-Forman Distillers Corp. v. New York State Liquor*

125. *See* Proposed Defendant-Intervenors' Memorandum of Points & Authorities in Support of Motion to Intervene at 1, N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1017 (C.D. Cal. 2019) (No. 19-08569), *aff'd*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021).

126. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1021.

127. *Id.* at 1020 (quoting Am. Trucking Ass'n v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)). As discussed in the Supreme Court's opinion concerning preliminary injunctions in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008), the district court noted that a preliminary injunction constitutes an "extraordinary remedy." *N. Am. Meat Inst.*, 420 F. Supp. 3d at 1020.

128. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1024–25.

129. *See id.*

130. *Id.* at 1027. The district court also contended that NAMI's argument that Proposition 12 is discriminatory because in-state farmers had more "lead time" to make structural adjustments to their animal confinement operations is without merit. *See id.* at 1028. While conceding that Proposition 12 could be discriminatory in effect if regulations passed to implement Proposition 12 exempt "bob" veal from the sales ban because it is culled primarily from California dairy farms, the district court held this argument was premature at the preliminary injunction stage and accordingly was insufficient to warrant granting a preliminary injunction on these grounds alone. *See id.* at 1028–29.

Authority, and *Healy*.[131] However, even if the extraterritoriality principle applied in a different context, such as the Ninth Circuit had found in *Sam Francis Foundation v. Christies*, *Inc.*,[132] the district court concluded that its application is limited only to cases where the statute regulates conduct taking place "wholly outside" a state's borders, not in cases where a statute regulates in-state conduct with out-of-state practical effects.[133] Here, the district court held that since Proposition 12 is designed to regulate in-state conduct, the extraterritoriality doctrine is inapplicable.[134]

In response to NAMI's substantial burden on interstate commerce claim, the district court reasoned that statutes do not impose a significant burden on interstate commerce unless they are inherently discriminatory or purposed to regulate extraterritorial conduct.[135] Thus, NAMI needed to demonstrate Proposition 12 would create "inconsistent regulation of activities that are inherently national or require a uniform system of regulation," which is found with laws regulating transportation or sports leagues.[136] Since Proposition 12 had not been shown to interfere with the flow of veal or pork products, the court held it simply "preclude[d] a preferred, more profitable method of operating in a retail market" by directing how, not where, meat products are produced, and therefore does not constitute a substantial burden on interstate commerce.[137]

Next, turning to the other preliminary injunction factors raised in NAMI's

131. *See id.* at 1029–30. The district court further elaborated that "the Ninth Circuit has held that the [extraterritoriality] doctrine is 'not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices.'" *Id.* at 1030 (quoting Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1146 (9th Cir. 2015)).

132. *See* Sam Francis Found. v. Christies, Inc., 784 F.3d 1320 (9th Cir. 2015) (en banc).

133. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1031.

134. *See id.* at 1031–32.

135. *See id.* at 1032.

136. *Id.* at 1033 (quoting Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1148 (9th Cir. 2012)).

137. *Id.* at 1033–34. The district court further stated that "[t]he gravamen of NAMI's 'substantial burden' argument is therefore ultimately a complaint about the cost of complying with Proposition 12's requirements. However, 'demonstrating that state regulations impose substantial costs on interstate operations is not sufficient to establish a burden calling for balancing under *Pike*.'" *Id.* at 1034 (quoting S. Pac. Transp. Co. v. Pub. Utilities Comm'n of Cal., 647 F. Supp. 1220, 1227 (N.D. Cal. 1986), *aff'd*, 830 F.2d 1111 (9th Cir. 1987)). While referencing declarations from NAMI members that Proposition 12 would cost millions of dollars over many months or even years to redesign animal facilities, the district court did not consider the economic costs as relevant considerations in the substantial burden analysis because "the regulation applies evenly no matter where production takes place." *Id.*

complaint, the district court exercised its discretion not to evaluate them.[138] Although Proposition 12 could impose significant costs on some NAMI members, and despite its recognition that the Eleventh Amendment would create an irreparable injury once the legislative changes went into effect, the court reasoned that "there are no serious questions regarding the merits of NAMI's constitutional challenge."[139] As a result, the district court denied NAMI's motion for a preliminary injunction.[140] In response, NAMI decided to appeal this denial of a preliminary injunction to the Ninth Circuit.[141]

While the decision denying NAMI's request for a preliminary injunction was pending in the Ninth Circuit, the district court ruled on defendant Xavier Becerra's motion to dismiss NAMI's complaint and defendant-intervenor Humane Society's motion for judgment on the pleadings, which were filed shortly after the district court denied NAMI's request for injunctive relief.[142] Applying the "accept[ing] as true all material allegations" standard as required when considering motions to dismiss,[143] the district court ruled NAMI alleged sufficient facts to state a plausible claim that Proposition 12 had a discriminatory purpose, discriminatory effect, and substantially burdened interstate commerce.[144] The court denied the motions as to those claims and granted the defendants' motions as to the extraterritoriality claim but provided

138. *See id.* at 1034–35.

139. *Id.* The district court recognized that the Eleventh Amendment, which grants states like California sovereign immunity against monetary damages unless it waives said immunity, will bar NAMI from recovering costs should its members decide to change their animal confinement structures to align with Proposition 12's mandates while challenging its constitutionality, even if the law is later struck down as unconstitutional in the face of the DCC. *See id.* at 1034; *see, e.g.*, Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852–53 (9th Cir. 2009), *vacated on other grounds and remanded sub nom.* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606 (2012) ("[I]t is clear that it would not be equitable or in the public's interest to allow [California] to continue to violate the requirements of federal law, especially when there are no adequate remedies available to compensate . . . [p]laintiffs for the irreparable harm that would be caused by the continuing violation."). As discussed later in this Note, the difficulty with preliminary injunction cases that involve significant capital, as is the case here, is that laws that may not appear to be clearly unconstitutional and therefore survive preliminary injunction scrutiny will have a rippling effect on the national economy with no paths for recourse against the state. *See* discussion *infra* Section V.B.

140. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1035.

141. *See* N. Am. Meat Inst. v. Becerra, 825 F. App'x 518, 519 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021).

142. *See* N. Am. Meat Inst. v. Becerra, No. 219CV08569CASFFMX, 2020 WL 919153, at *9 (C.D. Cal. Feb. 24, 2020).

143. *See id.* at *3.

144. *See id.* at *5–9.

NAMI with leave to amend.[145]

A. NAMI Takes Its DCC Challenge to the Ninth Circuit

On appeal, NAMI contended that the district court erred in denying its request for a preliminary injunction against Proposition 12's sales ban for four main reasons.[146] First, NAMI argued that the sales ban impermissibly discriminates against interstate commerce because it serves as a protectionist trade barrier without any legitimate state interest.[147] Indeed, NAMI alleged that the sales ban "strips away the competitive advantage that out-of-state producers have over in-state producers because their home states have not imposed the same costly confinement restrictions that California imposes on its farmers."[148] Second, NAMI asserted that the sales ban constitutes impermissible extraterritorial state legislation because "[t]he express purpose and practical effect of the [s]ales [b]an are to 'phase out' farming conditions in other [s]tates and countries that California lacks power to regulate."[149]

145. *See id.* In its decision, the district court applied a very narrow interpretation of the extraterritoriality principle, contending that binding precedent in *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), compelled the conclusion that the extraterritoriality principle only limits regulations seeking to regulate conduct wholly outside California's borders. *See N. Am. Meat Inst.*, 2020 WL 919153, at *7. As discussed later in this Note, this narrow extraterritoriality approach continually implemented by the Ninth Circuit is problematic. *See* discussion *infra* Section V.B. Its substantial deference to state legislative decisions continues to permit states like California to effectively regulate the entire economy without any consequence because of the sovereign immunity afforded to the state under the Eleventh Amendment. *See* discussion *infra* Section V.B.

146. *See N. Am. Meat Inst.*, 825 F. App'x at 519; *see also infra* notes 147–51 and accompanying text.

147. *See* NAMI Opening Brief, *supra* note 1, at 10.

148. *Id.* In essence, NAMI argued that the sales ban is discriminatory because its intended effect is to insulate California producers from competition by blocking the flow of goods into the state unless out-of-state producers make the same costly regulations as in-state producers. *See id.* at 17–18. Further, NAMI argued that the sales ban imposes no incremental burden on California producers, since they are already confined to these prohibitions under Section 25990(a) of the California Health and Safety Code. *See id.* at 21. Seeking to distinguish *Canards I* on the basis that the Ninth Circuit did not address whether a facially neutral statute complies with the DCC if its "practical and intended effect is to burden and discriminate against out-of-state competitors," NAMI argued that when subjecting the sales ban to scrutiny, California failed to show that the sales ban promotes any legitimate local interest because the State has no interest in out-of-state animal practices and failed to show any consumer health interests are actually served. *See id.* at 22–29.

149. *Id.* at 10. NAMI contended, contrary to the district court's ruling, that the extraterritoriality doctrine retains vitality and is not limited to price-control contexts or legislation seeking to wholly regulate conduct outside of a state's borders, given that the Supreme Court has not held anything

Third, NAMI alleged that the district court abused its discretion in holding the sales ban does not unduly burden interstate commerce because its express purpose is to control interstate commerce by compelling out-of-state competitors to make costly changes to their confinement operations without any evidence showing the legislation produces a legitimate local benefit.[150] Finally, NAMI contended that the district court erred in denying a preliminary injunction given the irreparable financial harm that accompanies the legislation, and as a result, the public interest favored granting a preliminary injunction.[151]

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indicating otherwise. *See id.* at 35–39. As discussed in greater detail later in this Note, this author contends that the most significant problem of the *Nami* decision is what NAMI foreshadows could occur if their appeal of the denial of a preliminary injunction is affirmed: "A contrary conclusion would allow California and other [s]tates to export their regulatory standards throughout the nation, balkanize the national economy, and foment trade wars and friction among the [s]tates that the Constitution was enacted to prevent." *Id.* at 10; *see* discussion *infra* Section V.B. The States Amici Brief focuses primarily on this argument as well, contending that Proposition 12 runs contrary to the intent of the Founding Fathers to prohibit economic balkanization and ultimately violates state sovereignty by usurping the sovereign police powers of other states. *See* Amici States Brief, *supra* note 4, at 12–14. The National Association of Manufacturers amicus brief raises similar arguments, contending that:

> If California can assert legal control over out-of-[s]tate meat production to benefit in-[s]tate producers, then North Carolina can do the same when it comes to Washington's apple production, and New York can regulate Vermont's milk production. And that protectionist impulse is not limited to food. States could rely on a similar theory to regulate supply chains in virtually any industry.

See Amici Commerce Brief, *supra* note 5, at 24–25.

150. *See* NAMI Opening Brief, *supra* note 1, at 39–40. NAMI contended the sales ban burdens interstate commerce because it will significantly impair "the free flow of . . . products across state borders." *Id.* at 41 (quoting Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1154–55 (9th Cir. 2012)). In terms of fiscal costs, NAMI alleged that its members will have to spend millions of dollars to comply with this legislation, and unless they engage in a complete overhaul of their barn spacing, they will have to segregate animals based on compliance and non-compliance with California's legislation, which is also burdensome. *See id.* at 40–42. Additionally, NAMI contended that the district court erred in dismissing its burden claims as irrelevant because California producers account for a small portion of the veal and hog market, thereby causing the burden to be placed most acutely on out-of-state producers. *See id.* at 42–43. Given these significant economic burdens, the exemptions for "bob" veal, of which California is a leading producer, and the minimal interest of California in animal welfare outside of its borders, NAMI contended that the sales ban should be struck down as violating the DCC. *See id.* at 42–45.

151. *See* NAMI Opening Brief, *supra* note 1, at 51–52. NAMI illuminated the significant weight of California's economic market, noting that:

> California is an important market for pork products, with more than 39 million consumers, or 12% of the U.S. market. . . . NAMI's members and thousands of independent veal and pork farmers throughout the nation are caught on the horns of a dilemma. Whichever alternative they select—comply with

In response to NAMI's contentions, the state defendants asserted that the district court did not abuse its discretion in denying NAMI's request for a preliminary injunction for three main reasons.[152] First, the state defendants contended that Proposition 12 does not have a discriminatory purpose because it applies the same confinement standards to veal and pork sales within its borders without consideration of the product's origin.[153] Second, the state defendants argued that Proposition 12 does not constitute impermissible extraterritorial regulation because the Ninth Circuit holds that state laws designed to regulate in-state product sales with out-of-state effects are permissible.[154] Third, the state defendants alleged that Proposition 12 does not regulate activities requiring a uniform system of regulation, and under *Pike* balancing, the legislation does not substantially burden interstate

> Proposition 12 or exit the California market—will inflict significant financial and other injuries, none of which are compensable through a damages action because of California's sovereign immunity.

Id. at 50–51. Further, NAMI stressed the need for a preliminary injunction to provide additional time to assess the constitutionality of Proposition 12 in part because the "multi-layered efforts to satisfy Proposition 12's requirements would need to begin immediately because producers cannot 'simply flip a switch' and come into compliance." *Id.* at 49.

152. *See* State Defendants Brief, *supra* note 9, at 7–8; *see also infra* notes 153–56 and accompanying text. The Humane Society made similar arguments as the state defendants but also asserted that NAMI's "claims of impending doom [were] hyperbolic" because, according to the Humane Society, their profits might grow by filling the market demand for cruelty-free products, and Proposition 12 will not create irreparable harm because NAMI members failed to allege any concrete percentage of business losses as a result of compliance that warranted granting a preliminary injunction. *See* Humane Society Brief, *supra* note 8, at 37–39.

153. *See* State Defendants Brief, *supra* note 9, at 7. The state defendants noted that NAMI had abandoned its argument that Proposition 12 has a discriminatory purpose on appeal and therefore argued that NAMI had a higher burden to prove the legislation has a discriminatory effect since it is not "facially discriminatory []or motivated by an impermissible purpose." *See id.* at 13 (quoting Int'l Franchise Ass'n v. City of Seattle, 803 F.3d 389 (9th Cir. 2015)). The state defendants further argued NAMI's assertion that Proposition 12 has a discriminatory effect by "purportedly neutralizing advantages of favorable regulatory treatment held by producers in other states" [was] without merit, and since the law is not discriminatory, the Ninth Circuit did not need to decide whether the legislation survives strict scrutiny. *See id.* at 16, 21. The state defendants also contended NAMI's argument that Proposition 12 has a discriminatory effect by exempting bob veal producers was without merit because they are not similarly situated to veal producers, and since the exemption is equally applied to all producers, it is not discriminatory. *See id.* at 20 n.5.

154. *See id.* at 8. The state defendants not only asserted that binding intra-circuit precedent only strikes down laws that seek to regulate conduct that occurs wholly outside of the state's borders as impermissible extraterritorial regulation, *see id.* at 21, but they also discredited NAMI's arguments raising concerns about other states responding to Proposition 12 by imposing more stringent requirements, arguing that this outcome is too speculative to deserve serious attention, *see id.* at 29–30.

commerce.[155] Even if it did, the state defendants argued that California's considerable interest in preventing animal cruelty outweighs any alleged burden.[156]

B. Ninth Circuit Affirms the Denial of a Preliminary Injunction

In its decision, *Nami* applied the abuse of discretion standard of review, which limits the Ninth Circuit's review of the district court's denial of a preliminary injunction and is deferential to the district court's determinations.[157] In practice, the Ninth Circuit does the following:

> We begin by identifying how little we can assist in the final resolution of the critical issues before the district court. Until a permanent injunction is granted or denied, we are foreclosed from fully reviewing the important questions presented. Review of an order granting or denying a preliminary injunction is much more limited than review of an order granting or denying a permanent injunction. At the preliminary injunction stage, the substantive law aspects of the district court's order will be reversed only if the order rests on an erroneous legal premise and, thus, constitutes an abuse of discretion; at the permanent injunction stage, we freely review all conclusions of law. Review of factual findings at the preliminary injunction stage is, of course, restricted to the limited and often nontestimonial record available to the district court when it granted or denied the injunction motion. The district court's findings supporting its order granting or denying a permanent injunction may differ from its findings at the preliminary injunction stage because by then presentation of all the evidence has been

155. *See id.* at 8; *see also infra* note 156 and accompanying text.

156. *See* State Defendants Brief, *supra* note 9, at 8. The state defendants asserted that given the Ninth Circuit precedent in *Canards I*, 729 F.3d 937, 952 (9th Cir. 2013), which allows states to exercise their police powers to prevent practices deemed cruel to animals, the Ninth Circuit should not second-guess California's legislative decision-making and accordingly should find that even if Proposition 12 is burdensome under the *Pike* test, the State's interest in preventing animal cruelty clearly outweighs the alleged burdens. *See id.* at 33–34.

157. *See* N. Am. Meat Inst. v. Becerra, 825 F. App'x 518, 519 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021).

> completed. Then too, our determination whether its subsequent findings are clearly erroneous may differ from our view taken at the preliminary stage.[158]

In *Nami*, the court affirmed the district court's denial of NAMI's request for a preliminary injunction against the enforcement of Proposition 12.[159] Ultimately, *Nami* reasoned that the district court "did not abuse its discretion in holding that NAMI was unlikely to succeed on the merits of its [D]ormant Commerce Clause claim" and therefore did not err in denying the injunction.[160]

First addressing NAMI's claim that Proposition 12 was not discriminatory in purpose or effect, *Nami* held the district court did not abuse its discretion in finding that Proposition 12 lacked a discriminatory purpose because of the lack of evidence suggesting that the legislation was protectionist in nature.[161] Further, *Nami* reasoned that the district court did not abuse its discretion in holding Proposition 12 lacked a discriminatory effect because it "treats in-state meat producers the same as out-of-state meat producers."[162] Addressing NAMI's extraterritoriality claim, *Nami* held that

158. Zepeda v. U.S. Immigr. & Naturalization Servs., 753 F.2d 719, 723–24 (9th Cir. 1983) (citation omitted). The *Zepeda* court went further in articulating the review framework for whether a district court abuses its discretion:

> A district judge may abuse his discretion in any of three ways: (1) he may apply incorrect substantive law or an incorrect preliminary injunction standard; (2) he may rest his decision to grant or deny a preliminary injunction on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or (3) he may apply an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

Id. at 724.

159. *See N. Am. Meat Inst.*, 825 F. App'x at 519.

160. *Id.*

161. *Id. Nami* also contended that even NAMI did not argue that Proposition 12 is clearly discriminatory, stating, "NAMI acknowledges that Proposition 12 is not facially discriminatory." *See id.*

162. *Id.* It is worth noting that the *Nami* panel conceded that the case law concerning the DCC is inconsistent, citing to Justice Gorsuch's concurring opinion in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100–01 (2018), when it deferred to the district court's decision to rely on *Canards I*, 729 F.3d 937 (9th Cir. 2013), for the proposition that state legislation has a discriminatory effect only if it does not treat in-state producers in the same manner as out-of-state producers. *See N. Am. Meat Inst.*, 825 F. App'x at 519. Although *Nami* does not provide the text it relies on from Justice Gorsuch's concurrence, given the citation provided in its decision, *Nami* was likely referring to the following portion of his concurrence:

> My agreement with the Court's discussion of the history of our [D]ormant

"[t]he district court did not abuse its discretion in concluding that Proposition 12 does not directly regulate extraterritorial conduct because it is not a price control or price affirmation statute."[163]

The *Nami* panel further reasoned that the district court "did not abuse its discretion in holding that Proposition 12 does not substantially burden interstate commerce" for two reasons.[164] First, *Nami* reasoned that "Proposition 12 does not impact an industry that is inherently national or requires a uniform system of regulation."[165] Second, *Nami* held that Proposition 12 does not substantially burden interstate commerce "because the law precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographical

> [C]ommerce [C]lause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day.

Wayfair, 138 S. Ct. at 2100–01 (Gorsuch, J., concurring).

163. *N. Am. Meat Inst.*, 825 F. App'x at 520. Due to the confining nature of the panel's scope of review for preliminary injunction appeals, *Nami*'s decision regarding the extraterritoriality issue is unsurprisingly in alignment with previous intra-circuit decisions that implemented a narrow version of the extraterritoriality doctrine. *See generally Canards I*, 729 F.3d at 951. This interpretation confined the doctrine's application to a narrow context that reflects a faulty understanding of the Supreme Court's decision in *Walsh*. *See id.* ("[T]he [Supreme] Court has held that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 'tie the price of its in-state products to out-of-state prices.'" (quoting Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003))). As discussed later in this Note, the continued trend within the Ninth Circuit of permitting a narrow reading of the extraterritoriality principle is inherently problematic. *See* discussion *infra* Section V.B.

164. *N. Am. Meat Inst.*, 825 F. App'x at 520 (citing Healy v. Beer Inst., 491 U.S. 324 (1989) and Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669–70 (2003)); *see infra* notes 165–66 and accompanying text.

165. *N. Am. Meat Inst.*, 825 F. App'x at 520 (citing Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1014–15 (9th Cir. 1994)). While *Venison Producers* was a challenge to Washington State's ban of private ownership and exchange of certain exotic wildlife, including certain species of deer, 20 F.3d at 1010–11, *Nami* presents a different issue in that the former was concerned with the preservation of wildlife within its borders against certain documented infectious diseases, while the sales ban here was concerned with farming practices taking place outside of its borders, which places doubt on the true purposes of Proposition 12 since it was not accompanied by any scientific findings showing it promotes public health. *See* NAMI Opening Brief, *supra* note 1, at 5–6.

origin."[166] Accordingly, *Nami* reasoned that NAMI was unlikely to "succeed on the merits."[167] Therefore, *Nami* held that "the district court did not err when it refused to consider the other preliminary injunction factors" and affirmed the denial of a preliminary injunction.[168]

IV. NAMI GOES TWO FOR THREE ON THE DCC ISSUES

A. Nami Is Correct Regarding the Discrimination and Undue Burden Claims

Nami correctly held that the district court did not abuse its discretion by concluding that Proposition 12 is not facially discriminatory in purpose or effect and that it does not substantially burden interstate commerce.[169] In this respect, *Nami* aligns with earlier circuit decisions in *Canards I* and *Chinatown*, which were deferential to the state legislatures' determinations.[170]

Importantly, NAMI did not meaningfully argue Proposition 12 is discriminatory in purpose apart from contending that it follows in the footsteps of AB 1437.[171] That legislation applied Proposition 2's egg-laying hen requirements solely to out-of-state producers, which NAMI argued is the

166. *N. Am. Meat Inst.*, 825 F. App'x at 520 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970)).

167. *Id.*

168. *Id.* (citing Glob. Horizons, Inc. v. U.S. Dep't of Labor, 510 F.3d 1054, 1058 (9th Cir. 2007)).

169. *See id.* at 519–20. These holdings might have been different if *Nami* was reviewing the district court's granting of summary judgment de novo, but the "abuse of discretion" standard applied on appeals from denials of preliminary injunctions only compels reversing the district court's findings when it relies on an erroneous legal premise. *See* Zepeda v. U.S. Immigr. & Naturalization Servs., 753 F.2d 719, 723–24 (9th Cir. 1983). Close call cases, such as the discrimination and undue burden claims presented here, do not compel reversing, which *Nami* recognized when it acknowledged "the inconsistencies in [D]ormant Commerce Clause jurisprudence." *N. Am. Meat Inst.*, 825 F. App'x at 519.

170. *See Canards I*, 729 F.3d 937 (9th Cir. 2013); Chinatown Neighborhood Ass'n v. Brown, 539 F. App'x 761 (9th Cir. 2003). These two decisions align with the Supreme Court jurisprudence concerning preliminary injunctions because the Court has stated that a preliminary injunction is an "extraordinary and drastic remedy . . . [It] is never awarded as of right." Munaf v. Geren, 553 U.S. 674, 689–90 (2008) (citation omitted). However, even if preliminary injunctions are rarely granted, this recognition does not provide helpful guidance as to when they should be. *See* Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 68 (2012) ("The term 'likelihood of success on the merits' has not always been free of ambiguity." (quoting Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 384 (7th Cir. 1984))).

171. *See* NAMI Opening Brief, *supra* note 1; *see also infra* note 172 and accompanying text.

same case here: the sales ban was designed to discriminate against out-of-state competitors.[172] However, the district court was not convinced that Proposition 12 had a discriminatory purpose given that Proposition 12, like AB 1437, cited to public health goals.[173] Further, the district court reasoned that NAMI provided insufficient evidence of a discriminatory purpose given that NAMI failed to point to any evidence from the Proposition 12 initiative campaign showing a discriminatory purpose.[174] The district court was "obligated to 'assume that the objectives articulated by the legislature are actual purposes of the statute.'"[175] Accordingly, *Nami* was correct when concluding the district court did not abuse its discretion in holding NAMI provided insufficient evidence of a discriminatory purpose to warrant a preliminary injunction.[176]

Further, the district court did not abuse its discretion in holding that Proposition 12 lacks a discriminatory effect "because it treats in-state meat producers the same as out-of-state meat producers."[177] NAMI's main argument was that the sales ban is discriminatory in effect because it operates as a protectionist trade barrier that strips away the competitive advantage of out-of-state producers, which cannot be justified on animal welfare or consumer-health grounds.[178] In its holding, the district court drew support

172. *See* NAMI Opening Brief, *supra* note 1, at 2–5, 7, 10; NAMI Reply Brief, *supra* note 7, at 4 n.1.

173. *See* N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1024–25 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021). The district court noted that Proposition 2, Section 25995 of the California Health and Safety Code, was driven by legislative findings based on public health reports and, given similar reasons cited for Proposition 12, NAMI failed to provide sufficient evidence to compel a contrary conclusion warranting a preliminary injunction. *See id.* at 1024–25.

174. *See id.* at 1024.

175. *Id.* (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S., 463 n.7 (1981)); *see also infra* note 176 and accompanying text.

176. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1024–25. This is not to say that Proposition 12 does not have a discriminatory purpose, as the district court acknowledged that assuming NAMI's complaint was true, "NAMI has alleged facts sufficient to state a claim that Proposition 12 has a discriminatory purpose" to deny the state defendants' motion to dismiss. N. Am. Meat Inst. v. Becerra, No. 219CV08569CASFFMX, 2020 WL 919153, at *6 (C.D. Cal. Feb. 24, 2020).

177. N. Am. Meat Inst. v. Becerra, 825 F. App'x 518, 519 (9th Cir. 2020) (citing South Dakota v. Wayfair, Inc., 139 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring)). *Nami* cited to Justice Gorsuch's concurrence from *Wayfair* to shed doubt on the proposition that Article III courts validly have the power to invalidate state laws absent controlling federal legislation. *Wayfair*, 139 S. Ct. at 2100–01 (Gorsuch, J., concurring).

178. *See* NAMI Opening Brief, *supra* note 1, at 15–29.

from *Canards I* for the notion that Proposition 12 is not discriminatory in effect by prohibiting how certain items are produced.[179] *Canards I* similarly held that the "facially neutral" statute in question did not discriminate against out-of-state foie gras producers because the statute restricted methods applicable to all producers.[180] Additionally, the district court correctly distinguished NAMI's reference to *Hunt* from the present challenge.[181] *Hunt* invalidated North Carolina's law, which deliberately stripped away Washington State's apple grading system reflecting its superior quality over USDA grading.[182] In contrast, Proposition 12 only stripped away a standard production method available to any meat processor.[183]

The district court correctly reasoned that the Ninth Circuit's decision in *National Optometrists* supported the conclusion that Proposition 12 was not discriminatory by placing an equal economic burden on in-state and out-of-state businesses.[184] In *National Optometrists*, the Ninth Circuit held California's ban on a particular eyewear sales method did not strip out-of-state sellers of a competitive advantage because all compliant sellers were permitted to operate in California.[185] While recognizing the costs of retrofitting facilities may be expensive, the district court held Proposition 12 was not protectionist because it was "an equal-opportunity burden."[186] Addressing NAMI's lead time and potential "bob veal" exemption arguments, the district court further reasoned that these arguments were premature and too speculative to warrant granting an injunction since "California ha[d] yet to issue any regulations implementing Proposition 12."[187] Given the uniform

179. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1026 n.4; *see also infra* note 180 and accompanying text. *See generally Canards I*, 729 F.3d 937 (9th Cir. 2013).

180. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1026 n.4. *See generally Canards I*, 729 F.3d at 948.

181. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1027. *See generally* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977).

182. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1026–27; *Hunt*, 432 U.S. at 351–52.

183. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1026–27.

184. *See id.* at 1027; *see also infra* note 187 and accompanying text; *see generally* Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144 (9th Cir. 2012).

185. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1027; *Nat'l Optometrists*, 682 F.3d at 1151.

186. *N. Am. Meat Inst.*, 420 F. Supp. 3d at 1027–28 (quotation marks omitted).

187. *See id.* at 1028–29 (quotation marks omitted). The district court also did not abuse its discretion regarding this claim because NAMI failed to cite to any case law showing that additional lead time to in-state providers is held to be discriminatory or that bob veal exemptions, if implemented in the manner in which NAMI hypothesizes, would likewise be discriminatory in effect. *See id.* at 1029 n.8. However, the district court did leave open the door that this could be proven when it considered the defendants' motion to dismiss. *See* N. Am. Meat Inst. v. Becerra, No.

precedent supporting the district court's determination, *Nami* correctly held that the district court did not abuse its discretion regarding the discriminatory effect claim.[188] The district court's adherence to Ninth Circuit precedent was not in error at this stage.[189]

Further, the *Nami* court was not compelled to find an abuse of discretion when the district court held "Proposition 12 does not substantially burden interstate commerce" because (1) it concluded that NAMI's industry is not inherently national and does not require uniform regulations, and (2) *Pike* does not hold laws are substantially burdensome if they preclude specific production methods.[190] The district court reasoned that *Canards I*, *Venison Producers*, and *National Optometrists* foreclose the argument that Proposition 12 creates a substantial burden impairing the flow of goods.[191] This is because only laws involving "transportation" or "professional sports leagues" typically impair the free flow of goods enough to cause a substantial burden.[192] While Proposition 12 has a significant impact on the national economy, the analysis under *Pike* does not focus on whether Proposition 12 imposes significant costs.[193] Rather, the proper inquiry is whether the law restricts the production of meat products on the basis of geographic origin versus the specific production method.[194] Since Proposition 12 falls in the latter

219CV08569CASFFMX, 2020 WL 919153, at *6–7 (C.D. Cal. Feb. 24, 2020) ("NAMI has therefore alleged facts sufficient to state a claim that Proposition 12 has a discriminatory effect. The motions challenging the discrimination against out of state commerce claims are, accordingly, DENIED.").

188. *See* N. Am. Meat Inst. v. Becerra, 825 F. App'x 518, 519 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021).

189. *See id.*

190. *See id.* at 520.

191. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1033. *See generally Canards I*, 729 F.3d 937 (9th Cir. 2013); Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144 (9th Cir. 2012); Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008 (9th Cir. 1994).

192. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1033.

193. *See id.* at 1033–34; Pike v. Bruce Church, Inc., 397 U.S. 137, 145–46 (1970); *see also infra* note 194 and accompanying text.

194. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1033–34. While the district court held NAMI correctly identified the burden of Arizona's order, it reasoned the order in *Pike* interfered with interstate commerce by effectively requiring cantaloupe producers to consolidate their business operations within the state to engage in interstate commerce. *See id.* at 1034 (citing *Pike*, 397 U.S. at 145). The district court held the situation in *Pike* was distinguishable because California does not require businesses to move in-state. *See id.* Ultimately, NAMI's argument by analogy that *Pike*'s conclusion that a $200,000 cost was substantially burdensome, which means the multi-million dollar restructuring costs imposed by Proposition 12 are burdensome, misconstrues *Pike*'s holding because restricting interstate commerce through economic costs without something more, such as causing a

category, and other Supreme Court cases have held similar restrictions can be permissible,[195] NAMI's argument that Proposition 12 is overly burdensome on economic grounds did not compel reversal.[196]

When recognizing *Nami*'s standard of review on appeal, NAMI failed to explain how the district court abused its discretion by relying on *Canards I*, *Venison Producers*, or *National Optometrists* to hold that NAMI's substantial burden argument did not warrant a preliminary injunction.[197] If the court accepted NAMI's argument that out-of-state interests bearing the economic brunt of Proposition 12 causes it to be unduly burdensome, any law impacting the national economy would fall into the same trap.[198] One state's population will always be less than that of the other forty-nine states combined, which under NAMI's argument, would result in most legislative decisions being invalidated under DCC challenges.[199] Therefore, NAMI's failure to meaningfully distinguish these three cases supports *Nami*'s holding that the district court did not abuse its discretion by denying a preliminary injunction on substantial burden grounds.[200]

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business to consolidate operations with a particular state, does not demonstrate a substantial burden on interstate commerce. *See id.*

195. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473–74 (1981) (holding that Minnesota's law requiring milk producers selling within the state to use pulpwood instead of plastic resin for their milk containers did not violate the Commerce Clause because "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry").

196. *See* N. Am. Meat Inst. v. Becerra, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021). However, it is worth noting that neither the district court nor the Ninth Circuit decision address NAMI's arguments questioning the legitimacy of California's alleged in-state interests in preventing animal cruelty or purporting that Proposition 12 has public health benefits in their substantial burden analysis, likely because the district court held Proposition 12 does not substantially burden the national economy. *See N. Am. Meat. Inst.*, 420 F. Supp. 3d at 1032–34. This leaves the question of whether preventing animal cruelty outside of one's borders is a legitimate in-state interest open for another day, which the Supreme Court should address, particularly when animal welfare legislation impacts out-of-state entities. *See* discussion *infra* Section V.D.

197. *See* NAMI Opening Brief, *supra* note 1, at 39–45 (mentioning the three cases in its substantial burden analysis but not explaining how the district court erred in relying on them to deny a preliminary injunction).

198. *See id.* at 45.

199. *See id.* Under NAMI's reasoning, if Delaware, for example, banned the use of all plastic for all food products sold within its borders, despite this legitimate health and safety interest, these laws would always be invalidated because other businesses that have any dealings in Delaware could argue that this substantially burdens their business because they now have to switch over to a nonplastic business plan. *See id.*; *see also supra* note 198 and accompanying text.

200. *See N. Am. Meat Inst.*, 825 F. App'x at 520.

B. Nami Conflicts with Supreme Court Prohibition of Extraterritorial Legislation

Although *Nami* was correct on the first two issues, the district court abused its discretion in holding that Proposition 12's sales ban does not constitute impermissible extraterritorial regulation "because it is not a price control or price affirmation statute."[201] Ultimately, *Nami* erred in affirming the district court's holding on the extraterritoriality claim for two primary reasons.[202]

First, the district court abused its discretion regarding the extraterritoriality claim because its holding rested on the erroneous legal premise that *Walsh* limited the extraterritoriality doctrine to price control or price affirmation contexts.[203] In *Walsh*, the Court considered whether the Maine Act—a state program negotiating rebates from drug manufacturers to primarily reduce prices for uninsured residents—was unconstitutional extraterritorial and discriminatory legislation.[204] The petitioner representing the out-of-state drug manufacturers cited to both *Baldwin* and *Healy* for the premise that the Maine Act was impermissibly regulating transactions outside of its borders.[205]

The Supreme Court rejected this argument, holding that the extraterritoriality principles in *Baldwin* and *Healy* were not applicable here only because "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect."[206] However, *Walsh* did not expressly or impliedly confine *Healy* or *Baldwin* to price control or price affirmative contexts because that would have required the Court to overrule its prior holding in *C & A Carbone, Inc. v. Town of*

201. *See id.* (citing Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989)).

202. *See infra* notes 203–31 and accompanying text.

203. *See* N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1017 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021) ("The Supreme Court has since indicated that the extraterritoriality doctrine's application is essentially limited to cases involving the sorts of price-setting statutes that [*Healy*, *Baldwin*, and *Brown-Forman*] addressed." (citing Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003))).

204. *See Walsh*, 538 U.S. at 649.

205. *See id.* at 668–69.

206. *Id.* at 669 (quoting Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81 (5th Cir. 2001)). *Walsh* did not hold that *Baldwin* and *Healy* only apply to price control statutes, but rather that regulations which do not expressly or inevitably regulate interstate commerce based on the law's design or implementation may be valid despite *Baldwin* and *Healy*. *See id.*

Clarkstown, which it did not do.[207] Just as the town in *Carbone* was not permitted to steer away solid waste from neighboring disposal sites because it believed the practice was harmful to the environment, California does not have the national authority to steer away animal products because it disproves of the confinement methods used.[208] Accordingly, the district court in *Nami* undermined the Supreme Court's mandate that the Commerce Clause's ultimate purpose is to prevent "economic [b]alkanization" promulgated by California's sales ban.[209]

207. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). *Carbone* applied extraterritoriality principles to invalidate a local ordinance that was not a price setting or price affirmation statute but required all solid waste within the town to be processed at a designated transfer station to pay off the facility's building costs. *See id.* at 393 ("Nor may Clarkstown justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other [s]tates." (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935))); *see also id.* at 406 (O'Connor, J., concurring) ("In addition, the practical effect of Local Law 9 must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other states and what effect would arise if not one, but many or every, jurisdiction adopted similar legislation." (citing Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989))). Further, the Supreme Court has also applied extraterritoriality principles to legislation impermissibly seeking to regulate transactions occurring across state lines. *See* Edgar v. MITE Corp., 457 U.S. 624, 626–27, 642 (1982) (plurality opinion) (holding that the Illinois Act requiring parties making a takeover offer for a target company to engage in a substantive disclosure process if 10% of the target company's shares were owned by in-state shareholders carried a "sweeping extraterritorial effect"). The Supreme Court is the sole determinant of whether its precedents are no longer binding law. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (holding that it is the "[Supreme] Court's prerogative alone to overrule one of its precedents").

208. *See Carbone*, 511 U.S. at 393; *see also supra* note 207 and accompanying text.

209. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018) ("The Commerce Clause 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic [b]alkanization that had plagued relations among the [c]olonies and later among the [s]tates under the Articles of Confederation." (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979))); *Healy*, 491 U.S. at 336 (citations omitted) ("[O]ur cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the [s]tate's borders, whether or not the commerce has effects within the [s]tate,' and, specifically, a [s]tate may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states.' Second, a statute that directly controls commerce occurring wholly outside the boundaries of a [s]tate exceeds the inherent limits of the enacting [s]tate's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the [s]tate. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute

The district court's decision in *Nami* borrowed language from the Ninth Circuit's holdings in *Canards I* and *Chinatown*, which erroneously construed a narrow interpretation of the extraterritoriality doctrine by holding that *Walsh* confined *Healy* and *Baldwin* to price setting and affirmation contexts.[210] However, setting that error aside, neither *Chinatown* nor *Canards I* directly controlled regarding the extraterritoriality claim given the factual differences in those cases.[211] *Chinatown* concerned a law completely banning shark fins from the California market based on a legitimate in-state interest of preventing animal cruelty occurring within its borders, while the *Nami* sales ban prohibits specific confinement practices outside of its borders that impact interstate commerce, without any comparable findings showing how the sales ban was pursuant to a legitimate state interest.[212] *Canards I* is factually distinguishable from *Nami* as well.[213] The law in *Canards I* practically banned one niche product (foie gras) and included findings discussing California's interests in preventing animal cruelty, while Proposition 12 carries a national impact among veal and pork producers but lacked findings purporting any

may interact with the legitimate regulatory regimes of other [s]tates and what effect would arise if not one, but many or every, [s]tate adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another [s]tate."); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986) ("While a [s]tate may seek lower prices for its consumers, it may not insist that producers or consumers in other [s]tates surrender whatever competitive advantages they may possess."); *see also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935) ("It is a very different thing to establish a wage scale or a [scale] of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.").

210. *See* N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1030 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021). *But see* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994) ("Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a [s]tate erects barriers to commerce."). Ninth Circuit cases since *Nami* have recognized that the extraterritoriality principle is not so limited. *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028 (9th Cir. 2021) ("[W]e have recognized a 'broad[er] understanding of the extraterritoriality principle' may apply outside this context." (quoting Ward v. United Airlines, Inc., 986 F.3d 1234, 1240–41 (9th Cir. 2021))).

211. *See* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015); *Canards I*, 729 F.3d 937 (9th Cir. 2013); *see also* discussion *infra* notes 212–15 and accompanying text.

212. *Compare Chinatown*, 794 F.3d at 1139 ("California's 'Shark Fin Law' makes it 'unlawful for any person to possess, sell, offer for sale, trade, or distribute a shark fin' in the state." (quoting CAL. FISH & GAME CODE § 2021(b))), *with N. Am. Meat Inst.*, 525 F. App'x at 520 ("It was not an abuse of discretion to conclude that Proposition 12 does not create a substantial burden because the law precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographical origin.").

213. *See Canards I*, 729 F.3d 937 (9th Cir. 2013); *see also infra* note 214 and accompanying text.

comparable benefits.[214] The district court erred in relying on these cases, misconstrued the Supreme Court's decision in *Walsh*, and ignored its applicable decision in *Carbone*.[215]

Second, the district court abused its discretion regarding the extraterritoriality claim because it ignored the fact that the Ninth Circuit applied the extraterritoriality doctrine post-*Walsh* in *Christie's*, *Rocky Mountain I*, and *Sharpsmart*, none of which involved price control or price affirmation statutes.[216] In *Christie's*, the en banc Ninth Circuit invalidated a portion of California's Resale Royalty Act.[217] The challenged legislation was not a price setting or affirmation statute, but an act requiring payment of royalties to an artist if the seller resides in California.[218] *Christie's* reasoned that the legislation was impermissible extraterritorial legislation: "[T]he

214. *Compare Canards I*, 729 F.3d at 945 ("Specifically, the Bill Analyses discuss the background of foie gras; countries that have banned force feeding to produce foie gras; grocers who have refused to purchase foie gras; whether there are alternative methods of producing foie gras; and support for, and against, the foie gras industry."), *with* NAMI Opening Brief, *supra* note 1, at 5–6 ("Proposition 12 was not accompanied by any legislative findings or evidence that meat from veal calves or breeding sows (or their offspring) not housed in compliance with Proposition 12 poses any increased risk of foodborne illness. In the district court, neither defendants nor their intervenors attempted to defend the law as a food-safety measure or responded to NAMI's showing that any food-safety interest is illusory.").

215. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1029–31, 1032 n.11; *see also supra* notes 210–14 and accompanying text.

216. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1029–32; *see also infra* notes 217–24 and accompanying text. Additionally, other circuits have held that *Walsh* did not limit extraterritoriality principles to the price contexts. *See* Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 670 (4th Cir. 2018) (citations omitted) ("Maryland's reading of [the *Walsh*] language, while adopted by two of our sister circuits, is too narrow. The Supreme Court's statement does not suggest that '[t]he rule that was applied in *Baldwin* and *Healy*' applies *exclusively* to 'price control or price affirmation statutes.' Instead, the Court's statement emphasizes that the extraterritoriality principle is violated if the state law at issue 'regulate[s] the price of any out-of-state transaction, either by its express terms or by its inevitable effect.'" (quoting Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003))); North Dakota v. Heydinger, 825 F.3d 912, 919 (8th Cir. 2016) ("The State and its supporting amici argue that only price-control and price-affirmation laws can violate the extraterritoriality doctrine, an argument that would seemingly insulate all environmental prohibitions from this Commerce Clause scrutiny. This categorical approach to the Commerce Clause would be contrary to well-established Supreme Court jurisprudence."). *But see* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174 (10th Cir. 2015) ("[T]he Supreme Court has emphasized as we do that the *Baldwin* line of cases concerns only 'price control or price affirmation statutes' that involve 'tying the price of . . . in-state products to out-of-state prices.'" (quoting *Walsh*, 538 U.S. at 669)). The Supreme Court needs to resolve this growing confusion as to whether extraterritoriality principles apply outside of *Baldwin* and *Healy*. *See* discussion *infra* Section V.D.

217. *See* Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1326 (9th Cir. 2015) (en banc).

218. *See id.* at 1322.

Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the [s]tate's borders, whether or not the commerce has effects within the [s]tate."[219] This is strikingly similar to the effect of Section 25900(b) of the sales ban, which regulates animal confinement practices outside of California by forcing out-of-state businesses to change their operating structures if they want to enter the California market, regardless of their present intentions.[220]

In *Rocky Mountain I*, the Ninth Circuit applied extraterritoriality principles to California's Fuel Standard legislation and upheld the law because the legislation did not seek to control extraterritorial conduct but simply provided credits and caps that encouraged cleaner fuels to impede global warming, a legitimate in-state interest.[221] Similarly, in *Sharpsmart*, the Ninth Circuit affirmed the district court's grant of a preliminary injunction against California's Medical Waste Management Act, which required medical waste transported outside of the state to be "consigned to a permitted medical waste treatment facility in the receiving state."[222] The court based the injunction on extraterritorial grounds because "California has attempted to regulate waste treatment everywhere in the country" and ultimately concluded that California "cannot be permitted to dictate what other states must do within their own borders."[223] This is exactly what occurred in *Nami*: California is "dictating" that farmers update their confinement practices to align with its standards to push its animal regulatory regime on all other states in the country.[224]

While the district court seemingly acknowledged that the Ninth Circuit has applied the extraterritoriality doctrine to non-price regulations post-

219. *Id.* at 1323 (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989)).

220. *See* CAL. HEALTH & SAFETY CODE § 25990(b) (West 2018); *see also infra* note 236 and accompanying text.

221. *See Rocky Mountain I*, 730 F.3d 1070, 1103, 1107 (9th Cir. 2013).

222. *See* Daniels Sharpsmart, Inc. v. Smith, 889 F.3d 608, 617–18 (9th Cir. 2018).

223. *Id.* at 615–16. In *Sharpsmart*, the Ninth Circuit directly relied upon *Healy* for its applicable guiding principles, contending that the proposition that "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other [s]tates and what effect would arise if not one, but many or every, [s]tate adopted similar legislation." *Id.* at 614–15 (quoting *Healy*, 491 U.S. at 336).

224. *See* N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1017, 1030 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021); *supra* note 223 and accompanying text; *see also* discussion *infra* Section V.B.

Walsh, the opinion reflected its hesitancy to apply it here.[225] The district court held that even if the extraterritoriality doctrine applied to Proposition 12, it would not be a basis for invalidation because it applies to in-state conduct—sales of meat products within California—which is permissible under California's state sovereignty.[226] However, the court incorrectly assumed that Proposition 12 was based on a legitimate in-state interest.[227] California did not argue this point besides contending that it has an interest in preventing all animal cruelty that could affect California consumers.[228] Moreover, the district court's interpretation of "regulat[ing] . . . wholly out-of-state conduct" was legal error.[229] Both the Supreme Court and the Ninth Circuit interpret this phrase not as focusing on whether the statute only regulates out-of-state conduct, but on whether the statute regulates conduct occurring entirely outside of the state, regardless of its in-state effects.[230] This error was an abuse

225. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1031 ("Whether or not *Christie's* implicitly revived the extraterritoriality doctrine's application to non-price regulations—a proposition the Court hesitates to accept given the en banc panel's silence, . . . NAMI arguably has, at the very least, raised an argument that the doctrine *could* apply to Proposition 12.").

226. *See id.* (citing *Rocky Mountain II*, 913 F.3d 940, 952 (9th Cir. 2019)).

227. *See id.* at 1031–32; *see also infra* note 228 and accompanying text.

228. *See N. Am. Meat Inst.*, 420 F. Supp. 3d at 1031–32; State Defendants Brief, *supra* note 9, at 33. The district court cited to *Rocky Mountain II* for the proposition that states have a traditional power to ensure a regulatory scheme applies to out-of-state entities to ensure "consistent . . . standards," *N. Am. Meat. Inst.*, 420 F. Supp. 3d at 1031, but the district court conveniently left out the word "environmental." *See id.*; *Rocky Mountain II*, 913 F.3d at 952. This omission matters because upholding environmental standards through incentives, rather than forced coercion, is a traditional use of a state's police power, *see Rocky Mountain II*, 913 F.3d at 952, while practically regulating the way that businesses confine animals outside of their borders must be examined under more rigorous scrutiny because California does not meaningfully have a sovereign interest in those animals unless the state imposes a blanket ban, such as with shark fins in the *Chinatown* case, *see* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015). Preventing animal cruelty within one's borders is a legitimate state interest, and the Supreme Court has held as much. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521–22 (1993). However, the Supreme Court did not hold that a state has a legitimate interest in preventing cruelty to animals outside of their borders by imposing economic regulations that spread across the nation. *See id.*

229. *See N. Am. Meat. Inst.*, 420 F. Supp. 3d at 1031 (quoting Sam Francis Foundation v. Christies, Inc., 784 F.3d 1320, 1324 (9th Cir. 2015) (en banc)); *see also infra* note 230 and accompanying text.

230. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 388, 393–95 (1994) (holding that a local ordinance impermissibly extended the town's police power beyond its jurisdictional bounds, which in effect controlled commerce in other states even though the legislation also impacted intrastate movements of waste products); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935) (invalidating New York's law mandating certain minimum prices of milk products sold within its borders as violating the DCC by impermissibly attempting to control out-of-state commerce); Daniels Sharpsmart, Inc. v. Smith, 889 F.3d 608, 612, 616 (9th Cir. 2018) (affirming the granting of a

of discretion.[231]

When properly applying Supreme Court precedent from *Healy*, *Carbone*, and *Baldwin*, it is clear NAMI was likely to have success on the merits in proving the sales ban constitutes impermissible extraterritorial legislation.[232] The Supreme Court prohibits legislation controlling conduct occurring wholly outside of a state's borders or that has the practical effect of controlling conduct beyond the state's boundaries.[233] The first component of Proposition 12, Section 25990(a) of the California Health and Safety Code, requires California farmers to comply with the new spacing requirements, which does not regulate extraterritorially.[234] The sales ban, Section 25990(b), however, carries an inevitable effect of forcing other states to comply with the requirements imposed on California farmers if they wish to continue business within the state.[235]

As in *Healy*, where the Supreme Court held that state laws with the practical effect of regulating commerce wholly outside of the state's borders are invalid under the Commerce Clause, and in *Carbone*, where the Court held that the town could not attach restrictions to imports or exports outside of its borders to control commerce in other states, Section 25990(b) attempts to do what *Healy* and *Carbone* expressly forbid: regulate interstate commerce by attaching restrictions to animal products brought into California.[236] Therefore, *Nami* should have reversed the district court's holding on the extraterritoriality claim and remanded the case with instructions that the district court consider the other preliminary injunction factors in light of this determination.[237]

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preliminary injunction on extraterritoriality grounds where California's statute attempted to govern the disposal of medical waste within California and across the nation); *Christie's*, 784 F.3d at 1323, 1325–26 (invalidating a portion of California's Resale Royalty Act as impermissible extraterritorial legislation even though the same statute also regulated "in-state sales of fine art").

231. *See supra* note 230 and accompanying text.

232. *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 332–36 (1989); *Carbone*, 511 U.S. at 393–95; *Baldwin*, 294 U.S. at 528; *see also supra* note 230 and accompanying text; *infra* notes 233–37 and accompanying text.

233. *See Healy*, 491 U.S. at 336; *see also supra* note 232 and accompanying text.

234. *See* CAL. HEALTH & SAFETY CODE § 25990(a) (West 2018).

235. *See id.* § 25990(b).

236. *See id.*; *Healy*, 491 U.S. at 332; *Carbone*, 511 U.S. at 393 ("States and localities may not attach restrictions to exports or imports in order to control commerce in other [s]tates." (citing *Baldwin*, 294 U.S. 511)).

237. *See* N. Am. Meat Inst. v. Becerra, 825 F. App'x 518 (9th Cir. 2020), *cert. denied sub nom.* N. Am. Meat Inst. v. Bonta, 141 S. Ct. 2854 (2021). The district court recognized its denial of a

Though the district court abused its discretion and the error was affirmed on appeal, the *Nami* litigation is not over.[238] As seen with *Chinatown*, *Rocky Mountain I* and *Rocky Mountain II*, and *Canards*, this legal battle will likely continue at the district court level until it rules on whether to grant California's inevitable summary judgment motion, which would then be reviewed de novo once it is reconsidered by the Ninth Circuit.[239] Given this likely reality, NAMI members will be stuck in a difficult situation as this battle continues over the next several years.[240]

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preliminary injunction could constitute irreparable injury since the Eleventh Amendment would bar financial recovery to NAMI members, so it is likely if the district court found for NAMI on the first factor, it might have on the remaining factors. *See id.* (citing Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852 (9th Cir. 2009), *vacated on other grounds and remanded sub nom.* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606 (2012)); *Maxwell-Jolly*, 563 F.3d at 847 (holding that money damages are irreparable where a plaintiff can "obtain no remedy in damages against the state because of the Eleventh Amendment"). Further, NAMI persuasively argued that a preliminary injunction should be granted:

> Absent a preliminary injunction, NAMI's members and countless farmers throughout the country will suffer severe irreparable harm. . . . [T]he [s]ales [b]an irreparably harms veal and pork producers by putting them to a Hobson's choice: either spend millions of dollars to comply with California's confinement requirements . . . or be excluded from the California market and suffer the resulting loss of revenues and customer goodwill. Either way, Proposition 12 subjects veal and pork producers to tremendous costs, none of which can be recovered post-trial because California's sovereign immunity precludes a damages action against the State.

See NAMI Opening Brief, *supra* note 1, at 11.

238. *See N. Am. Meat Inst.*, 825 F. App'x 518; *see also infra* notes 239–40 and accompanying text. However, it is worth noting that while NAMI petitioned for rehearing en banc, their petition was denied. *See* N. Am. Meat Inst. v. Becerra, No. 19-56408, 2020 U.S. App. LEXIS 40287, at *2 (9th Cir. Dec. 23, 2020).

239. *See* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1139–41 (9th Cir. 2015) (noting that the plaintiffs moved for a preliminary injunction against the Shark Fin Law in August 2012, which was denied and affirmed on appeal in 2013, which caused the plaintiffs to file an amended complaint in December 2013, which was dismissed with prejudice in March 2014 and affirmed by this court in July 2015). The *Rocky Mountain I* and *II* cases were fiercely litigated from 2009 through 2019. *See* Rocky Mountain Farmers Union v. Corey, No. 09-CV-02234 (E.D. Cal. 2009); *Rocky Mountain II*, 913 F.3d 940 (9th Cir. 2019). The *Canards* cases began in 2012 and several decisions are currently pending within the Ninth Circuit. *See* Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, No. 12-CV-05735-SVW-RZ, 2012 WL 12842942 (C.D. Cal. Sept. 28, 2012); *Canards District*, No. 12-cv-05735-SVW-RZ, 2020 WL 5049182 (E.D. Cal. July 14, 2020), *appeal docketed*, No. 20-55944 (9th Cir. Sept. 10, 2020).

240. *See* discussion *infra* Section V.B.

V. IMPLICATIONS OF THE NAMI DECISION

There are five key takeaways from this decision that are explained more in-depth below.[241] First, *Nami*'s decision upholding Proposition 12 ensures that commendable animal welfare protections remain in place for farm animals.[242] Second, *Nami* unfortunately encourages California to continue to exert significant economic influence over the national economy.[243] Third, the unpublished nature of *Nami* fails to provide helpful guidance to district courts that will hear similar challenges in the future.[244] Fourth, *Nami* reveals that the Supreme Court needs to provide clearer rules regarding its DCC jurisprudence.[245] Fifth, Congress should enact more robust animal welfare reform that will prevent states from engaging in these problematic economic practices.[246]

A. California Provides a Powerful Voice for the Voiceless

There are positive benefits to Proposition 12's mandate of increased living spaces for farm animals, particularly in light of scientific knowledge that animals are sentient beings that experience pain and pleasure.[247] Importantly, *Nami* will undeniably impact the conversation among animal

241. *See infra* notes 242–46 and accompanying text.
242. *See* discussion *infra* Section V.A.
243. *See* discussion *infra* Section V.B.
244. *See* discussion *infra* Section V.C.
245. *See* discussion *infra* Section V.D.
246. *See* discussion *infra* Section V.E.
247. *See* Amanda Howell, *The Meat of the Matter: Shoring Up Animal Agriculture at the Expense of Consumers, Animals, and the Environment*, 50 ENV'T L. REP. 10228, 10237 (2020) ("[A]nimal treatment laws are backed by concrete evidence that support the notion that the laws are necessary to protect consumers' health and safety from the sale of animal products that are produced in a way that worsens food safety, as well as the lives of animals. Moreover, states also have a legitimate interest in preventing animal cruelty."); Marc Bekoff, *A Universal Declaration on Animal Sentience: No Pretending*, PSYCH. TODAY (June 20, 2013), https://www.psychologytoday.com/blog/animal-emotions/201306/universal-declaration-animal-sentience-no-pretending ("It's time to stop pretending that we don't know if other animals are sentient: We do indeed know what other animals want and need."); Richard L. Cupp, Jr., *Animals as More Than "Mere Things," but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 U. CIN. L. REV. 1023, 1067 (2016) ("Doing more to recognize and highlight animals' special status as property that is capable of pain or distress may help us to attain better treatment for animals while preserving an animal welfare paradigm. Our laws regarding animals need changes, including changes in how we frame the matter of animals' status as property.").

rights scholars and welfare groups about the best avenues for pursuing changes to improve the well-being of animals.[248] While *Nami* does not decide whether animal welfare is a sufficient reason to substantially burden interstate commerce given its procedural posture, this decision will likely pave the way for greater animal welfare reform.[249] Perhaps *Nami* shows that promoting ballot initiatives is the best course of action for animal welfare groups.[250]

248. *See* Nancy Perry, *A Quarter of a Century of Animal Law: Our Roots, Our Growth, and Our Stretch Toward the Sun*, 25 ANIMAL L. 395, 413 (2019) (footnote omitted) ("In fact, California animal welfare, labor, environmental[,] and consumer advocates came together again in 2018 to pass Proposition 12, another farm animal confinement measure that added specificity and sales requirements to the code. . . . Such collaboration and earnest recognition of the need for intersectional values and support will be essential if we hope to succeed in inspiring major policy reforms for animals. It provides the best blueprint for our future as a credible and effective movement for social change."); Emma Therrien, *2018 State Legislative Review*, 25 ANIMAL L. 447, 459 (2019) (footnote omitted) ("[Proposition 12's] proponents also consider California's status as an economic powerhouse. For example, Josh Balk, Spokesman for [Humane Society of the United States (HSUS)], predicts that 'the world's fifth-largest economy banning the sale of meat and eggs from caged animals is going to have a tremendous impact.' Sara Amundson, also with HSUS, praised California for 'rais[ing] the bar at an important time in [the] consideration of what farm to table means in this country.'" (quoting Kelsey Piper, *California and Florida Both Pass Animal Welfare Laws by a Landslide*, VOX (Nov. 7, 2018, 2:38 PM), https://www.vox.com/future-perfect/2018/11/7/18071246/midterms-amendment-13-proposition-12-california-florida-animal-welfare)).

249. *See* N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021); *see also* Ernesto Hernandez-Lopez, *Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs*, 7 U.C. IRVINE L. REV. 347, 399 (2017) ("[W]hen these cases are seen as state attempts to regulate food sales and production with animal welfare norms, food's powerful role in the Constitution and the Constitution's influence in food debates begin to emerge. The Commerce Clause and Supremacy Clause are menu items deciding if states can or cannot protect animals. Routine preemption, commerce, and federal questions take on animal cruelty and food freedom significance. This pot of legal ingredients appears to simmer when it becomes obvious that California is just one of many states seeking these measures."); *supra* note 248 and accompanying text.

250. *See* Pamela Frasch & Joyce Tischler, *Animal Law: The Next Generation*, 25 ANIMAL L. 303, 323 (2019) (footnote omitted) ("The voting public overwhelmingly supports greater protections for farmed animals. A handful of states have outlawed the most extreme forms of confinement via the ballot initiative process, but the recent laws in Massachusetts and California also include sales bans. These bans apply to animal products produced out of state, making their impact wider (this is especially the case in California because it is the most populous state in the [United States] and has a significant agriculture sector). In addition to the promise of slaughter-free meat on the horizon and positive legislative reforms like Prop 12, some companies are voluntarily changing their corporate practices to source animal products from farms with purportedly higher welfare standards."). *See generally N. Am. Meat Inst.*, 420 F. Supp. 3d 1014.

B. California Can Continue To Flex Its "Sovereignty Muscles" to the Detriment of the National Economy

The *Nami* decision reflects a deeper trend growing within California: the Golden State can compel businesses nationwide to comply with its initiatives by passing legislation that does not appear on its face to impermissibly burden interstate commerce.[251] For example, California recently defeated a DCC challenge of a law that banned the sale of fur products within the City and County of San Francisco.[252] In this case, the district court held that the legislation was permissible because it does not substantially burden interstate commerce.[253]

Further, while the *Canards District* decision is being appealed, the district court's recent declaratory judgment in this never-ending case allows California to force businesses through a complex pattern of hoops if they wish to get foie gras into its market.[254] While *Canards District* held California "has no interest in sales occurring outside of California, even if those sales are to a California resident or visitor," permitting California to enact legislation that forces states to sell non-California products outside of California and then allows them to transport said products into the state constitutes extraterritorial legislation.[255] The same result could happen in the *Nami* context: meat producers have California businesses buy their egg and pork products in Arizona to then bring them across the border into California, which needlessly

251. *See* Robert G. Hibbert & Ryan M. Fournier, *Food and Beverage Policy Trends To Watch This Year*, LAW 360 (Jan. 1, 2020, 12:37 PM), https://www.law360.com/articles/1227629/food-and-beverage-policy-trends-to-watch-this-year ("[Proposition 12] is similar to voter initiatives in other states, such as Massachusetts's ban on certain farm animal confinement practices. The broader issue here is the ability for states to effectively dictate animal care standards on a national level. In some cases, this means that meat-consuming states are dictating animal-raising standards to meat-producing states."); *see also infra* notes 254–57 and accompanying text.

252. *See* Int'l Fur Trade Fed'n v. City of San Francisco, 472 F. Supp. 3d 696, 702–04 (N.D. Cal. July 2020); *see also infra* note 254 and accompanying text.

253. *See Int'l Fur Trade Fed'n*, 472 F. Supp. 3d at 702–04.

254. *See Canards District*, No. 2:12-CV-05735-SVW-RZ, 2020 WL 5049182, at *5 (C.D. Cal. July 14, 2020) ("The Court holds that a sale of foie gras does not violate § 25982 when: [t]he [s]eller is located outside of California[;] [t]he foie gras being purchased is not present within California at the time of sale[;] [t]he transaction is processed outside of California (via phone, fax, email, website, or otherwise)[;] [p]ayment is received and processed outside of California[;] and [t]he foie g[r]as is given to the purchaser or a third-party delivery service outside of California, and '[t]he shipping company [or purchaser] thereafter transports the product to the recipient designated by the purchaser,' even if the recipient is in California.").

255. *See id.* at *4; *supra* note 252 and accompanying text.

complicates commerce and fails to meaningfully prevent animal cruelty occurring within California.[256] Notably, this extraterritorial trend is growing.[257] For example, California recently stated its plans to ban the sale of new gas engine vehicles by 2035 to fight against carbon emissions, which will force automobile manufacturers to adjust their plans if they continue to sell within the California market.[258]

Ultimately, the problem with the Ninth Circuit's continued narrowing of the extraterritoriality doctrine is best illustrated by the following quote:

> The narrow interpretation of extraterritoriality endorsed by California and the Ninth Circuit . . . [is] problematic. If a state is completely free to indirectly regulate out-of-state conduct so long as it only directly regulates an in-state transaction, one state will be able to regulate much of the country. California could, for example, require any company that does business in California to certify that all of its animals, no matter where they are sold, were raised in California-compliant conditions. Further, California could require that companies doing business in California, for example, give their workers union rights, a certain minimum wage, or free health care throughout their global operations, even with respect to goods that are not sold in California. Such actions, however, seem to violate the Constitution's implicit command that "[n]o state can legislate except with reference to its own jurisdiction." A narrow interpretation of the extraterritoriality doctrine would therefore render [the Constitution] unable to fulfill its intended purpose of ensuring that a state does not exceed its sphere of sovereign authority.[259]

256. *See supra* notes 254–55 and accompanying text.

257. *See infra* note 258 and accompanying text.

258. *See* Russ Mitchell, *Sales of New Gas-Powered Cars Banned in California by 2035: What You Need To Know*, L.A. TIMES (Sept. 23, 2020, 1:25 PM), https://www.latimes.com/business/story/2020-09-23/sales-new-gasoline-cars-banned-by-2035-what-you-need-to-know ("Gov. Gavin Newsom's executive order banning sales of new combustion-engine motor vehicles in California starting in 2035 will mark a radical change in transportation infrastructure.").

259. Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENV'T L. REV. 423, 449 (2015) (footnote omitted) (quoting Bonaparte v. Tax Court, 104 U.S. 592,

Even if Proposition 12 is later found to unduly burden interstate commerce, constitute an impermissible burden under the *Pike* balancing test, or violate the extraterritoriality doctrine, the Ninth Circuit's decision denying this preliminary injunction leaves NAMI with no other form of recourse because California's sovereign immunity precludes recovery of costs.[260]

States and NAMI members are now at an economically problematic crossroads.[261] They must decide whether to comply with California's mandates, refuse to do so and lose all business within the state, or litigate at the risk of falling behind in their compliance efforts if their lawsuits are unsuccessful.[262] Time is ticking: as of August 2021, only 4% of hog operations within the United States comply with California's space requirements that are to be enforced in 2022, making many businesses fearful

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594 (1881)). Schmitt further articulated the importance of the extraterritoriality doctrine by stating that "[t]he extraterritoriality doctrine therefore 'reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual [s]tates within their respective spheres.'" *Id.* at 448 (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 335–36 (1989)). However, some scholars contend that the extraterritoriality doctrine should never be applied to DCC challenges where legislation burdens in-state and out-of-state interests equally. *See* Cholden-Brown, *supra* note 91, at 180–82 (footnotes omitted) ("Protectionist bans, even if partial, are 'local measures for control and suppression of the problem [that] are in force [and] are generally comparable in their impact to the embargo on imports.' California 'has a legitimate interest in guarding against imperfectly understood [health] risks, despite the possibility that they may ultimately prove to be negligible' and cannot be expected to 'sit idly by and wait . . . until the scientific community agrees on what . . . organisms are or are not dangerous before it acts to avoid such consequences.' . . . Extraterritoriality, if applied even when the challenged statute does not implement protectionist discrimination, is wholly divorced from the purpose of the [D]ormant Commerce Clause, and[] absent some limiting principle, poses a broad threat to a state's authority to regulate conduct with direct effects within its bounds." (quoting Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1148 (1986) and Maine v. Taylor, 477 U.S. 131, 148 (1986))).

260. *See* Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852–53 (9th Cir. 2009), *vacated on other grounds and remanded sub nom.* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606 (2012) ("[I]t is clear that it would not be equitable or in the public's interest to allow [California] to continue to violate the requirements of federal law, especially when there are no adequate remedies available to compensate . . . [p]laintiffs for the irreparable harm that would be caused by the continuing violation."); Douglas v. Cal. Dep't of Youth Auth., 271 F.3d 812, 817–18 (9th Cir. 2001) (holding that the three exceptions to the general rule that states are protected under the Eleventh Amendment from suits brought by citizens in federal court are when: (1) the state voluntarily waives its sovereign immunity, (2) Congress abrogates the state's sovereign immunity pursuant to a grant of constitutional authority, and (3) under the *Ex Parte Young* doctrine when the suit seeks prospective injunctive relief).

261. *See infra* notes 262–66 and accompanying text.

262. *See* discussion *infra* Part VI.

that the Golden State will lose almost all of its pork supply or be unable to afford the estimated 60% increase in cost for the limited pool of compliant pork.[263] Some scholars believe this sort of "Hobson's choice" is a valid exercise of a state's sovereign authority to legislate for the well-being of its citizens.[264] Since the preliminary injunction was denied, California faces no economic repercussions for Proposition 12 if it is found unconstitutional.[265] As other states follow in California's footsteps, the issue of the permissibility of burdens on interstate commerce will not be going away anytime soon.[266]

C. "Unpublished Opinions" Still Pack a Problematic Punch

It is important to note that *Nami* does not create binding precedent within the Ninth Circuit because it is an unpublished opinion.[267] However, its proffered determinations without any substantial reasoning leave district courts without guidance in balancing future DCC challenges concerning animal welfare legislation.[268] Given the potential ramifications from *Nami*, it

263. *See* Scott McFetridge, *Bacon May Disappear in California as Pig Rules Take Effect*, AP NEWS (July 31, 2021), https://apnews.com/article/lifestyle-business-health-california-coronavirus-pandemic-5ebe70407fcd94ef712c16410f32c4b1 ("If half the pork supply was suddenly lost in California, bacon prices would jump 60%, meaning a $6 package would rise to about $9.60.").

264. *See, e.g.*, Schmitt, *supra* note 259, at 455 (footnotes omitted) ("To protect the health, welfare, and morals of its residents, a state sometimes needs to exercise its sovereign power to treat goods differently based only on the manner in which they were produced. California, for example, must treat ethanol and eggs sold in-state differently based on the manner in which they were produced to address California's role in serious issues that have huge consequences for state residents. Specifically, California should be able to use its sovereign power to protect the 'health and welfare' of its citizens by reducing the amount of pollution Californians produce. Moreover, California should have the power to legislate for the 'morals' of its citizens by ensuring that they do not participate in animal cruelty. In doing so, California is exercising its sovereignty for the protection of its own citizens and thus is not disrupting the allocation of power in our federal system." (quoting Mugler v. Kansas, 123 U.S. 623, 661 (1887))).

265. *See* CAL. PROP. 12, § 2 (2018); *see also supra* note 260 and accompanying text.

266. *See* Cholden-Brown, *supra* note 91.

267. *See* N. Am. Meat Inst. v. Becerra, 825 F. App'x 518 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021) (noting that the *Nami* decision has not been selected for publication).

268. *See* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 797, 800 (1995) ("[E]ven if a relevant decision can be located, and its precedential value ascertained, it may provide insufficient information about the facts of the case, the relevant rules, and the reasoning behind the rules' application. . . . [O]nly through thoughtful preparation of opinions can judges demonstrate due consideration of each case. Only through publication . . . in all potentially law-making decisions can the courts secure the values of stability, certainty, predictability, consistency, and fidelity to authority, which are essential to the vitality and legitimacy of the judicial

was prudent that the Ninth Circuit wrote this as an "unpublished" opinion.[269] If *Nami* were a published decision, it would very likely encourage states within the Ninth Circuit's jurisdiction to enact additional quasi-protectionist legislation, knowing it would likely be upheld based on stare decisis.[270] Yet without guidance from the Ninth Circuit, district courts considering challenges regarding animal welfare legislation may conflict.[271] Further, *Nami*'s "unpublished" disposition reflects the need for deeper analysis on the three DCC principles.[272] Through a published opinion, the Ninth Circuit could have defined the contours of the DCC framework to prevent future decisions from applying them in an arbitrary manner.[273]

However, unpublished opinions still carry weight: the Ninth Circuit and other courts of appeals permit the use of unpublished opinions for their persuasive value.[274] Moreover, the Ninth Circuit even permits the use of portions of vacated opinions as precedential authority.[275] Given the concurrent *National Pork* litigation,[276] California and the Humane Society have additional ammunition because they can use *Nami* to support their arguments that Proposition 12 does not violate the DCC.[277] Unfortunately, NAMI and others will likely lose when challenging similar balkanization measures promulgated in California in the future.[278]

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system.").

269. *See N. Am. Meat Inst.*, 825 F. App'x 518; *infra* note 270 and accompanying text.

270. *See* Pedroza v. Benefits Rev. Bd., 624 F.3d 926, 931 (9th Cir. 2010) ("[A]n unpublished decision is not precedent for our panel.").

271. *See supra* note 268 and accompanying text.

272. *See N. Am. Meat Inst.*, 825 F. App'x 518; *supra* note 268 and accompanying text.

273. *See* Dragich, *supra* note 268, at 800–01.

274. *See* FED. R. APP. P. 32.1 advisory committee's 2006 note on the rule ("Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.").

275. *See* Michael D. Moberly, *This Is Unprecedented: Examining the Impact of Vacated State Appellate Court Opinions*, 13 J. APP. PRAC. & PROCESS 231, 233 n.17 (2012) ("[T]he Ninth Circuit and others have taken the position that a vacated judgment retains precedential authority on those issues not addressed in the order vacating it." (quoting Endsley v. Luna, 750 F. Supp. 2d 1074, 1088 n.6 (C.D. Cal. 2010))).

276. *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028 (9th Cir. 2021).

277. *See N. Am. Meat Inst.*, 825 F. App'x 518; *supra* notes 271–74 and accompanying text.

278. *See supra* notes 267–77 and accompanying text.

D. The Supreme Court Needs To Clarify What Constitutes Permissible Burdens on Interstate Commerce and Extraterritorial Legislation

Nami illuminates the need for the Supreme Court to (1) clarify its DCC jurisprudence to provide clearer guidance to lower courts in their decision-making[279] and (2) address whether farm animal welfare legislation like Proposition 12 can constitute a valid, permissible burden on interstate commerce in light of the DCC principles.[280] The standard for permissible burdens on interstate commerce is a crucial and complicated issue that remains a recurring question in DCC challenges.[281]

While *Nami* reflects the reality that supposedly facially neutral laws that may be discriminatory in purpose or effect can be upheld to the detriment of other states, the Supreme Court itself is not immune from inconsistently applying DCC principles to "facially neutral" laws.[282] Therefore, some

279. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce."). Some scholars are critical of Justice Thomas's decisions concerning DCC challenges and believe that his decision to abstain from helping the Court to enunciate a meaningful framework is disconcerting. *See* James M. McGoldrick, Jr., *Why Does Justice Thomas Hate the Commerce Clause?*, 65 LOY. L. REV. 329, 397 (2019) ("It is unfortunate that Justice Thomas does not see himself as part of the solution in bringing order to the morass he claims is the Dormant Commerce Clause. Justice Thomas sees his withdrawal of all consideration of the issue as the only remedy for what he considers to be the doctrine's betrayal of his beloved textualism. He has used his considerable skills as a purveyor of the historical records to challenge again and again conventional wisdom as to the legitimacy of the Dormant Commerce Clause. It is unfortunate that he has sidelined himself from that continued battle.").

280. *See* Hernandez-Lopez, *supra* note 249, at 352 ("[T]he subject of animals and food is ripe for constitutional inquiry, since federal law is relatively hands-off regulating welfare for farm animals.").

281. *Compare* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2476 (2019) ("Not only is the 2-year residency requirement ill[-]suited to promote responsible sales and consumption practices . . . but there are obvious alternatives that better serve that goal without discriminating against nonresidents."), *with id.* at 2484 (Gorsuch, J., dissenting) ("How much public health and safety benefit must there be to overcome this Court's worries about protectionism 'predominating'? Does reducing competition in the liquor market, raising prices, and thus reducing demand still count as a public health benefit, as many [s]tates have long supposed? . . . The Court offers lower courts no more guidance than to proclaim delphically that 'each variation must be judged based on its own features.'" (quoting *id.* at 2472)).

282. *Compare* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 335, 351–54 (1977) (invalidating a North Carolina law requiring imported apple cartons to bear a "U.S. grade" as opposed to individual state grades, which while facially neutral, discriminated against other states, particularly the State of Washington, and thus failed to show the regulation furthered the goal of eliminating deceptive labeling), *with* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upholding a Minnesota statute that banned the sale of milk in plastic, nonreturnable, nonrefillable containers, which

scholars contend that new doctrinal frameworks for the DCC should be created or at least clarified, particularly for the Court's extraterritoriality doctrine.[283] Moreover, technological advances increasingly blur the commerce lines between states, so it is important for the Supreme Court to clarify what constitutes impermissible extraterritorial legislation.[284] By doing so, the Supreme Court can ensure that economic powerhouse states like California can continue to enact meaningful legislation for its citizens while respecting the sovereignty of the other forty-nine states.[285] The Supreme Court should also answer whether the extraterritorial doctrine only applies to price control or price affirmation statutes as the circuit split regarding this issue continues to grow.[286]

In general, the Supreme Court needs to clarify what constitute legitimate, permissible burdens on interstate commerce.[287] The Supreme Court's largely deferential and fact-sensitive approach, as currently implemented, does little to guide lower courts.[288] The Court should grant certiorari to a case like *Nami*

although not discriminatory on its face, was purposed to favor Minnesota pulpwood manufacturers over out-of-state plastic producers). Comparison of these cases reflects how the Supreme Court has "chartered an uneven course without providing a meaningful explanation of why certain statutes are evaluated under a lower level of scrutiny." Felmly, *supra* note 46, at 479–81. Justice Scalia recognized this inconsistency problem, once candidly observing that "once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a 'quagmire.'" W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

283. *See* Schmitt, *supra* note 259, at 425 ("This Article proposes a new doctrinal test that has the potential to provide clarity and consistency to the courts' extraterritoriality jurisprudence. Under this proposal, which is derived from existing precedent, a state regulation of in-state conduct violates the extraterritoriality principle only when the regulation: (1) lacks a corresponding in-state interest; and (2) *inescapably* has the practical effect of regulating conduct beyond the state's borders.").

284. *See infra* note 283 and accompanying text.

285. *See* Felmly, *supra* note 46, at 509 ("In order to ensure both that states act within their respective spheres and that novel state initiatives are not undeservedly invalidated, arriving at a paradigm for the extraterritoriality principle that is clear and that allows for some extraterritorial reach by states is essential.").

286. *See supra* note 216 and accompanying text.

287. *See infra* note 288 and accompanying text.

288. *See* Felmly, *supra* note 46, at 512 (footnotes omitted) ("Weighing the costs and benefits of particular legislative initiatives is a job that should be left to those best able to accomplish it. Courts have neither the available resources nor the expertise needed to tackle such an endeavor. Moreover, although ad hoc balancing may tend to produce results more tailored to the individual facts of particular cases, it fails to contribute to the development of a consistent body of legal principles. State legislators need predictable legal principles in order to respond appropriately to the needs of their constituents. Prior fact-specific case holdings oftentimes do little to assist state legislators in their efforts to evaluate proposed solutions to the issues raised by the latest technological advances.").

to determine whether states have a legitimate interest in preventing animal cruelty such that they can effectively regulate confinement practices of farm animals outside of their borders.[289] Not only would Supreme Court precedent clarifying the DCC framework assist lower courts in these complex decisions, but it also would guide state legislators as they advocate for the desires and wants of their local citizens.[290] Unfortunately, the Supreme Court recently denied NAMI's petition for a writ of certiorari in June 2021, so hopefully, a different case can be used to clarify the DCC framework in the future.[291]

E. Congress Should Be the Solution to Resolving the Tension Between Animal Welfare and Permissible Burdens on Interstate Commerce

While Supreme Court clarity regarding the DCC framework would be invaluable for lower courts, Congress holds the power under the Commerce Clause to provide a lasting solution to these growing questions concerning animal welfare legislation.[292] Cases like *Nami* expose the need for comprehensive federal legislation, which would be a step in the right direction to bring about substantive animal welfare reform while avoiding the economic balkanization that California has espoused through measures like Proposition 12.[293] The Commerce Clause was designed to support national economic unity, and when billions of dollars potentially hang in the balance, Congress needs to fulfill its constitutional command to enact legislation that will

289. *See supra* notes 279–88 and accompanying text. As mentioned earlier, the Supreme Court has assumed that preventing animal cruelty is a legitimate state interest. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521–22 (1993). But it has not clarified how far this interest expands and whether it extends beyond the state's borders to confinement practices in other states. *See id.*

290. *See supra* notes 279–89 and accompanying text.

291. *See* N. Am. Meat Inst. v. Bonta, 141 S. Ct. 2854 (2021) (denying certiorari).

292. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "to regulate [c]ommerce . . . among the several [s]tates"). Animal welfare legislation that impacts interstate commerce is a category that Congress can and should regulate under its broad Commerce Clause powers. *See id.*

293. *See* Watnick, *supra* note 85, at 75, 78 ("New federal legislation should be passed immediately so that we may begin to behave as a civilized society with regard to the animals that produce our food. To embrace this mandate, one only need embrace the simple moral assumption that animals have some moral status; thus, we have a moral and ethical obligation to treat our farm animals humanely. . . . This morally and ethically sound legislative framework will have the added advantage of avoiding a patchwork of state legislation regarding laying hens and other farm animals[] and will in the end inure to the benefit of all those associated with the egg and farming industry, including animals, farmers, workers, and you.").

preempt attempts from state actors seeking to legislate extraterritorially.[294]

Thankfully, Congress is implementing animal welfare reform, as it criminalized specific acts of cruelty through the Preventing Animal Cruelty and Torture Act in 2019.[295] However, much work remains to be done in terms of promoting uniform living conditions for farm animals, and several scholars have noted the need for greater congressional action.[296] Not only would such federal legislation provide basic comfort to farm animals, but it would prevent costly litigation and ensure consistency in judicial decision-making when federal statutes control.[297] While this may seem infeasible, two somewhat

294. *See* Donald L. R. Goodson, *Toward a Unitary Commerce Clause: What the Negative Commerce Clause Reveals About the Commerce Power*, 61 CLEV. ST. L. REV. 745, 782 (2013) ("The purpose of the Commerce Clause, as the Court makes clear in the negative Commerce Clause context, is interstate commercial harmony and economic union. The greatest threats to interstate commercial harmony are externalities or spillover effects of state behavior, and the greatest impediments to economic union are instances in which a uniform rule is needed or desired but is difficult to achieve because of coordination problems, which may be caused by races to the bottom or conflicting state regulations of national commerce. Congress, then, should only regulate to address externalities of activities within states or solve collective action problems that the states are singularly incompetent to address.").

295. *See* Neil Vigdor, *House Unanimously Approves Bill To Make Animal Cruelty a Federal Offense*, N.Y. TIMES (Oct. 23, 2019), https://www.nytimes.com/2019/10/23/us/politics/animal-cruelty-pact-act-bill.html; Richard Gonzales, *Trump Signs Law Making Cruelty to Animals a Federal Crime*, NPR (Nov. 25, 2019, 11:08 PM), https://www.npr.org/2019/11/25/782842651/trump-signs-law-making-cruelty-to-animals-a-federal-crime. Both articles revealed that the Preventing Animal Cruelty and Torture Act carried bipartisan support and expanded upon prior legislation by banning serious harm to specific animals and crush videos. *See* Vigdor, *supra*; Gonzales, *supra*. There is a question as to whether this law will face the same fate as 18 U.S.C. § 48(b), in which the Supreme Court struck down a law criminalizing the distribution of animal torture as substantially overbroad in violation of the First Amendment. *See* United States v. Stevens, 559 U.S. 460, 482 (2010). In that case, only Justice Alito dissented, arguing that "the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations." *Id.* at 495 (Alito, J., dissenting); 18 U.S.C. § 48(b).

296. *See* Hernandez-Lopez, *supra* note 249, at 355; Watnick, *supra* note 85, at 45; Amy Mosel, *What About Wilbur? Proposing a Federal Statute To Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 187 (2001) ("Congress has the power to regulate the agricultural industry under the Commerce Clause of the United States Constitution. Congress should enact a statute that establishes minimum requirements that farmers must follow in raising farm animals. The statute should acknowledge animals' individual and behavioral needs, taking great care to provide them with the basic *creature comforts*.").

297. *See* Hernandez-Lopez, *supra* note 249, at 397 (footnote omitted) ("Eventual federal preemption, with statutory law on farm animal treatment, is more likely to provide lasting solutions to these state and food producer contests, more so than lawsuits examining variants of economic discrimination. At first glance, California's preemption jurisprudence appears like a muddle, measures have been found to be preempted by federal statutes and not preempted by federal statutes.").

recent cases show that federal preemption can invalidate California's impermissible attempts to regulate interstate animal welfare.[298] First, in *National Meat Ass'n v. Harris*,[299] the Supreme Court unanimously ruled to preempt California's legislation that sought to regulate slaughterhouses' handling and treatment of non-ambulatory pigs because it conflicted with the Federal Meat Inspection Act's regulation of such activities.[300]

Second, in *April in Paris*,[301] a district court granted a preliminary injunction against Sections 653(o) and 653(p) of the California Penal Code, which sought to "criminalize the sale and possession for sale of alligator and crocodile parts in California."[302] The district court reasoned that plaintiffs made a strong showing that the California legislation was preempted under Section 6(f) of the Endangered Species Act.[303] The court further reasoned that a preliminary injunction was proper because of the industry-wide, irreparable economic injuries that would result from enforcing California's law,

298. *See* Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 468 (2012); April in Paris v. Becerra, 494 F. Supp. 3d 756, 761 (E.D. Cal. 2020); *see also infra* notes 300–05 and accompanying text.

299. *See Nat'l Meat Ass'n*, 565 U.S. 452.

300. *See id.* at 468. The Supreme Court reasoned that the Federal Meat Inspection Act's preemption clause nullified California's sales ban provisions because "if the sales ban were to avoid the FMIA's preemption clause, then any [s]tate could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the [s]tate disapproved. That would make a mockery of the FMIA's preemption provision." *Id.* at 464. As a potential solution to the growing issue under *Nami*, Congress could amend the Federal Meat Inspection Act to cover the sort of confinement practices enacted under Proposition 12. *See id.*

301. *See April in Paris*, 494 F. Supp. 3d 756.

302. *See id.* at 761.

303. *See id.* at 762–63 (citation omitted) ("The ESA governs the treatment of endangered and threatened wildlife in the United States. Section 6(f) of the ESA, codified as 16 U.S.C. § 1535(f), addresses conflicts between federal and state laws. . . . The ESA grants authority to the Secretary of the Interior to designate endangered and threatened species. The Nile crocodile and saltwater crocodile population of Australia are designated as threatened species, saltwater crocodiles outside of Australia are endangered, and the American alligator is listed as threatened due to similarity of appearance."); *see also* Janet McConnaughey, *Judge Continues Halt of California's Ban on Gator Products*, AP NEWS (Oct. 15, 2020), https://apnews.com/article/global-trade-wildlife-crocodiles-california-courts-29c07e3faff3817c9b68c30a83e30612 ("Louisiana and the other plaintiffs made a strong showing that federal law, including the Endangered Species Act, controls trade in those products and preempts California from barring trade in them, [Chief District Judge] Mueller wrote. She rejected California's argument that it was only regulating trade within the state. . . . Mueller's order shows she understands the importance of sustainable trade and the economic and social impacts that a ban could have, said David E. Frulla, one of the Washington attorneys representing companies led by April in Paris, a San Francisco firm that makes and sells products from alligator and other exotic skins.").

especially given the sovereign immunity enjoyed by the state.[304] Accordingly, these two cases illustrate that Congress is the key to promote animal welfare reform while ensuring that impermissible barriers to trade are eliminated so that states do not infringe on other states' sovereignty with their extraterritorial or protectionist legislation.[305]

VI. CONCLUSION

California rightly acts as a beacon for meaningful change in the realm of animal welfare that the rest of the nation should emulate.[306] However, strong-arming states to comply with its policy decisions in order to avoid significant economic loss is concerning.[307] Despite what California claims is the true purpose of Proposition 12, California provided no legislative findings showing its benefits to public health, and its legislators knew that the state's economic influence is so expansive that most businesses cannot afford to leave the California market.[308]

Unfortunately, *Nami* reflects how California can have its cake and eat it too.[309] By enacting legislation that does not clearly unduly burden interstate commerce, California can implement policy initiatives that survive judicial

304. *See April in Paris*, 494 F. Supp. 3d at 770 (citations omitted) ("The injuries alleged here are largely economic. Economic injury, standing alone, is not generally considered irreparable, as it can be remedied by the award of damages. However, where the parties cannot recover monetary damages from their injury, economic harm can be considered irreparable. Where California's Eleventh Amendment sovereign immunity bars a financial recovery, monetary injury may be irreparable. . . . In addition, the economic harm alleged is not confined to a single plaintiff; the harms alleged are likely to be diffuse, industry-wide and difficult to quantify as damages. It appears there would be no way to remedy after the fact the harms plaintiff would suffer[] without an injunction."). The court further reasoned that:

> [S]etting aside the policy judgments this dispute encompasses, the court concludes plaintiffs' likelihood of success as to preemption compels finding in favor of plaintiffs. The question is not which policy better protects animals, but whether state or federal law controls. Although California has its own interest in protecting animals, the reach of that interest ends where the preemptive effect of federal law begins. Because plaintiffs make a strong showing of preemption, the court finds the public interest weighs in their favor.

Id. at 771.

305. *See Nat'l Meat Ass'n*, 565 U.S. 452; *April in Paris*, 494 F. Supp. 3d 756; *see also supra* notes 299–304 and accompanying text.

306. *See* discussion *supra* Section V.A.

307. *See* discussion *supra* Section V.B.

308. *See* discussion *supra* Section V.B.

309. *See* discussion *supra* Section V.B.

scrutiny by stating "legitimate" reasons that force out-of-state businesses to either comply or face economic losses.[310] While challenges make their way through the courts, looming compliance deadlines force in-state businesses to make the required changes while out-of-state businesses hold out for injunctive relief.[311] If the lawsuits fail, businesses lose significant capital and are unable to participate in California's market until they make the changes, isolating the state from some out-of-state competitors.[312] However, even if the laws are eventually struck down as unconstitutional, California will not face any economic repercussions, unless an injunction is granted, because of its sovereign immunity.[313] This troubling reality is the exact type of economic balkanization that the Commerce Clause was designed to prevent.[314]

DCC challenges to animal welfare legislation implicate complicated questions of federalism, state sovereignty, and legitimacy of state interests.[315] Therefore, the Supreme Court needs to provide clearer rules, especially regarding permissible extraterritorial effects, to aid lower courts when considering such challenges.[316] However, the Supreme Court's remedies are temporary, as challenges will continue as new animal welfare legislation impacts the national economy.[317] Therefore, advocating for robust federal legislation, which could provide uniform and meaningful improvements to the lives of animals across the nation, is the best solution.[318]

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310. *See* discussion *supra* Section V.B.
311. *See* discussion *supra* Section V.B.
312. *See* discussion *supra* Section V.B.
313. *See* discussion *supra* Section V.B.
314. *See* discussion *supra* Part II.
315. *See* discussion *supra* Section V.D.
316. *See* discussion *supra* Section V.D.
317. *See* discussion *supra* Section V.D.
318. *See* discussion *supra* Section V.E.

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