

# You Are What You EATS: Opposing Potential New Legislation

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## I. INTRODUCTION

Meat is a substantial part of the American diet.<sup>2</sup> According to the National Agricultural Statistics Service and the United States Department of Agriculture, 32.0 billion pounds of commercial red meat production occurred between January and July 2022.<sup>3</sup> By 2050, chicken and pork are predicted to be mass produced at triple the rate of beef.<sup>4</sup> The inevitable expansion of intensive mass production of farmed animals is made possible by factory farming. Factory farms, known as, concentrated animal farming operations (“CAFOs”), are “a specific type of large-scale industrial agricultural facility that raises animals, usually at high-density, for the consumption of meat, eggs, or milk.”<sup>5</sup> In 2019, a study conducted by Sentience Institute estimated that 99% of United States’ farmed animals live in factory farms.<sup>6</sup>

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  2. *Risky Meat*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, at p. 2 <https://www.cspinet.org/eating-healthy/avoiding-foodborne-illness/risky-meat> (last visited Sep. 29, 2023)
  3. *Livestock Slaughter*, U.S. DEP’T OF AGRICULTURE, at p. 1 (Aug. 25, 2022), <https://downloads.usda.library.cornell.edu/usda-esmis/files/rx913p88g/fb495h26w/rj431c909/lstk0822.pdf>.
  4. *Factory Farming: The Real Climate Change Culprit*, WORLD ANIMAL PROTECTION FARMING BLOG (Aug. 11, 2021), <https://www.worldanimalprotection.org.uk/blogs/cop26-factory-farming>.
  5. Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, CENTER FOR DISEASE CONTROL AND PREVENTION, at p. 1 (2010), [https://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf).
  6. Jacey Reese Anthis, *US Factory Farming Estimates*, SENTIENCE INSTITUTE, (last updated Apr. 11, 2019).

CAFOs were first regulated as a point source under the Federal Water Pollution Control Act (“Clean Water Act”).<sup>7</sup> A point source is, “any single identifiable source of pollution from which pollutants are discharged, such as a pipe, ditch, ship or factory smokestack.”<sup>8</sup> CAFOs are considered a point source under the Clean Water Act because the wastewater from CAFOs contain a high concentration of nutrients, such as nitrogen and phosphorus, which can impact water bodies and harm aquatic life.<sup>9</sup> Under the Clean Water Act, CAFOs must obtain an Environmental Protection Agency (“EPA”) permit under the National Pollutant Discharge Elimination System (“NPDES”) to discharge waste in bodies of water.<sup>10</sup>

In addition to federal regulation, states often regulate CAFOs through other state permits, licenses, or authorization programs.<sup>11</sup> However, local regulations may be preempted by state law regarding the regulation of CAFOs.<sup>12</sup> Thus, it often makes

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7. *Point Source*, NATIONAL OCEAN SERVICE, [https://oceanservice.noaa.gov/education/tutorial\\_pollution/03pointsource.html#:~:text=The%20U.S.%20Environmental%20Protection%20Agency%20\(EPA\)%20defines%20point%20source%20pollution,common%20types%20of%20point%20sources](https://oceanservice.noaa.gov/education/tutorial_pollution/03pointsource.html#:~:text=The%20U.S.%20Environmental%20Protection%20Agency%20(EPA)%20defines%20point%20source%20pollution,common%20types%20of%20point%20sources).

8. *Id.*

9. *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, ENVIRONMENTAL PROTECTION AGENCY, at p. 3, (May 2002), <https://www3.epa.gov/npdes/pubs/region2.pdf>.

10. *Id.* at 5.

11. Jennine Kottwitz & Tegan Jarchow, *Concentrated Animal Feeding Operation (CAFO) Regulations*, SUSTAINABLE DEVELOPMENT CODE, [https://sustainablecitycode.org/brief/concentrated-animal-feeding-operation-cafo-regulations/#\\_edn13](https://sustainablecitycode.org/brief/concentrated-animal-feeding-operation-cafo-regulations/#_edn13) (last visited Oct. 23, 2023).

12. *Petition to Adopt a Rebuttable Presumption that Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act*, EARTHJUSTICE, at p. 94, (Oct. 2022), [https://earthjustice.org/wp-content/uploads/cafo\\_presumptionpetition\\_withexhibits\\_oct2022.pdf](https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf).

it difficult for local efforts to increase CAFO regulation.<sup>13</sup> When enacted, these state authorizations are often more stringent than federal requirements.<sup>14</sup>

California recently demonstrated a stricter regulatory role of CAFOs through an approved proposition enacted under California Health & Safety Code §25990(b)(2) (“Proposition 12”).<sup>15</sup> Proposition 12 states that,

A business owner or operator shall not knowingly engage in the sale of. . . 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.<sup>16</sup>

Proposition 12 was subsequently challenged, reaching the United States Supreme Court in May 2023.<sup>17</sup> In *National Pork Producers Council v. Ross*, the Court dismissed the action against the California legislation and upheld the statute as constitutional.<sup>18</sup>

In response to the Court’s ruling, the U.S. Senate introduced the “Ending Agricultural Trade Suppression Act” (“EATS Act”) in June 2023.<sup>19</sup> The alleged purpose of this bill is to “[p]revent States and local jurisdictions from interfering with

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<sup>13</sup>. *Id.*

<sup>14</sup>. CAL. HEALTH & SAFETY CODE § 25990(b)(2) (Deering 2008).

<sup>15</sup>. *Id.*

<sup>16</sup>. Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1149 (2023).

<sup>17</sup>. *Id.* at 1150.

<sup>18</sup>. Ending Agricultural Trade Suppression Act, S. 2019, 118th Cong. (2023).

<sup>19</sup>. *Id.*

the production and distribution of agricultural products in interstate commerce, and for other purposes.”<sup>20</sup>

According to a legislative analysis conducted at Harvard Law School, over one thousand state laws regulating the agricultural industry, including CAFOs and their environmental impacts, are at risk of being nullified.<sup>21</sup> Specifically, according to an article written by the President of the Humane Society Legislative Fund, the EATS Act targets state laws regulating food safety, environmental protection standards, and agricultural product regulations.<sup>22</sup>

The EATS Act seeks to limit state sovereignty through the federal government’s proposed power to cancel state and local laws that attempt to protect its citizens from the disastrous effects of CAFOs.<sup>23</sup> This Article first outlines the current federal and state regulations of CAFOs.<sup>24</sup> Second, this Article will explain the legislative and procedural history of the California legislation, the subsequent U.S. Supreme Court case, and the introduction of the EATS Act in Congress.<sup>25</sup> Specifically, this Article aims to expose the disastrous effects the EATS Act will have, if passed, on states’ abilities to regulate agricultural and environmental practices within their own borders. Third, this Article will conclude with how the EATS Act threatens state

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<sup>20</sup>. *Id.*

<sup>21</sup>. *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act,”* BROOKS MCCORMICK JR. ANIMAL LAW & POLICY PROGRAM, at p. 4, (July 26, 2023), <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf>.

<sup>22</sup>. Natalie Alms, *The EATS Act Explained: The Latest Threat to Farmed Animals*, ANIMAL EQUALITY <https://animalequality.org/blog/2023/07/28/eats-act-explained/#:~:text=The%20EATS%20Act%20seeks%20to,for%20sale%20within%20the%20state> (last updated Aug. 20, 2023).

<sup>23</sup>. *Id.*

<sup>24</sup>. *See infra* Section II.A.

<sup>25</sup>. *See infra* Section II.B.; *see infra* Section II.C.

CAFO regulations, which poses immense risk to environmental protections, consumer safety, and animal welfare.<sup>26</sup>

## II. BACKGROUND

### A. *Federal and State Regulation of CAFOs*

#### 1. *Federal Regulation*

In 1948, the Federal Water Pollution Control Act was the first federal law to attempt to regulate water pollution in the United States.<sup>27</sup> The goal of this Act was to enact “comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries and improving sanitary condition of surface and underground waters.”<sup>28</sup> Based on the plain language of the statute, the federal regulations only applied to *interstate waterways*,<sup>29</sup> which are defined as “all surface waters of the state that cross or form a part of the border *between states*.”<sup>30</sup> Starting in the 1960s, the United States experienced national outcry regarding the state of American pollution regulation.<sup>31</sup> In response, President Nixon presented to Congress

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<sup>26</sup>. *See infra* Section III.

<sup>27</sup>. *History of the Clean Water Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/history-clean-water-act> (last updated June 22, 2023).

<sup>28</sup>. *Federal Water Pollution Control Act (Clean Water Act) of 1948*, FEDCENTER, <https://www.fedcenter.gov/Bookmarks/index.cfm?id=2431> (last updated July 31, 2017).

<sup>29</sup>. *Id.*

<sup>30</sup>. *Interstate Waters Definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/interstate-waters> (last visited Feb. 16, 2024).

<sup>31</sup>. *The Origins of EPA*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/history/origins-epa> (last updated June 5, 2023).

the EPA in 1970 to delegate environmental responsibility and oversight under a singular federal agency.<sup>32</sup>

Two years later, the Clean Water Act emerged from the amendment and expansion of the 1948 Federal Water Pollution Control Act.<sup>33</sup> The Clean Water Act “made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained.”<sup>34</sup> To regulate the discharge from point sources, the NPDES “is authorized to state governments by EPA to perform many permitting, administrative, and enforcement aspects of the program.”<sup>35</sup>

The EPA defines Animal Feeding Operations (“AFO”) as a facility where the following two conditions are met:

- (i) animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
- (ii) crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.<sup>36</sup>

For an AFO facility to be required to obtain an NPDES permit to discharge pollutants in waters of the United States, the facility needs to meet the definition of a CAFO.<sup>37</sup> In 2003, the Clean Water Act was amended to require all CAFOs to obtain

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<sup>32</sup>. *Summary of the Clean Water Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last updated June 22, 2023).

<sup>33</sup>. *Id.*

<sup>34</sup>. *Id.*

<sup>35</sup>. *Program Areas*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/npdes> (last updated October 19, 2023).

<sup>36</sup>. *Animal Feeding Operations*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/npdes/animal-feeding-operations-afos> (last updated August 15, 2023).

<sup>37</sup>. *Id.*

an NPDES permit.<sup>38</sup> As a result, the EPA classified CAFOs into three regulatory areas: Large CAFO, Medium CAFO, and Small CAFO.<sup>39</sup> The criteria to determine the CAFO category is dependent on the size threshold of the number of animals.<sup>40</sup> A CAFO will automatically be classified as large if it meets the requisite number of animals in the facility.<sup>41</sup> A medium CAFO falls within the designated size range and either “[h]as a manmade ditch or pipe that carries manure or wastewater to surface water, or where the animals come into contact with surface water that passes through the area where they’re confined.”<sup>42</sup> Small CAFOs are noted to be designated on a “case-by-case basis.”<sup>43</sup> It should be noted that, notwithstanding these definitions, the EPA will designate a facility as a medium-sized CAFO if a facility is found to significantly contribute to pollution.<sup>44</sup>

In *Waterkeeper Alliance, Inc. v. United States EPA*,<sup>45</sup> the Second Circuit Court of Appeals in 2005 agreed with Petitioners that the EPA “exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate that they have no potential to discharge.”<sup>46</sup> In 2008, the EPA revised its

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<sup>38</sup>. *Regulatory Definitions of Large CAFOs, Medium CAFOs, and Small CAFOs*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, [https://www.epa.gov/sites/default/files/2015-08/documents/sector\\_table.pdf](https://www.epa.gov/sites/default/files/2015-08/documents/sector_table.pdf) (last visited Oct. 21, 2023).

<sup>39</sup>. *Id.*

<sup>40</sup>. *Id.*

<sup>41</sup>. *Id.*

<sup>42</sup>. *Id.*

<sup>43</sup>. *Id.*

<sup>44</sup>. *Id.*

<sup>45</sup>. *Waterkeeper All., Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486, 490 (2nd Cir. 2005).

<sup>46</sup>. *Id.* at 504.

NPDES regulations in response to *Waterkeeper* to only require CAFOs that “discharge or propose to discharge” pollutants to seek a permit.<sup>47</sup>

In a national summary conducted by the EPA in 2022, there were a total of 21,539 CAFOs, while only 6,406 CAFOs have NPDES permits.<sup>48</sup> Accordingly, almost seventy percent of CAFOs do not have NPDES permits and cannot be properly regulated under the Clean Water Act and other federal regulations.<sup>49</sup> In addition, the Fair Agricultural Reporting Method (“FARM”) Act now also “exempt[s] [CAFOs] from reporting air emissions from animal waste.”<sup>50</sup>

In 2022, over fifty environmental advocacy organizations petitioned the EPA to increase its oversight regulations of large CAFOs to further improve and comply with the purpose of the Clean Water Act.<sup>51</sup> The petition noted that local governments have enforced more stringent CAFO regulations than state governments.<sup>52</sup> However, majority of states implement baseline federal CAFO regulations, along with other state regulations.<sup>53</sup>

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<sup>47</sup>. *Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision*, FEDERAL REGISTER (Nov. 20, 2008), <https://www.federalregister.gov/documents/2008/11/20/E8-26620/revised-national-pollutant-discharge-elimination-system-permit-regulation-and-effluent-limitations>.

<sup>48</sup>. *NPDES CAFO Permitting Status Report*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (May 16, 2023), <https://www.epa.gov/system/files/documents/2023-05/CAFO-Status-Report-2022.pdf>.

<sup>49</sup>. *Id.*

<sup>50</sup>. *Id.* at 94.

<sup>51</sup>. *Petition to Adopt a Rebuttable Presumption that Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act*, EARTHJUSTICE, (October 2022), [https://earthjustice.org/wp-content/uploads/cafo\\_presumptionpetition\\_withexhibits\\_oct2022.pdf](https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf).

<sup>52</sup>. *Id.* at 94.

<sup>53</sup>. *See infra* Section II(A)(2).



## 2. State Implementation of Federal CAFO Regulations

The EPA is authorized to approve states to administer the NPDES CAFO program under 40 CFR § 122.23.<sup>54</sup> Of the forty-four states that are authorized by the EPA to execute the NPDES CAFO program, thirty-two of those states administer the NPDES CAFO program combined with state permits or authorization regimes.<sup>55</sup> The EPA federal regulations require states to collect and report state CAFO information to the EPA.<sup>56</sup> However, there is no standard for collecting or reporting information to the EPA.<sup>57</sup> State-held agencies, theoretically, conduct their own inspections.<sup>58</sup> However, there is a “lack of consistent and complete data at the state level [that] raises serious questions about how comprehensively states are keeping tabs on the CAFOs within their own borders.”<sup>59</sup> When a state-held facility is noncompliant and in violation of CAFO regulations, the EPA at the federal level oversees monitoring and initiating enforcement actions.<sup>60</sup> However, federal enforcement actions against state-held CAFOS are seldomly initiated.<sup>60</sup> For example, in 2017, the EPA only conducted 125 inspections out of the 19,961 CAFOs in America.<sup>61</sup> The Natural

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<sup>54</sup> 40 CFR § 122.23.

<sup>55</sup> United States Environmental Protection Agency, *supra* note 9, at p. 5.

<sup>56</sup> D. Lee Miller, *CAFOs: What We Don't Know is Hurting Us*, THE NATURAL RESOURCES DEFENSE COUNCIL, at p. 5 (2019), <https://www.nrdc.org/sites/default/files/cafos-dont-know-hurting-us-report.pdf>.

<sup>57</sup> *Id.* at 10.

<sup>58</sup> *Id.* at 13.

<sup>59</sup> *Petition to Adopt a Rebuttable Presumption that Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act*, EARTHJUSTICE, at p. 90, (October 2022), [https://earthjustice.org/wp-content/uploads/cafo\\_presumptionpetition\\_withexhibits\\_oct2022.pdf](https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf).

<sup>60</sup> D. Lee Miller, *supra* note 56, at p. 10.

<sup>61</sup> *Id.*

Resources Defense Council (“NRDC”) therefore encourages states to “fill” the federal gap and attempt to regulate local CAFOs within their own state borders.<sup>62</sup>

### *3. State Regulations*

Attempting to “step into the federal gap,” regulations of CAFOs vary between the states,<sup>63</sup> as federal law only requires a permit for CAFOs that are “known to discharge waste.”<sup>64</sup> According to the Blueprint for Rural Policy, state level policy priorities when considering CAFO regulation include passing legal authorization to expand CAFOs, regulate CAFOs as a pollution industry, and ban inhumane farming practices.<sup>65</sup> Some state programs merely comply with federal regulation requirements, but other states have their own detailed regulations that are “broad in scope with detailed definitions and designation enforcement support.”<sup>66</sup>

Due to the lack of federal regulation regarding CAFOs, states have the authority to implement additional regulations on CAFOs.<sup>67</sup> Some states have

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<sup>62.</sup> *Petition to Adopt a Rebuttable Presumption that Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act*, EARTHJUSTICE, at p. 90, (October 2022), [https://earthjustice.org/wp-content/uploads/cafo\\_presumptionpetition\\_withexhibits\\_oct2022.pdf](https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf).

<sup>63.</sup> *See generally, State CAFO Guidelines*, SOCIALLY RESPONSIBLE AGRICULTURE PROJECT, <https://sraproject.org/state-cafo-guides/#section1> (outlining the laws regulating CAFOs in every state) (last visited Oct. 23, 2023).

<sup>64.</sup> *Regulate Concentrated Animal Feeding Operations (CAFOs)*, BLUEPRINT FOR RURAL POLICY, <https://rural.stateinnovation.org/rein-in-corporate-monopolies/regulate-concentrated-animal-feeding-operations-cafos/> (last visited Oct. 23, 2023).

<sup>65.</sup> *CAFO Regulations*, COUNTY HEALTH RANKINGS & ROADMAPS, [https://www.countyhealthrankings.org/take-action-to-improve-health/what-works-for-health/strategies/cafo-regulations#footnote\\_50](https://www.countyhealthrankings.org/take-action-to-improve-health/what-works-for-health/strategies/cafo-regulations#footnote_50) (last updated Aug. 9, 2023).

<sup>66.</sup> *Id.*

<sup>67.</sup> *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, *supra* note 9, at p. 3.

stringent state provisions.<sup>68</sup> For example, seven states require that CAFO facilities submit an odor management plan.<sup>69</sup> Alabama makes a specific provision for nuisance claims relating to CAFO odors.<sup>70</sup> According to the ASPCA, fifteen states have banned forms of “extreme confinement” for farmed animals residing in CAFOs.<sup>71</sup> However, three states (Arkansas, Massachusetts, and New Hampshire) implemented the federal NPDES permit system for CAFOs.<sup>72</sup> Some states very weakly monitor CAFOs.<sup>73</sup> For example, fifteen states did not have any data relating to CAFOs within EPA systems.<sup>74</sup> A potential reason for state regulation and monitoring issues of CAFOs can be attributed to state disagreement about conducting inspections and possibly the EPA’s limited scope on concentrating “its efforts on a few known miscreant facilities.”<sup>75</sup>

### ***B. California Legislation Challenged in the Supreme Court***

In 2018, California residents successfully increased regulation and oversight of CAFOs within their state borders. Proposition 12 banned “intensive cage confinement within the state, and . . . out-of-state products that come from animals in intensive

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<sup>68</sup>. *Menu of State Laws Regarding Odors Produced by Concentrated Animal Feeding Operations*, CENTER FOR DISEASE CONTROL AND PREVENTION, at p. 2 <https://www.cdc.gov/php/docs/menu-environmentalodors.pdf> (last visited Oct. 23, 2023).

<sup>69</sup>. *Id.* at 3.

<sup>70</sup>. *Id.*

<sup>71</sup>. *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, *supra* note 9, at p. 5. *See also, supra*, Section II.A.1.

<sup>72</sup>. *The EPA’s Failure to Track Factory Farms*, FOOD&WATERWATCH, at p. 1, (August 2013), [https://foodandwaterwatch.org/wp-content/uploads/2021/03/EPA-Factory-Farms-IB-Aug-2013\\_0.pdf](https://foodandwaterwatch.org/wp-content/uploads/2021/03/EPA-Factory-Farms-IB-Aug-2013_0.pdf).

<sup>73</sup>. Madhavi Kulkarni, *Out of Sight, But Not Out of Mind: Reevaluating the Role of Federalism in Adequately Regulating Concentrated Animal Feeding Operations*, 44 WM. & MARY ENVTL. L. AND POL’Y REV. 285, 301 (2019).

<sup>74</sup>. *Id.*

<sup>75</sup>. Hannah Truxel, *What You Need to Know about California Prop 12 and the Supreme Court Case*, THE HUMANE LEAGUE, <https://thehumaneleague.org/article/prop-12-supreme-court> (last updated Jul. 31, 2023).

confinement.”<sup>77</sup> Proposition 12 specifically defined minimum requirements regarding livestock confinement to provide more physical space for farmed animals in California.<sup>78</sup> The Act also prohibits “the in-state sale of products from caged animals raised out-of-state.”<sup>79</sup> Violation of Proposition 12 is considered a crime and a civil violation that can result in at least a \$1,000 fine or a prison sentence of up to 180 days.<sup>80</sup>

National Pork Producers Council and the American Farm Bureau Federation filed a claim for declaratory and injunctive relief against Karen Ross, the Secretary of the California Department of Food and Agriculture, alleging that Proposition 12 violated the Dormant Commerce Clause<sup>81</sup> of the Constitution of the United States.<sup>82</sup>

Specifically, Plaintiffs contended that the Commerce Clause was violated as Proposition 12 “imposes substantial burdens on interstate commerce.”<sup>83</sup> To support this contention, Plaintiffs further alleged that the requirements of Proposition 12 “interferes with the functioning of a \$26 billion a year interstate industry” while increasing operating, training, and veterinary costs.<sup>84</sup> The California Southern District Court considered a law in violation of the Commerce Clause if it “(1) [d]irectly discriminates against interstate commerce or (2) [d]irectly regulates extra-territorial

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<sup>77</sup>. *Id.*

<sup>78</sup>. *Id.*

<sup>79</sup>. *Id.*

<sup>80</sup>. *Id.*

<sup>81</sup>. *Art.I.S8.C3.7.1 Overview of Dormant Commerce Clause*, CONSTITUTIONANNOTATED (The Dormant Commerce Clause prohibits “state laws that unduly restrict interstate commerce even in the absence of congressional legislation.”) (last visited Nov 16, 2023).

<sup>82</sup>. *Nat’l Pork Producers Council v. Ross*, 456 F.Supp 3d 1201, 1204 (S.D.C. 2020) (ruling in the U.S. District Court Southern District of California that Petitioners failed to state a claim).

<sup>83</sup>. *Id.*

<sup>84</sup>. *Id.* at 1205.

conduct.”<sup>85</sup> The California Southern District Court in 2020 granted the Defendants’ motion to dismiss because the Plaintiffs did not properly prove a substantial burden on interstate commerce.<sup>86</sup>

In 2021, the Ninth Circuit Court of Appeals affirmed the California Southern District Court’s ruling, stating that the district court was correct in dismissing the Council’s complaint for failing to state a claim that could be remedied.<sup>87</sup> The Ninth Circuit addressed the claims of the Petitioners that Proposition 12 results in an “undue burden on interstate commerce” and “has an impermissible extraterritorial effect.”<sup>88</sup> Regarding the alleged undue burden on interstate commerce, the Ninth Circuit explained that Proposition 12 applies to entities within California and other states.<sup>89</sup> However, Proposition 12 “merely impose[s] a higher cost on production, rather than affect interstate commerce.”<sup>90</sup> Citing *Association des Eleveurs de Canards et d’Poes du Quebec v. Harris*, the Court emphasized that a statute is not invalid just because it has some impact on commerce.<sup>91</sup>

The Ninth Circuit subsequently disagreed with Petitioners’ claim that Proposition 12 “impermissibly regulates extraterritorial conduct outside of California’s borders by compelling out-of-state producers to change their operations

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<sup>85.</sup> *Id.* (quoting *Association des Eleveurs de Canards et d’Poes du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013)).

<sup>86.</sup> *Id.* at 1210.

<sup>87.</sup> *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1025 (9th Cir. 2021) (The Ninth Circuit Court of Appeals upheld the ruling from the Southern District Court).

<sup>88.</sup> *Id.* at 1026-1027.

<sup>89.</sup> *Id.* at 1029.

<sup>90.</sup> *Id.*

<sup>91.</sup> *Id.* (citing *Association des Eleveurs de Canards et d’Poes du Quebec*, 729 F.3d at 948).

to meet California standards.”<sup>92</sup> The Ninth Circuit reasoned that a state law is not unconstitutional if it requires out-of-state producers “to meet burdensome requirements in order to sell their products in the state without violating the dormant Commerce Clause.”<sup>93</sup>

In May 2023, the United States Supreme Court affirmed the Ninth Circuit District Court’s holding and stated, “[c]ompanies that choose to sell products in various States must normally comply with the laws of those various states.”<sup>94</sup> The Court rejected Petitioner’s claim that Proposition 12 violates an “almost per se” rule because out-of-state pork producers who want to sell in California will be burdened with “substantial new costs.”<sup>95</sup> In *Baldwin v. G.A.F Seeling, Incorporated*, a New York law that prohibited out-of-state dairy producers from selling milk products in New York for less than the minimum price discriminated against out-of-state producers while benefitting New York producers.<sup>96</sup> However, Proposition 12 “applied evenly between out-of-state producers and in-state producers.”<sup>97</sup>

Petitioners relied on *Pike v. Bruce Church* and asserted that under Pike’s balancing test, a law may be prevented if the law’s excessive burdens outweigh a local

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<sup>92</sup>. *Id.* at 1029.

<sup>93</sup>. Nat’l Pork Producers Council v. Ross, 143 S.Ct 1142, 1150 (2023) (The Supreme Court further affirmed the ruling from the Ninth Circuit and the Southern District of California Court).

<sup>94</sup>. *Id.* at 1154.’

<sup>95</sup>. *Id.*

<sup>96</sup>. Kristine A. Tidgren, *California’s Proposition 12 Survives Supreme Court Challenge*, IOWA STATE UNIVERSITY CENTER FOR AGRICULTURAL LAW AND TAXATION AG DOCKET BLOG, (May 19, 2023), <https://www.calt.iastate.edu/blogpost/californias-proposition-12-survives-supreme-court-challenge#:~:text=Violating%20Proposition%2012%20is%20a,who%20raise%20and%20process%20pi gs.>

<sup>97</sup>. Nat’l Pork Producers Council, 143 S.Ct. 1172 (citing *Pike v. Bruce Church*, 397 U.S. 137, (1970)).

benefit.<sup>98</sup> The Court explained that in *Minnesota v. Clover Leaf Creamery Company*, using *Pike’s* balancing test, the law’s effects did not indicate an advantage for in-state firms versus a disadvantage for out-of-state firms.<sup>99</sup> The Supreme Court stated that “petitioners’ claim falls well outside *Pike’s* heartland.”<sup>100</sup> The Court stated that being asked to use *Pike* in this case would be similar to being asked to decide “whether a particular line is longer than a particular rock is heavy.”<sup>101</sup>

Thus, the Court affirmed the Ninth Circuit’s ruling that the Petitioner failed to state a claim as a matter of law and the case was properly dismissed.<sup>102</sup>

### ***C. Introduction of the EATS Act***

In 2018, the House of Representatives voted against a Farm Bill amendment.<sup>103</sup> The Amendment contained a provision to “preempt all meaningful state farm animal welfare laws,”<sup>104</sup> nullifying “hundreds of state laws to restrict farm animal confinement. . . [a] wide range of other concerns. . . in such domains as food safety, environmental protection.”<sup>105</sup> In 2021, the EATS Act was first introduced after the passage of Proposition 12 and had similar goals and impacts to the King

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<sup>98.</sup> *Id.* at 1158.

<sup>99.</sup> *Id.* at 1159.

<sup>100.</sup> *Id.* at 1160 (quoting *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1998)) (Scalia, J., concurring in judgement.)

<sup>101.</sup> *Id.* at 1150.

<sup>102.</sup> Michael Markarian, *The King Amendment is Dead-For Now-With House Failure of Farm Bill*, SAVING EARTH ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/explore/savingearth/the-king-amendment-is-dead-for-now-with-house-failure-of-farm-bill> (last visited Oct. 23, 2023).

<sup>103.</sup> *Id.*

<sup>104.</sup> Michael Markarian, *supra* note 102.

<sup>105.</sup> Hannah Truxel, *What is the Ending Agricultural Trade Suppression (EATS) Act? How Does it Harm Animals?*, THE HUMANE LEAGUE, (Jun. 27, 2023), <https://thehumaneleague.org/article/eats-act#:~:text=The%202021%20version%20of%20the%20EATS%20Act%20did%20not%20experience,uphold%20Prop%2012%20changed%20everything.>

Amendment.<sup>106</sup> However, the EATS Act of 2021 did not advance in Congress.<sup>107</sup> In June 2023, a month after the Supreme Court’s decision in *National Pork Producers Council v. Ross*, the EATS Act was reintroduced to Congress.<sup>108</sup>

As noted in the Harvard Law Legislative Analysis and the Agricultural Marketing Act of 1946, “agricultural products” include “any and all products raised or produced on farms and any processed or manufactured product thereof.”<sup>109</sup> Subsection 2(b) of the EATS Act prohibits a state or local government from imposing “a standard or condition on the preharvest production of any agricultural products sold or offered for the sale in interstate commerce.”<sup>110</sup> The Act fails to define the scope of “preharvest production.”<sup>63111</sup> The EATS Act is not aimed to implement new federal regulations of agricultural products, however, it would “set federal regulations as a new ceiling.”<sup>112</sup> Meaning, additional regulations implemented by state and local authorities, relating to pre-harvest production could be in violation of the EATS Act.<sup>113</sup>

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<sup>106.</sup> *Id.*

<sup>107.</sup> Marlena Williams, *What the EATS Act is, and Why it Matters for Animals*, SENTIENT MEDIA, (Jun. 27, 2023), <https://sentientmedia.org/eats-act-farm-bill/>.

<sup>108.</sup> *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act”* BROOKS MCCORMICK JR. ANIMAL LAW & POLICY PROGRAM 7 (July 26, 2023), <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf>.

<sup>109.</sup> S. 2019/H.R. § 4417.

<sup>110.</sup> *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act”*, *supra* note 109, at p. 20.

<sup>111.</sup> *Id.* at 23.

<sup>112.</sup> *Id.*

<sup>113.</sup> *Id.*



Sponsors of the bill argue that the bill’s purpose is to “benefit the economies of farming states, like Iowa, Texas, and Arkansas.”<sup>114</sup> As of October 18<sup>th</sup>, 2023, 181 House of Representatives members oppose the EATS Act.<sup>115</sup> In a letter signed by the Congressional opponents of the EATS Act, they state, “[w]e believe that Congress should not usurp the power of states to regulate food and agricultural products in a manner that is responsive to local contexts.”<sup>116</sup> If the EATS Act were to pass in Congress, the impacts of the potential law will impact state rights on regulating and monitoring impacts to the environment, consumer safety, and animal welfare.<sup>117</sup>

### III. ANALYSIS: THE EATS ACT THREATENS STATES, THE ENVIRONMENT, CONSUMERS, AND ANIMAL WELFARE

#### a. *Threatening State Rights*

Over 1,000 state laws and regulations are at risk of being invalidated if the EATS Act were to be passed.<sup>118</sup> According to the Humane Society Legislative Fund, “the broad scope of the legislation places many state laws at risk.”<sup>119</sup> In a report by

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<sup>114</sup> Björn Ólafsson, *211 Members of Congress Now Oppose the EATS Act*, SENTIENT MEDIA, (Oct. 15, 2023) <https://sentientmedia.org/eats-act-opposition/>.

<sup>115</sup> *Id.*

<sup>116</sup> See *infra* section III.

<sup>117</sup> *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act”* BROOKS MCCORMICK JR. ANIMAL LAW & POLICY PROGRAM (July 26, 2023), <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf>. See *generally*, Appendix at 50.

<sup>118</sup> Amanda Donchatz, *Pennsylvania Pork Producer Challenges Controversial Agriculture Legislation in Congress*, QUALITY ASSURANCE & FOOD SAFETY, (Nov. 9, 2023), <https://www.qualityassurancemag.com/news/pennsylvania-pork-producer-challenges-controversial-agriculture-legislation-in-congress/>.

<sup>119</sup> See, *supra* note 20.

Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School,<sup>120</sup> the EATS Act could nullify thousands of state laws that are aimed to promote and protect public health and safety.<sup>121</sup> The EATS Act raises potential constitutional violations and infringes on state’s sovereignty and policing power to enact legislation.<sup>122</sup> The Act specifically violates the Anti-Commandeering Doctrine of the Tenth Amendment.<sup>122</sup>

The Tenth Amendment of the United States Constitution states, “[t]he Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>123</sup> While the Anti-Commandeering Doctrine is not directly expressed in the U.S. Constitution, the United States Supreme Court has ruled that the federal government may not order states to enact certain laws or enforce federal laws.<sup>124</sup>

In *New York v. United States*, the Supreme Court weighed in on the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act, which required that each state be reasonable for the disposal of low-level radioactive waste formed within the state.<sup>125</sup> The Court noted that while under the Commerce Clause,

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<sup>120</sup> *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act”*, *supra* note 20, at p. 48.

<sup>121</sup> *Id.* at 49.

<sup>122</sup> *Id.* at 24. *See, Amdt10.4.2 Anti-Commandeering Doctrine*, CONSTITUTIONANNOTATED, [https://constitution.congress.gov/browse/essay/amdt10-4-2/ALDE\\_00013627/](https://constitution.congress.gov/browse/essay/amdt10-4-2/ALDE_00013627/) (last visited Nov. 21, 2023) (the Anti-Commandeering Doctrine holds that “Congress may not commandeer state regulatory processes by ordering states to enact or administer a federal regulatory program.”).

<sup>123</sup> U.S. Const. amend. X.

<sup>124</sup> *New York*, 505 U.S. at 151.

<sup>125</sup> *Id.* at 156.

Congress can “regulate publishers engaged in interstate commerce” but is therefore constrained by the Tenth Amendment.<sup>126</sup> The Supreme Court specifically questioned whether the incentive provision of the Low-Level Radioactive Waste Policy Amendments Act stripped away the separation of powers between state and federal law-making authority.<sup>127</sup> Finding the Act’s incentive provision unconstitutional, the Supreme Court noted that “Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”<sup>128</sup>

The EATS Act would compel states to enact and enforce the regulatory program of “a standard or condition on the preharvest production of any agricultural products sold or offered for sale in interstate commerce.”<sup>129</sup> Section 2(C) of the EATS Act specifies that if there are no laws regarding a specific agricultural product, the non-existence of a specific state regulation becomes “the new functional regulatory ceiling for that product nationwide . . . states could not impose any preharvest regulation on agricultural products originating outside their borders that fall within the scope of a federal regulatory void.”<sup>130</sup> As suggested by the Harvard analysis, states

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<sup>126</sup> *Id.* at 159.

<sup>127</sup> *Id.* at 170 (quoting *Hodel v. VA Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, (1981)).

<sup>128</sup> Ending Agricultural Trade Suppression Act, S. 2019, 118th Cong. (2023).

<sup>129</sup> *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act”* BROOKS MCCORMICK JR. ANIMAL LAW & POLICY PROGRAM 23 (July 26, 2023), <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf>.

<sup>130</sup> *Id.* at 24.

would be compelled to adopt a “lowest common denominator regulation” for a preharvest agricultural product.<sup>131</sup>

State laws providing more stringent requirements regarding CAFO regulation are at risk of being invalidated.<sup>132</sup> Specifically, Proposition 12 and the general ban of cruelly-produced farmed animal agricultural products are at risk of being voided.<sup>133</sup> Given the broad scope of the term “preharvest production,” the EATS Act could strip away state authority to regulate agricultural products “so long as those conditions relate to preharvest production.”<sup>134</sup> If states are stripped of their ability to oversee CAFOs and their production of product, then CAFOs could be subject to solely federal oversight by the EPA.<sup>135</sup>

b. *Threatening the Environment*

i. Water Pollution

As of February 2022, large CAFOs are the biggest contributor to United States water pollution.<sup>136</sup> According to the EPA, CAFOs have polluted around 145,000 miles of waterways and one million acres of lakes, to the point where these water sources

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<sup>131</sup>. *The EATS Act: A Dangerous Step Backwards for Farmed Animal Protection*, LEWIS & CLARK LAW SCHOOL, (Oct. 2, 2023), <https://law.lclark.edu/live/news/51855-the-eats-act-a-dangerous-step-backwards-for-farmed>.

<sup>132</sup>. *Id.*

<sup>133</sup>. Hannah Truxel, *What is the Ending Agricultural Trade Suppression (EATS) Act? How Does it Harm Animals?*, THE HUMANE LEAGUE, (Jun. 27, 2023), <https://thehumaneleague.org/article/eats-act#:~:text=The%202021%20version%20of%20the%20EATS%20Act%20did%20not%20experience,uphold%20Prop%2012%20changed%20everything>.

<sup>134</sup>. *Id.* See *supra*, Section II.B.1

<sup>135</sup>. Gina Goldberg, *Large-scale Factory Farms Have Become the Biggest Source of Water pollution in the U.S.*, PUBLIC INTEREST RESEARCH GROUP (Feb. 28, 2022), <https://pirg.org/articles/large-scale-factory-farms-have-become-the-biggest-source-of-water-pollution-in-the-u-s/>.

<sup>136</sup>. *Corporate Agribusiness and the Fouling of America’s Waterways*, ENVIRONMENTAMERICA (Jun. 29, 2016), <https://environmentamerica.org/center/resources/corporate-agribusiness-and-the-fouling-of-americas-waterways/>.

are no longer viable for wildlife to flourish and for human consumption.<sup>137</sup> Water pollution from CAFOs can often occur from stormwater mixing with manure and flowing into drains that lead to water sources.<sup>138</sup> Farmed animals living in CAFOs are estimated to produce 885 billion pounds of manure each year.<sup>139</sup> According to a study conducted by a U.S. Government Accountability Office, a large hog CAFO has the ability to produce amounts of manure that is one and a half times the amount of human waste produced in the city of Philadelphia.<sup>140</sup> Water pollution from CAFOs can often occur from stormwater mixing with manure and flowing into drains that thus lead to water sources.<sup>141</sup>

In 2014, agribusiness facilities in more than thirty states have reported dumping 250,804,935 pounds of toxic pollutants into United States rivers.<sup>142</sup> In August 2023, the EPA denied two petitions asking for the revision of the Clean Water Act to improve the CAFO permit system, apply more pollution-based permits to CAFO facilities, and a general increase in regulation.<sup>143</sup> As a response, the EPA

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<sup>137.</sup> *Id.*

<sup>138.</sup> *Factory Farming: A Recipe for Disaster for Animals & Our Planet*, ASPCA, <https://www.aspc.org/protecting-farm-animals/factory-farming-environment> (last visited Nov. 16, 2023).

<sup>139.</sup> *Concentrated Animal Feeding Operations*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, at p. 19 (Sep. 2008), <https://www.gao.gov/assets/gao-08-944.pdf>.

<sup>140.</sup> *Id.* at 9.

<sup>141.</sup> *Id.* at 19.

<sup>142.</sup> *EPA Denies Factory Farm Water Pollution*, FOOD&WATERWATCH, (Aug. 2015), <https://www.foodandwaterwatch.org/2023/08/15/epa-denies-factory-farm-water-pollution-petition/>

<sup>143.</sup> Kathleen Garvey, *EPA's Disappointing Delay in Addressing Factory Farm Pollution*, ENVIRONMENTAL LAW & POLICY CENTER BLOG, (Aug. 22, 2023), <https://elpc.org/blog/epas-disappointing-delay-in-addressing-factory-farm-pollution/>.

claimed it will create a “federal advisory subcommittee”<sup>144</sup> and finish its Effluent Guidelines Program Plan regarding collecting more information about CAFOs.<sup>145</sup>

Due to the EPA lacking sufficient monitoring of point source pollutants in U.S. waterways,<sup>146</sup> some states have enacted stringent laws regarding water pollution from CAFOs to protect the environment and state citizens.<sup>147</sup> States, such as Oklahoma, enacted a law to specifically decrease contamination of surface waters.<sup>148</sup> Missouri specifically notes its “stringent state technical standards related to the handling and land application of animal manure. . .”<sup>149</sup> Missouri additionally included a statutory provision that allows for a public nuisance provision if discharged contaminated water contributes to odor.<sup>150</sup> Georgia strictly requires an additional land application system permit that prohibits the discharge of CAFO waste to surface water.<sup>151</sup> Similarly, Oklahoma has enacted a law to specifically decrease contamination of surface waters through strict regulation of carcass disposal.<sup>152</sup> Courts have recently ruled against state organizations, demanding “more diligent

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<sup>144</sup>. *Animal Feeding Operations- Regulations, Guidance, and Studies*, U.S., EPA, <https://www.epa.gov/npdes/animal-feeding-operations-regulations-guidance-and-studies> (last updated Aug. 15, 2023) (The EPA announced the Effluent Guidelines Program in January 2023 which consists of undertaking a detailed study of CAFOs in order to make a decision to revise the effluent limitation guidelines of CAFOs).

<sup>145</sup>. *See infra* Section II.A.1.

<sup>146</sup>. Madhavi Kulkarni, *Out of Sight, But Not Out of Mind: Reevaluating the Role of Federalism in Adequately Regulating Concentrated Animal Feeding Operations*, 44 WM. & MARY ENVTL. L. AND POL’Y REV. 285, 292 (2019) (arguing the failure of state and federal laws regarding CAFO regulation).

<sup>147</sup>. OKLA. ADMIN. CODE § 35:17-3-11(a).

<sup>148</sup>. *Concentrated Animal Feeding Operation (CAFO)*, MISSOURI DEPARTMENT OF NATURAL RESOURCES, <https://dnr.mo.gov/water/business-industry-other-entities/permits-certification-engineering-fees/concentrated-animal-feeding-operation-cafo> (last visited Nov. 16, 2023).

<sup>149</sup>. MO. CODE REGS. ANN. TIT. 701, § 059.

<sup>150</sup>. *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, *supra* note 9, at p. 13.

<sup>151</sup>. *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, *supra* note 9, at p. 13.

<sup>152</sup>. OKLA. ADMIN. CODE § 35:17-4-13.

monitoring of water discharges.”<sup>153</sup> Similarly, in 2021, Idaho must now comply with monitoring and reporting discharges into waters.<sup>154</sup>

However, if the EATS Act were to be passed, stringent state regulations attempting to combat water pollution from CAFOs could be nullified.<sup>155</sup> As the Act targets “state-specific regulations on livestock production,” state-based laws regarding the prevention of water pollution from CAFOs would be invalidated.<sup>156</sup>

## ii. Gas and Emissions

According to Farm Sanctuary, CAFOs account for sixty-six percent of greenhouse gas emissions in the United States.<sup>157</sup> In fact, manure from factory farms can release an estimated four hundred gases into our air.<sup>158</sup> Greenhouse gases, such as methane, have a “high climate-warming impact.”<sup>159</sup> These gases are produced from manure from the farmed animals and are released into the atmosphere.<sup>160</sup>

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<sup>153</sup>. *EPA Must Force Idaho Factory Farms to Monitor and Report Water Pollution: Ninth Circuit*, FOOD&WATERWATCH, (Sep.16,2021), <https://www.foodandwaterwatch.org/2021/09/16/epa-must-force-idaho-factory-farms-to-monitor-and-report-water-pollution-ninth-circuit/>. See *Food & Water Watch, Inc., at al v. U.S. EPA*, 20 F.4th 506, 509 (2021).

<sup>154</sup>. See generally, *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act”* BROOKS MCCORMICK JR. ANIMAL LAW & POLICY PROGRAM (July 26, 2023). <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf>.

<sup>155</sup>. Kevin Hardy, *Congress takes Aim at State Animal Welfare Laws*, NEW HAMPSHIRE BULLETIN (Oct. 2, 2023), <https://newhampshirebulletin.com/2023/10/02/congress-takes-aim-at-state-animal-welfare-laws/>.

<sup>156</sup>. Infographic of Animal Agriculture & the Environment by the Numbers, in *The Planet in Crisis*, FARM SANCTUARY, <https://www.farmsanctuary.org/issue/environment/> (last visited Nov. 16, 2023).

<sup>157</sup>. *How Factory Farming Creates Air Pollution*, ONE GREEN PLANET, (2021), <https://www.onegreenplanet.org/environment/how-factory-farming-creates-air-pollution/>.

<sup>158</sup>. *Animals are Dying-Help Us Catch This Climate Culprit*, WORLD ANIMAL PROTECTION, <https://www.worldanimalprotection.us/climate-week-2023#:~:text=Methane%3A%20Methane%20is%20a%20greenhouse,of%20US%20greenhouse%20gas%20emissions> (last visited Nov. 16, 2023).

<sup>159</sup>. Austin Dip, *Why are CAFOs Bad for the Environment?* ACTION FOR THE CLIMATE EMERGENCY (Aug. 6, 2021), <https://acespace.org/2021/08/06/why-are-cafos-bad-for-the-environment/>

<sup>160</sup>. *Id.*

Greenhouse gas emissions, like methane and nitrous oxide are reportedly twenty-three to thirty-three times stronger than carbon dioxide.<sup>161</sup> According to the U.S. Energy Information Administration, an increase in greenhouse gases causes an increase in the average surface temperature of the earth over time.<sup>162</sup>

However, the EPA lacks a federal standard to measure CAFO air pollution.<sup>163</sup> Thus, multiple states have enacted their own laws to regulate gas and emissions from CAFOs.<sup>164</sup> For example, Minnesota requires permit applications to include Air Emissions Plans.<sup>165</sup>

In addition to air quality, CAFOs also produce environmental odors.<sup>166</sup> There is currently no federal law or regulation specifically addressing CAFO-related odors.<sup>167</sup> However, nine states have enacted legislation to combat CAFO odor in their communities.<sup>168</sup>

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<sup>161.</sup> *Energy and the Environment Explained*, ENERGY INFORMATION ADMINISTRATION, <https://www.eia.gov/energyexplained/energy-and-the-environment/greenhouse-gases-and-the-climate.php> (last updated Dec. 21, 2022).

<sup>162.</sup> Madison McVan, *18 Years and Counting: EPA Still Has No Method for Measuring CAFO Air Pollution*, INVESTIGATE MIDWEST (Apr. 20, 2023), <https://investigatamidwest.org/2023/04/20/18-years-and-counting-epa-still-has-no-method-for-measuring-cafo-air-pollution/>.

<sup>163.</sup> *Raising a Stink: Air Emissions from Factory Farms*, ENVIRONMENTAL INTEGRITY, [https://environmentalintegrity.org/pdf/publications/CAFOAirEmissions\\_white\\_paper.pdf](https://environmentalintegrity.org/pdf/publications/CAFOAirEmissions_white_paper.pdf) at p. 4 (last visited Nov. 16, 2023).

<sup>164.</sup> *Id.* at 5.

<sup>165.</sup> *Menu of State Laws Regarding Odors Produced by Concentrated Animal Feeding Operations*, CENTER FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/phlp/docs/menu-environmentalodors.pdf> (last visited Oct. 23, 2023).

<sup>166.</sup> *Id.*

<sup>167.</sup> *Id.*

<sup>168.</sup> *Coalition Launches Urging Congress to Oppose the EATS Act*, FARM ACTION FUND, (Aug. 17, 2023), <https://farmactionfund.us/2023/08/17/coalition-launches-urging-congress-to-oppose-the-eats-act/#:~:text=If%20passed%2C%20the%20EATS%20Act,to%20maintain%20the%20status%20quo.%E2%80%9D>.



The EATS Act would cause the U.S. to be even more susceptible to the impacts of climate change.<sup>169</sup> State laws taking steps to incorporate stringent requirements and regulations tackling air pollution and odor from CAFOs would be nullified.<sup>170</sup> Given that CAFOs would be considered a facility partaking in “preharvest production”<sup>171</sup> of meat products, states would be restricted from legislating.<sup>172</sup> Thus, leaving states subject to a gap in regulation of state produced agricultural products.<sup>173</sup>

*c. Threatening Consumer Safety*

According to the Centers for Disease Control and Prevention, zoonotic diseases are diseases that spread from animals to humans and make up around sixty percent of “infectious diseases”<sup>174</sup> Farmed animals living in CAFOs can become immunologically suppressed, due to stress in their environments.<sup>175</sup>

Researchers have found that the typical CAFO environment consists of “animal overcrowding, enclosed facilities, illness-inducing grain feed, and unsanitary conditions.”<sup>176</sup> Animals are then not able to properly fight off infections. Then, when

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<sup>169.</sup> *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act,”* BROOKS MCCORMICK JR. ANIMAL LAW & POLICY PROGRAM, (July 26, 2023) <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf>. See generally, Appendix at 50.

<sup>170.</sup> Ending Agricultural Trade Suppression Act, S. 2019, 118<sup>th</sup> Cong. (2023).

<sup>171.</sup> *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act,”* supra note 170, at p. 25.

<sup>172.</sup> *Id.* See infra Section II.C

<sup>173.</sup> Kelley Lee, *Introduction: The Increasing Threat From Zoonotic Diseases*, COUNCIL ON FOREIGN RELATIONS, (Feb. 13, 2023), <https://www.cfr.org/report/global-governance-emerging-zoonotic-diseases#:~:text=An%20estimated%2060%20percent%20of,2.7%20million%20human%20deaths%20worldwide.>

<sup>174.</sup> *Factory Farms are the Perfect Breeding Grounds for Zoonotic Diseases*, SENTIENT MEDIA (Dec. 2, 2020), <https://sentientmedia.org/zoonotic-diseases/>.

<sup>175.</sup> Omar Khodor, *How Factory Farming Could Cause the Next COVID-19*, THE REGULATORY REVIEW, (Oct. 12, 2022), <https://www.theregreview.org/2022/10/12/khodor-how-factory-farming-could-cause-the-next-covid-19/>.

<sup>176.</sup> *Id.*

humans consume animal products containing harmful pathogens and diseases, they may become ill.<sup>177</sup> In fact, the Severe Respiratory Syndrome (“SARS”) and Swine Flu (“H1N1”) arose due to the overproduction of farmed animals in the United States.<sup>178</sup> For example, pork products have caused around 787,000 cases a year of “food-borne illnesses.”<sup>179</sup>

The U.S. Department of Agriculture in October 2023 reported the return of avian flu (bird flu) in the United States.<sup>180</sup> Referring to the amount of antibiotics being injected into animals living in CAFOs, causing an immense risk to human health when consumed<sup>181</sup>, National Resources Defense Council attorney Avinash Kar stated that “the American meat industry continues to have a drug problem and the clock is ticking to solve it.”<sup>182</sup> According to researchers, there is a significant lack of federal oversight regarding zoonotic diseases spread by animals.<sup>183</sup> Therefore, many states have enacted their own set of laws to prevent bird flu and swine flu, by requiring laws such as “requiring pre-entry veterinary inspection, permits,

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<sup>177.</sup> *Food Safety*, WORLD HEALTH ORGANIZATION, (May 19, 2022), <https://www.who.int/news-room/fact-sheets/detail/food-safety>.

<sup>178.</sup> Michael Greger, Primary Pandemic Prevention, AM J LIFESTYLE MED. (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8504329/>.

<sup>179.</sup> Crystal Heath, *Opinion: The EATS Act Threatens Animal Welfare and Public Health While Protecting Corporate Profits*, MODERN FARMER, (Sep. 19, 2023), <https://modernfarmer.com/2023/09/opinion-the-eats-act/>.

<sup>180.</sup> *Deadly Bird Flu Returns to U.S. Turkey Industry, as Thanksgiving Slaughter Looms for 46M Birds*, FARM SANCTUARY, (Oct. 13, 2023), <https://www.farmsanctuary.org/news-stories/bird-flu-us-turkey-industry/#:~:text=Yet%2C%20bird%20flu%20offers%20an,enormous%20size%20of%20commercial%20flocks.>

<sup>181.</sup> Tia Schwab, *Unhealthy Conditions for Farm Animals Are—No Surprise—Bad for Humans, Too*, STONE PIER PRESS, <https://stonepierpress.org/goodfoodnews/factory-farms-public-health> (last visited Nov 17, 2023).

<sup>182.</sup> *Id.*

<sup>183.</sup> *Gaps in the Animal Health Framework*, at p. 119, (THE NATIONAL ACADEMIES PRESS) (2005).

quarantines, and testing regimes for live (preharvest) poultry imported from other states.”<sup>184</sup>

Not only do CAFOs pose immense risk to the food humans consume, but also to the water humans drink and the air they breathe.<sup>185</sup> Animal waste from CAFOs contain traces of antibiotic drugs, bacteria, disease, and chemicals.<sup>186</sup> The California State Board reports that “farming communities” can encounter chemicals in their drinking water linked to certain types of cancers.<sup>187</sup> Additionally, CAFO waste contaminating water can cause “blue-baby syndrome,” in which the unborn fetus does not receive enough oxygen.<sup>188</sup> In *Board of Water Works Trustees of the City of Des Moines, Iowa v. SAC County Board of Supervisors*<sup>189</sup>, Des Moines Water Works filed a lawsuit claiming that the nitrite concentrations from the Raccoon River exceeded the standard for drinking water.<sup>190</sup> Specifically, water was being contaminated through “drainage tiles used to make farmland more productive” that kept “nitrates from entering streams and rivers.”<sup>191</sup> The claim was dismissed by the Supreme Court

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<sup>184</sup>. *Legislative Analysis of S.2019/H.R. 4417: The “Ending Agricultural Trade Suppression Act”* BROOKS MCCORMICK JR. ANIMAL LAW & POLICY PROGRAM, (July 26, 2023), <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf>. See generally, Appendix at 50.

<sup>185</sup>. Lisa Held, *Congress Could Roll Back Pesticide Protections in the Farm Bill*, CIVIL EATS, (Nov. 7, 2023), <https://civileats.com/2023/11/07/congress-may-roll-back-pesticide-protections-farm-bill/>.

<sup>186</sup>. Daniel Ross, *Factory Farms Pollute the Environment and Poison Drinking Water*, TRUTHOUT, (Jan 29, 2019), <https://truthout.org/articles/factory-farms-pollute-the-environment-and-poison-drinking-water/>.

<sup>187</sup>. *How Industrial Agriculture Affects Our Water*, FOODPRINT, <https://foodprint.org/issues/how-industrial-agriculture->.

<sup>188</sup>. Carrie Hribar, *supra* note 5, at p. 4.

<sup>189</sup>. *Bd. Of Water Works Trs. of City of Des Moines v. Sac Cnty. Bd. Of Supervisors*, 890 N.W.2d 50, 52 (Okla. 2017).

<sup>190</sup>. *Id.* at 53.

<sup>191</sup>. MacKenzie Elmer, *Des Moines Water Works Won’t Appeal Lawsuit*, DES MOINES REGISTER, <https://www.desmoinesregister.com/story/news/2017/04/11/des-moines-water-works-not-appeal-lawsuit/100321222/> (last updated Apr. 11, 2017).

of Iowa reasoning that the state’s water quality issues and concerns were to be resolved by the state legislature.<sup>192</sup>

Due to the air pollution generated by CAFOs,<sup>193</sup> the EPA estimates that “nearly three-quarters of the country’s ammonia pollution comes from livestock facilities.”<sup>194</sup> Ammonia, a pollutant, causes “chemical burns” to the “respiratory tract, skin, and eyes, severe cough, and chronic lung disease and at high doses can be toxic.”<sup>195</sup> In a statement before the House of Representatives, The director of National Resources and Environment stated, “[the EPA] had received 26 comment letters from state and local emergency response agencies supporting the exemption for ammonia from poultry operations.”<sup>196</sup> Federal laws, such as the Clean Air Act (CAA),<sup>197</sup> are designed to “protect public health” against dangerous pollutants.<sup>198</sup> However, the EPA takes little to no enforcement action of CAFOs under the CAA.<sup>199</sup>

These “gaps” of inadequate federal CAFO regulation give states the authority, through the Tenth Amendment,<sup>200</sup> to provide more protective measures than federal regulations by “setting strict standards” on qualities of air, water, and the food

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<sup>192</sup>. See *infra* Section II.b(ii).

<sup>193</sup>. Eleanor Hurst, *Hidden in the Air: Factory Farming and Air Pollution*, NEW ROOTS INSTITUTE, (Feb. 17, 2022), <https://ffacoalition.org/articles/hidden-in-the-air-factory-farming-and-air-pollution/>.

<sup>194</sup>. *Id.*

<sup>195</sup>. *Id.*

<sup>196</sup>. *Concentrated Animal Feeding Operations*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, at p.40, (Sep. 2008), <https://www.gao.gov/assets/gao-08-944.pdf>.

<sup>197</sup>. 42 U.S.C. §7401 et seq. (1970).

<sup>198</sup>. *Summary of the Clean Air Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-air-act> (last updated Sep. 6, 2023).

<sup>199</sup>. J. Nicholas Hoover, *Can’t You Smell that Smell? Clean Air Act Fixes for Factory Farm Air Pollution*, SJALP. 2, 12 (explaining the lack of federal regulation of the CAA).

<sup>200</sup>. See *infra* Section III.(a).

humans consume.<sup>201</sup> For example, in 2021, Texas enacted a law that requires specific testing of milk to protect human consumption from tuberculosis and brucellosis.<sup>202</sup> However, if the EATS Act were passed, any state law regarding water quality, air quality, or food quality concerns stemming from “preharvest production,”<sup>203</sup> such as CAFOs, would be invalidated.<sup>204</sup> Thus, states are left subjected to weak federal regulation of CAFOs.<sup>205</sup>

#### *d. Threatening Animal Welfare*

There are no current federal laws that regulate or monitor the conditions of farmed animals residing in CAFOs.<sup>206</sup> The Federal Animal Welfare Act exempts farmed animals, only applying to companion animals.<sup>207</sup> Animals living in CAFOs endure not only extreme confinement but often brutal mutilations, genetic manipulation, and inhumane treatment.<sup>208</sup> Due to the extreme confinement gestation crates cause, pneumonia is common among pigs living in CAFOs.<sup>209</sup> This could also be attributed to 92.6% of pigs living in extreme confinement experiencing stress.<sup>210</sup>

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<sup>201.</sup> Sean Hect, “*States’ Rights*” and *Environmental Law: California on the Front Lines*, LEGALPLANET BERKELEY LAW, (Mar. 6, 2017), <https://legal-planet.org/2017/03/06/states-rights-and-environmental-law-california-on-the-front-lines/>.

<sup>202.</sup> 25 TEX. ADMIN. CODE § 217.29.

<sup>203.</sup> *See* Ending Agricultural Trade Suppression Act, S. 2019, 118th Cong. (2023).

<sup>204.</sup> *See supra* Section III.(a).

<sup>205.</sup> *See supra* Section II.A.1.

<sup>206.</sup> *2018-2020: Farmed Animals & the Law*, ANIMAL LEGAL DEFENSE FUND, <https://aldf.org/article/student-animal-legal-defense-fund-saldf-program-guides/2018-2020-farmed-animals-the-law/> (last visited Nov. 17, 2023).

<sup>207.</sup> Transportation, Sale, and Handling of Certain Animals 7 U.S. CODE § 2137 (guidelines for humane standards for dogs and cats).

<sup>208.</sup> THL, *How Are Factory Farms Cruel to Animals?* THE HUMANE LEAGUE, <https://thehumaneleague.org/article/factory-farming-animal-cruelty> (last updated Jan. 3, 2023).

<sup>209.</sup> *Id.*

<sup>210.</sup> Crystal Heath, *Opinion: The EATS Act Threatens Animal Welfare and Public Health While Protecting Corporate Profits*, MODERN FARMER, (Sep. 19, 2023), <https://modernfarmer.com/2023/09/opinion-the-eats-act/>.

When asked about the topic of “protecting farmed animals,” the U.S. Department of Agriculture stated that “primary authority for regulating CAFOs rests with State and local governments.”<sup>211</sup> Several states have adopted laws that ban forms of extreme confinement.<sup>212</sup> Massachusetts, for example, enacted a law in 2021 that specified “space requirements” on battery cages<sup>213</sup> while “phasing in” a ban on gestation crates<sup>214</sup> by 2022.<sup>215</sup> Additionally, Massachusetts’s law also banned the intrastate sale of animal products that resided in extreme confinement.<sup>216</sup> However, Massachusetts’s “phasing in” of this sales ban has been delayed to 2023 due to the Supreme Court considering the constitutionality of Proposition 12.<sup>217</sup> In a report conducted by Data for Progress, 48% of respondents indicated they would “strongly support” a law like Proposition 12 in their state.<sup>218</sup> However, the EATS Act would invalidate any current or future law a state would pass for the benefit of animal welfare for farmed animals living in CAFOs for “preharvest production.”<sup>219</sup>

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<sup>211</sup> Helena Masiello, *CAFO’s are a Public Health Crisis: The Creation of COVID-19*, 76 U. MIA. L. REV. 900, 910 (2022) (discussing the disastrous effects CAFOs have on public health).

<sup>212</sup> *See supra* Section II.A.1.

<sup>213</sup> THL, *Everything You Should Know About Battery Cages*, THE HUMANE LEAGUE, (Dec. 3, 2020), (explaining that a battery cage is the “most common method in the U.S. for confining chickens in order to produce eggs on an industrial scale” and can cause broken bones and psychological effects to chickens) <https://thehumaneleague.org/article/battery-cages>.

<sup>214</sup> THL, *What are Gestation Crates for Pigs and Why are They Bad?* THE HUMANE LEAGUE, (Sep. 15, 2021), (defining gestation crates as a cage that “enclose pigs in a space of about seven feet by two feet— an area barely larger than the pig’s body) <https://thehumaneleague.org/article/pig-gestation-crates>.

<sup>215</sup> S.2603 Leg., 192nd Sess (Ma. 2022) at p. 2-5.

<sup>216</sup> *Farm Animal Confinement Bans by State*, ASPCA, <https://www.asPCA.org/improving-laws-animals/public-policy/farm-animal-confinement-bans> (last visited Oct. 23, 2023).

<sup>217</sup> *Id.*

<sup>218</sup> *Data for Progress* [https://www.filesforprogress.org/datasets/2022/7/dfp\\_prop\\_12\\_toplines.pdf](https://www.filesforprogress.org/datasets/2022/7/dfp_prop_12_toplines.pdf) (last visited Nov. 17, 2023) (showing a poll of citizen’s opinions on farmed animal products).

<sup>219</sup> Ending Agricultural Trade Suppression Act, S. 2019, 118th Cong. (2023). *See also, supra* Section II.C.

#### IV. CONCLUSION

If the EATS Act were to pass in Congress, thousands of state laws aiming to protect against the threatening impacts on the environment, consumer safety, and animal welfare resulting from America's CAFOs would be at risk of being invalidated. Given the lack of federal regulation regarding CAFOs and their effects, states have provided more stringent regulations and requirements. The EATS Act will prevent states from enacting laws regulating CAFOs as CAFOs are speculated to be an agricultural practice regarding "pre-harvest" production. This will ultimately limit states' ability to make policies better fit for their constituents and environment. If the EATS Act does not pass, states will be able to continue legislating for the health and safety of their citizens.

