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Not Tested on Animals: The Future of Cosmetic Animal Testing in the U.S. and beyond

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“NOT TESTED ON ANIMALS”: THE FUTURE OF COSMETIC ANIMAL TESTING IN THE U.S. AND BEYOND

I. INTRODUCTION

In the United States’ cosmetic industry, it is common practice to assess the safety of cosmetic products and their ingredients by testing them on animals prior to their distribution to be sold for human use.¹ The term “cosmetics” includes any items intended to be applied to the body for the purpose of “cleansing, beautifying . . . or altering [one’s] appearance”² The most frequently used animals in the cosmetic industry include rabbits, guinea pigs, mice, and rats.³ The most common tests conducted on animals include the application of chemicals onto the shaved skin or into the eyes of restrained animals without pain relief, the repeated force-feeding of the animals to identify signs of potential health hazards such as cancer, and “lethal dose” tests where animals are force fed “large amounts of . . . test chemical[s] to determine the dose that causes death.”⁴ After completion of these tests, animals are killed without pain relief, “normally by asphyxiation, neck-breaking, or decapitation.”⁵

¹ See Humane Cosmetics Act, H.R. 2790, 115th Cong. (2017) (defining cosmetic animal testing). “The term ‘cosmetic animal testing’ means the internal or external application or exposure of any cosmetic to the skin, eyes, or other body part of a live non-human vertebrate for purposes of evaluating the safety or efficacy of a cosmetic.” *Id.*

² Federal Food, Drug, and Cosmetic Act § 321, 21 U.S.C. § 9 (2018) (defining cosmetics as per Federal Food, Drug, and Cosmetic Act).

The term ‘cosmetic’ means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.

Id.; see *Cosmetics Testing FAQ*, HUMANE SOC’Y OF THE U.S., http://www.humanesociety.org/issues/cosmetic_testing/qa/questions_answers.html (last visited Sept. 24, 2019) [<https://perma.cc/5AVA-NC3G>] (identifying “cream, perfume, lipstick, nail polish, eye and facial makeup, shampoo, and hair color” as cosmetics).

³ See *Cosmetics Testing FAQ*, *supra* note 2 (identifying animals commonly used for testing in cosmetic industry).

⁴ See *id.* (describing painful tests to which animals are subjected).

⁵ See *id.* (indicating animals in cosmetic testing are killed after use).

Federally, the U.S. remains mostly silent with respect to animal testing regulations in the cosmetic industry.⁶ The U.S. Food & Drug Administration's ("FDA") Federal Food, Drug, and Cosmetic Act ("FD&C Act") is the primary legislation in place for regulating consumer protection guidelines for food, drugs, and cosmetics.⁷ While the FD&C Act does not explicitly require the use of animal tests to determine a product's safety, it also fails to provide any regulations regarding cosmetic animal testing at all.⁸ Rather, the FD&C Act opens the door for cosmetic manufacturers to assess the safety of their products through any method those companies deem reasonable, including testing their products and ingredients on animals.⁹

While U.S. federal law provides inadequate cosmetic animal testing regulations, "[t]he fight to ban animal testing recently scored a major victory" as California became the first state to ban the sale of any cosmetic product tested on an animal.¹⁰ Beginning in January 2020, California's new

⁶ See Courtney G. Lee, *The Animal Welfare Act at Fifty: Problems and Possibilities in Animal Testing Regulation*, 95 NEB. L. REV. 194, 228 (2016) (indicating countries ahead of United States with respect to cosmetic animal testing policies); see also *Cosmetics Testing FAQ*, *supra* note 2 (explaining that policies and consumer pressure will help end cosmetic animal testing).

⁷ See Federal Food, Drug, and Cosmetic Act §§ 301–399, 21 U.S.C. § 9 (2018) (citing full text of FD&C Act); see also *How Did the Federal Food, Drug, and Cosmetic Act Come About?*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/aboutfda/transparency/basics/ucm214416.htm> (last updated Mar. 28, 2018) [<https://perma.cc/PUU7-P3X8>] ("The enactment of the 1938 Food, Drug, and Cosmetic Act tightened controls over drugs and food, included new consumer protection against unlawful cosmetics and medical devices, and enhanced the government's ability to enforce the law.").

⁸ See Federal Food, Drug, and Cosmetic Act §§ 361–364 (describing limited cosmetic regulations under FD&C Act); see also *Animal Testing and Cosmetics*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/scienceresearch/producttesting/ucm072268.htm> (last updated Nov. 22, 2017) [<https://perma.cc/NKX4-HGWW>] (explaining FDA's lack of animal testing regulations in cosmetic industry).

⁹ See *Animal Testing and Cosmetics*, *supra* note 8 (addressing FDA's stance on cosmetic animal testing).

The FD&C Act does not specifically require the use of animals in testing cosmetics for safety, nor does the Act subject cosmetics to FDA premarket approval. However, the agency has consistently advised cosmetic manufacturers to employ whatever testing is appropriate and effective for substantiating the safety of their products Animal testing by manufacturers seeking to market new products may be used to establish product safety.

Id.

¹⁰ See CAL. CIV. CODE § 1834.9.5 (Deering 2018) (banning sale of cosmetic products tested on animals); Macaela Mackenzie, *California Passes Cruelty-Free Cosmetics Act to Ban the Sale of Animal-Tested Beauty Products*, ALLURE (Sept. 5, 2018, 3:00 PM), <https://www.allure.com/story/california-cruelty-free-cosmetics-act-bill?verso=true> [<https://perma.cc/C55N-NN95>] (summarizing history and anticipated impact of California's bill). "Now, it's official: The future of beauty looks cruelty-free." Mackenzie, *supra* note 10; Hayley Schueneman, *California Is*

bill will essentially prohibit the marketing of any cosmetic product that was tested on an animal.¹¹ This Note seeks to provide insight into the future of cosmetic animal testing based on implemented regulations and recently introduced policies in the United States and beyond.¹²

II. HISTORY

Historically, animals have been denied rights based on the belief that their inability to communicate suggests that they lack reason and consciousness.¹³ Animals were believed to be inanimate objects and therefore unable to suffer.¹⁴ In the United States, that belief led to the “widespread acceptance” of animal testing “in the 1930s after . . . unsafe [cosmetic] products resulted in . . . great harm [to humans].”¹⁵ Federal regulations were adopted to require “companies to prove their products’ safety . . . before offering them for sale to the public.”¹⁶ Currently, cosmetic manufacturers and production companies in the United States are permitted

Banning Animal Testing in Beauty, CUT (Sept. 5, 2018), <https://www.thecut.com/2018/09/california-passes-bill-that-bans-all-animal-testing-by-2020.html> [<https://perma.cc/K8RK-X8JE>] (discussing potential impact of California’s new bill).

¹¹ See CAL. CIV. CODE § 1834.9.5 (citing California’s new regulation for animal testing within cosmetic industry).

Notwithstanding any other law, it is unlawful for a manufacturer to import for profit, sell, or offer for sale in this state, any cosmetic, if the cosmetic was developed or manufactured using an animal test that was conducted or contracted by the manufacturer, or any supplier of the manufacturer, on or after January 1, 2020.

Id.

¹² See Danielle Magnifico, *The Effects of Domestic Regulation on International Trade Law as an Avenue for Change Beyond Borders*, 16 ASPER REV. INT’L BUS. & TRADE L. 201, 203 (2016) (discussing European Union’s full ban on producing, marketing, and importing cosmetics tested on animals); see also *Animal Advocates Praise EPA for Efforts to Reduce Painful Skin Tests on Animals*, HUMANE SOCIETY OF THE U.S. (Apr. 11, 2018), <https://www.humanesociety.org/news/animal-advocates-praise-epa-efforts-reduce-painful-skin-tests-animals> [<https://perma.cc/HJ34-7L87>] (introducing federal policy encouraging use of non-animal testing methods).

¹³ See Laura Donnellan, *Animal Testing in Cosmetics: Recent Developments in the European Union and the United States*, 13 ANIMAL L. 251, 252–53 (2007) (describing historical misunderstanding of animals’ instinctual nature and behavior).

¹⁴ See *id.* at 253 (explaining historical view of animals as property rather than sentient beings with rights).

¹⁵ See Lee, *supra* note 6, at 217 (referencing unsafe cosmetic products which caused “great harm and loss of life.”); see also Donnellan, *supra* note 13, at 252–53 (highlighting human misconception of animals as inanimate objects incapable of suffering).

¹⁶ See Lee, *supra* note 6, at 217 (explaining FD&C Act as response to injury and death from unsafe cosmetic and drug products).

to decide which method will be used to prove their products' safety, and countless companies continue to choose animal testing.¹⁷

Despite the widespread historical misunderstanding regarding their consciousness, recent global developments have suggested that animals are "sentient beings" by developing and implementing legislative regulations to protect their rights.¹⁸ The European Union ("EU") has aimed to prioritize animal welfare based on up to date scientific evidence of animal sentience.¹⁹ For example, by 2009, the EU had already banned the use of animal testing for cosmetic purposes with regard to both complete cosmetic products and ingredients used in cosmetic products.²⁰ As of 2013, the EU has made it illegal to market any cosmetic product that has been tested on an animal.²¹

A number of nations have followed the EU's trajectory by developing similar laws banning or limiting cosmetic animal testing.²² In 2015, New Zealand amended its Animal Welfare Act to recognize the sentience of animals and to ban testing cosmetic products and ingredients on animals.²³ While cosmetic products were rarely, if ever, tested on animals

¹⁷ See *Animal Testing and Cosmetics*, *supra* note 8 (indicating federal law permits cosmetic companies to perform animal tests).

¹⁸ See Donnellan, *supra* note 13, at 253 (discussing recent developments compared to historical beliefs). "Animals were viewed as inanimate objects, pieces of personal property that could not be ascribed rights Notwithstanding the philosophical debate, recent developments in both the European Union (EU) and the United States (U.S.) suggest that animals are sentient beings and deserve the paternalistic protection of the law." *Id.*

¹⁹ See *id.* at 254 (describing animal welfare as "issue of very high importance"); see also *Main Achievements: No Animal Testing for Cosmetic Purposes*, EUROPEAN COMM'N, https://ec.europa.eu/food/animals/welfare/main_achievements_en (last visited Nov. 12, 2018) [<https://perma.cc/AWL3-P7EQ>] (identifying newly implemented EU legislation aimed to improve quality of animals' lives).

²⁰ See *Main Achievements: No Animal Testing for Cosmetic Purposes*, *supra* note 19 (summarizing imperative moments in EU for cosmetic animal testing legislation). In 2004, the EU banned cosmetic companies from testing finished cosmetic products on animals. *Id.* Subsequently, in 2009, the EU banned testing cosmetic ingredients on animals. *Id.*

²¹ See *id.* (explaining EU cosmetic marketing ban effective in 2013).

²² See *Cosmetics Testing FAQ*, *supra* note 2 (identifying countries that have inspired global trend toward reducing animal tests in cosmetic industry). Countries that ban or limit cosmetic animal testing include the EU, India, Israel, Norway, Switzerland, New Zealand, South Korea, Taiwan, Turkey, and multiple states in Brazil. *Id.* "Cosmetic companies in the United States and abroad that conduct animal tests will not be able to sell those products in any of these countries unless they change their practices." *Id.*

²³ See *Animal Welfare Amendment Act (No 2) 2015*, N.Z. LEGIS., available at <http://www.legislation.govt.nz/act/public/2015/0049/latest/DLM6432504.html> (last visited Sept. 24, 2019) [<https://perma.cc/L2XJ-ASQL>] (amending New Zealand's 1999 Animal Welfare Act through addition of Section 84A).

in New Zealand, the amendment is meant to portray a global message that New Zealanders condemn cosmetic animal testing.²⁴ Unfortunately, the U.S. remains far behind numerous nations with respect to cosmetic animal testing legislation.²⁵

III. FACTS

Despite United States' slight attempt to develop regulations prioritizing animal welfare, the fact remains that no federal legislation protects the animals who continue to be subjected to the excruciating tests conducted in the cosmetic industry.²⁶ In fact, two of the most common

(1) A person must not use an animal in any research, testing, or teaching that is for the purpose of—

- (a) developing, making, or testing a cosmetic; or
- (b) developing, making, or testing an ingredient that is intended exclusively for use in a cosmetic.

(2) Subsection (1)(b) does not apply to research, testing, or teaching in relation to an ingredient that is carried out for a purpose unrelated to the intended use of the ingredient in a cosmetic.

(3) A person commits an offence who contravenes subsection (1).

(4) In a prosecution for an offence against this section, it is not necessary for the prosecution to prove that the defendant intended to commit the offence.

Id.; see also Kelly Buchanan, *New Zealand: Animal Welfare Legislation Recognizes Animals as Sentient, Bans Cosmetic Testing*, LIBR. OF CONGRESS (May 19, 2015), <http://www.loc.gov/law/foreign-news/article/new-zealand-animal-welfare-legislation-recognizes-animals-as-sentient-bans-cosmetic-testing/> [<https://perma.cc/949K-LXAE>] (listing amendments to New Zealand's 1999 Animal Welfare Act).

²⁴ See Buchanan, *supra* note 23 (describing New Zealand's stance on animal testing); see also *Law Change to Ban Cosmetic Testing on Animals*, N.Z. GOV'T (Apr. 1, 2015), <https://www.beehive.govt.nz/release/law-change-ban-cosmetic-testing-animals> [<https://perma.cc/5YZ3-HZ7L>] (“To the best of our knowledge there never has been any animal testing for cosmetics in New Zealand, but this amendment will send an important message that this kind of testing is unacceptable to New Zealanders and will never happen here.”).

²⁵ See sources cited *supra* note 6 (identifying lack of cosmetic animal testing regulation in United States).

²⁶ See Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2018) (describing regulations on animal testing for research purposes); see also *Animal Welfare Act*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. LIBR., <https://www.nal.usda.gov/awic/animal-welfare-act> (last visited Nov. 15, 2019) [<https://perma.cc/W8YX-9AVH>] (describing federal regulations in place related to animals used for research). The Animal Welfare Act is “the only Federal law in the United States that regulates the treatment of animals in research . . .” *Animal Welfare Act*, *supra* note 26. The Animal Welfare Act does not specifically provide any regulations related to animal testing in the cosmetic industry. *Id.*

animal species used for cosmetic testing are excluded from the United States' legal definition of an animal.²⁷

The United States has recently considered two policies, which, if implemented, would assist in regulating certain tests that are currently conducted on animals.²⁸ The first is entitled Use of Alternative Approaches for Skin Sensitization as a Replacement for Laboratory Animal Testing (“Use of Alternative Approaches”) and was drafted by the Environmental Protection Agency (“EPA”) to encourage non-animal testing methods for pesticides and industrial chemicals.²⁹ Although it is not specifically aimed toward the cosmetic industry, the Use of Alternative Approaches supports the use of non-animal testing methods in place of painful skin irritancy tests which are often used by cosmetic companies.³⁰ If enacted, the Use of Alternative Approaches may guide cosmetic companies toward replacing animal testing methods with the alternative techniques set forth in the policy.³¹

In addition to the EPA’s Use of Alternative Approaches policy, another policy, commonly referred to as the Humane Cosmetics Act, was introduced in Congress in 2017.³² The intent behind the Humane Cosmetics Act was to eliminate animal testing in the cosmetics industry by prohibiting the production and marketing of cosmetic products that were tested on animals and imposing a high civil penalty of up to \$10,000 to companies for

²⁷ See 7 U.S.C. § 2132(g) (outlining legal definition of “animal”).

The term ‘animal’ means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; *but such term excludes . . . rats . . . and mice . . . bred for use in research . . .*

Id. (emphasis added).

²⁸ See Humane Cosmetics Act, H.R. 2790, 115th Cong. (2017) (seeking to prohibit manufacture, sale, and transport of cosmetic products tested on animals); *Animal Advocates Praise EPA for Efforts to Reduce Painful Skin Tests on Animals*, *supra* note 12 (describing Humane Society’s support of EPA’s proposed alternatives to traditional animal testing).

²⁹ See *Animal Advocates Praise EPA for Efforts to Reduce Painful Skin Tests on Animals*, *supra* note 12 (explaining EPA’s drafted policy for use of alternative tests).

³⁰ See *id.* (indicating EPA’s goal to reduce animal testing generally). “In the EPA’s official statement on the draft policy, EPA Administrator Scott Pruitt stated, ‘this draft policy is another step toward achieving EPA’s goal of reducing the use of animals and increasing the use of cutting-edge science in chemical testing.’” *Id.*

³¹ See *Cosmetics Testing FAQ*, *supra* note 2 (describing three most commonly performed animal tests in cosmetic industry).

³² See H.R. 2790 (seeking to “phase out” production and sale of cosmetic products tested on animals).

each violation.³³ Unfortunately, the Humane Cosmetics Act never received legitimate consideration in the House.³⁴ While neither the Humane Cosmetics Act nor the Use of Alternative Approaches were passed, the State of California has played an enormous role in setting the stage for states to develop their own cosmetic animal testing guidelines.³⁵

For decades, California has remained loyal to animal welfare and ahead of federal law when it comes to developing stricter regulations surrounding the use of animal testing.³⁶ After multiple failed attempts,

³³ See *id.* §§ 3–4 (outlining federal legislation introduced to promote discontinuing cosmetic animal testing).

SEC. 3. PROHIBITIONS

(a) TESTING.—It shall be unlawful for any entity, whether private or governmental, to conduct or contract for cosmetic animal testing that occurs in the United States and is for the purpose of developing a cosmetic for sale in or affecting interstate or foreign commerce.

(b) SALE OR TRANSPORT. —It shall be unlawful to sell, offer for sale, or knowingly transport in interstate commerce any cosmetic if the final product or any component thereof was developed or manufactured using cosmetic animal testing conducted or contracted for after the effective date specified in section 5(a).

SEC. 4. CIVIL PENALTIES

(a) IN GENERAL.—In addition to any other penalties applicable under law, the Secretary of Health and Human Services shall assess whoever violates any provision of this Act a civil penalty of not more than \$10,000 for each such violation.

Id.

³⁴ See *id.* (reporting Humane Cosmetics Act failed to advance almost immediately after introduced).

³⁵ See CAL. CIV. CODE § 1834.9.5 (Deering 2018) (providing language for California’s newest animal welfare law); see also H.R. 2790 (indicating failed federal law introduced to ban sale of cosmetics tested on animals); *Animal Advocates Praise EPA for Efforts to Reduce Painful Skin Tests on Animals*, *supra* note 12 (discussing EPA’s attempt to promote alternative tests other than painful animal skin tests).

³⁶ See Donnellan, *supra* note 13, at 270–74 (discussing California’s attempts to ban use of “barbaric” irritancy tests on animals).

[The Draize Test is] a technique whereby a beauty or household product is applied to a rabbit’s eye, skin, or penis over a twenty-four, forty-eight, or seventy-two hour period. In some cases, the observations last from seven to twenty-one days. Rabbits are placed in a holding device which only exposes their heads so that they cannot claw out their eyes or escape In most cases, the rabbit is not anaesthetized during the process, and is killed after the test has ended.

Id. at 271. See Stephanie A. Sheridan & Michael A. Keough, *California Bans Cosmetics Tested on Animals*, STEPTOE (Oct. 3, 2018), <https://www.steptoec.com/en/news-publications/california-bans-cosmetics-tested-on-animals.html> [<https://perma.cc/L6AS-TDNP>] (indicating California’s

California ultimately enacted Senate Bill 2082 (“S.B. 2082”), which became “the first statute in the U.S. to curtail animal testing in the cosmetic industry.”³⁷ S.B. 2082 prohibits the use of animal testing methods for cosmetics, pesticides, and additional household products, where “an appropriate alternative test method has been scientifically validated and recommended by the Inter-Agency Coordinating Committee for the Validation of Alternative Methods (ICCVAM) . . . and adopted by the relevant federal agency . . . or program”³⁸ Animal testing for medical purposes is exempted under California’s bill.³⁹

In addition to California’s legislature, many Californians have shown their support of cruelty-free cosmetic regulations through two class action fraud suits against cosmetic companies Avon and Mary Kay.⁴⁰ In both cases, the plaintiffs argued that the companies advertised as “cruelty free” in the U.S., however they also marketed their products in China, where law

efforts to ban sale of animal fur). “San Francisco and West Hollywood have also banned the sale of animal fur products, and Los Angeles is considering a similar fur sale ban. California has also banned the importation of certain exotic animal skins, such as pythons, cheetahs, and whales.” *Id.*

³⁷ See CAL. CIV. CODE § 1834.9 (prohibiting manufacturers from importing cosmetics that were tested on animals); see also Donnellan, *supra* note 13, at 272 (“S.B. 2082 was given force of law in 2000, when Chapter 476 was enacted, and it later became California Civil Code § 1834.9.”).

³⁸ See CAL. CIV. CODE § 1834.9 (banning use of animal testing in cosmetic industry where alternative methods are available).

Manufacturers and contract testing facilities shall not use traditional animal test methods within this state for which an appropriate alternative test method has been scientifically validated and recommended by the Inter-Agency Coordinating Committee for the Validation of Alternative Methods (ICCVAM) and adopted by the relevant federal agency or agencies or program within an agency responsible for regulating the specific product or activity for which the test is being conducted [The ICCVAM is] a federal committee comprised of representatives from 14 federal regulatory or research agencies . . . that reviews the validity of alternative test methods. The committee is the federal mechanism for recommending appropriate, valid test methods to relevant federal agencies.

Id.; see Donnellan, *supra* note 13, at 276 (suggesting California’s loyalty to animal welfare).

³⁹ See CAL. CIVIL CODE § 1834.9(e) (defining medical research). Under California law, medical research is defined as “research related to the causes, diagnosis, treatment, control, or prevention of physical or mental diseases and impairments of humans and animals or related to the development of biomedical products, devices, or drugs as defined in Section 321(g)(1) of Title 21 of the United States Code.” *Id.*

⁴⁰ See *Beltran v. Avon Prods.*, 867 F. Supp. 2d 1068, 1073 (C.D. Cal. 2012) (describing plaintiff’s representation of one million U.S. Avon cosmetics consumers, including those in California); *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1216 (C.D. Cal. 2012) (discussing plaintiff’s basis for nation-wide class action fraudulent concealment claim).

requires imported cosmetics to be tested on animals.⁴¹ The plaintiffs argued that had they been aware that the cosmetic products were tested on animals in a foreign country, they would not have purchased the products.⁴² Although the plaintiffs' claim in *Beltran* was dismissed before litigation, the *Stanwood* court held that Mary Kay had a duty to disclose that its products were tested on animals in a foreign nation because that information is a material fact, as the plaintiffs would not have purchased the products had it been disclosed.⁴³

Moreover, California has recently proven their continued loyalty to animal welfare by adding Senate Bill 1249 ("Cruelty Free Cosmetics Act" or "the Act") which is almost identical to the federally proposed Humane Cosmetics Act.⁴⁴ Pre-existing state law prevented California cosmetic companies from using traditional animal testing methods.⁴⁵ The Cruelty

⁴¹ See *Beltran*, 867 F. Supp. 2d at 1073 (stating cosmetic products were tested on animals after being sold in China); *Stanwood*, 941 F. Supp. 2d at 1216 (indicating Chinese law requires cosmetic products be tested on animals); see also *Here's How China Is Moving Away From Animal Testing*, BLOOMBERG (Jan. 16, 2018, 5:00 PM), <https://www.bloomberg.com/news/articles/2018-01-16/ending-china-animal-tests-is-salve-for-big-beauty-quicktake-q-a> [<https://perma.cc/Y7RK-TXRV>] (discussing China's requirement of testing cosmetics on animals despite attempt to move toward alternatives).

⁴² See *Beltran*, 867 F. Supp. 2d at 1073 (explaining plaintiffs would not have purchased cosmetic products tested on animals); *Stanwood*, 941 F. Supp. 2d at 1216 (indicating if plaintiffs knew products were tested on animals, they would have acted differently).

⁴³ See *Beltran*, 867 F. Supp. 2d at 1084 (disqualifying plaintiff's representation due to conflict of interest); *Stanwood*, 941 F. Supp. 2d at 1221 (indicating duty to disclose animal testing as material fact).

The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client Avon's motion to disqualify is GRANTED. The law firms of Eagan Avenatti and the X-Law Group are both disqualified from representing Plaintiff in the present lawsuit.

Beltran, 867 F. Supp. 2d at 1078-84. "For a fact to be material, 'a plaintiff must show that had the omitted information been disclosed, one would have been aware of it and behaved differently.'" *Stanwood*, 941 F. Supp. 2d at 1221 (quoting *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007)).

⁴⁴ See CAL. CIV. CODE § 1834.9.5 (Deering 2018) (outlining new bill that prohibits sale of cosmetics tested on animals); see also Humane Cosmetics Act, H.R. 2790, 115th Cong. (2017) (proposing federal regulation related to cosmetic animal testing).

⁴⁵ See CAL. CIV. CODE § 1834.9 (banning cosmetic companies from using animal tests in California where alternative methods are available); see also *SB-1249 Animal Testing: Cosmetics*, CAL. LEGIS. INFO. (Sept. 28, 2018, 9:00 PM), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1249 [<https://perma.cc/PLU4-TW78>] (providing California legislative counsel's digest on impact of new bill). "Existing law prohibits manufacturers and contract testing facilities from using traditional animal testing methods within this state when an appropriate alternative test method has been scientifically validated and

Free Cosmetics Act (“the Act”) makes California the first and only state to explicitly prohibit the production and marketing of cosmetic products that were tested on animals.⁴⁶ The Cruelty Free Cosmetics Act will be effective on January 1, 2020, and after that date, any cosmetic product developed or manufactured using animal tests cannot be sold in California.⁴⁷ The Act does include exceptions, as it provides that animal tests may be used when the tested ingredient cannot be replaced, the test is required for a specific human health issue, and where the law has not accepted a non-animal alternative method.⁴⁸ It also does not prohibit animal tests that are conducted to comply

recommended by the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) or other specified agencies.” *SB-1249 Animal Testing: Cosmetics, supra*, note 45.

⁴⁶ See CAL. CIV. CODE § 1834.9.5(a)(b) (listing types of cosmetic products excluded from production and marketing).

(a) Notwithstanding any other law, it is unlawful for a manufacturer to import for profit, sell, or offer for sale in this state, any cosmetic, if the cosmetic was developed or manufactured using an animal test that was conducted or contracted by the manufacturer, or any supplier of the manufacturer, on or after January 1, 2020.

(b) For purposes of this section, the following terms apply:

(1) “Animal test” means the internal or external application of a cosmetic, either in its final form or any ingredient thereof, to the skin, eyes, or other body part of a live, nonhuman vertebrate.

(2) “Cosmetic” means any article intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, including, but not limited to, personal hygiene products such as deodorant, shampoo, or conditioner.

(3) “Ingredient” means any component of a cosmetic as defined by Section 700.3 of Title 21 of the Code of Federal Regulations.

(4) “Manufacturer” means any person whose name appears on the label of a cosmetic product pursuant to the requirements of Section 701.12 of Title 21 of the Code of Federal Regulations.

(5) “Supplier” means any entity that supplies, directly or through a third party, any ingredient used in the formulation of a manufacturer’s cosmetic.

Id.

⁴⁷ See *id.* § 1834.9.5 (explaining timeline of when prohibitions go into effect); Hilary Hanson, *California Just Officially Banned The Sale Of Animal-Tested Cosmetics*, HUFFPOST (Sept. 28, 2018, 5:40 PM), https://www.huffingtonpost.com/entry/california-just-officially-banned-the-sale-of-animal-tested-cosmetics_us_5b913ac6e4b0cf7b003d5c09 [<https://perma.cc/GMJ3-T2L5>] (explaining limitations on California Cruelty Free Cosmetics Act).

⁴⁸ See CAL. CIV. CODE § 1834.9.5(c)(1) (listing prohibitions, limitations, and exemptions under California Cruelty Free Cosmetics Act).

(c) The prohibitions in subdivision (a) do not apply to the following:

with foreign cosmetic safety regulations, provided that the test results were not used to determine the product's safety in California.⁴⁹ Despite these exceptions, the California Cruelty Free Cosmetics Act is an enormous victory for animals and advocates alike, and supporters are hopeful that it will influence the federal government to reconsider and eventually enact the Humane Cosmetics Act.⁵⁰

IV. ANALYSIS

While California's enactment of the Cruelty Free Cosmetics Act is a monumental accomplishment for animal rights supporters, it raises potentially concerning interstate commerce implications.⁵¹ Although the states maintain control of their police powers, generally allowing them to pass health and safety regulations, a state may not "do so in a way that discriminates against interstate commerce."⁵² The U.S. Constitution's

(1) An animal test of any cosmetic that is required by a federal or state regulatory authority if all of the following apply:

(A) The ingredient is in wide use and cannot be replaced by another ingredient capable of performing a similar function.

(B) A specific human health problem is substantiated and the need to conduct animal tests is justified and is supported by a detailed research protocol proposed as the basis for the evaluation.

(C) There is not a nonanimal alternative method accepted for the relevant endpoint by the relevant federal or state regulatory authority.

Id.

⁴⁹ See *id.* § 1834.9.5(c)(2) ("The prohibitions . . . do not apply to . . . [a]n animal test that was conducted to comply with a requirement of a foreign regulatory authority, if no evidence derived from the test was relied upon to substantiate the safety of the cosmetic sold in California by the manufacturer.").

⁵⁰ See Hanson, *supra* note 47 (suggesting encouragement for federal policy reform inspired by California's new bill).

⁵¹ See U.S. CONST. art. I, § 8, cl 3 (giving Congress control of interstate commerce). Congress holds the power "[t]o regulate Commerce . . . among the several states." *Id.*

⁵² See Sheridan & Keough, *supra* note 36 (pointing to limitations and interstate commerce implications of California's new law).

Governor Brown signed the bill into law on Friday The governor's signature may not be the last word, however. The law may be susceptible to challenges under the US Constitution's Commerce Clause, as states generally may pass health and safety regulations but cannot do so in a way that discriminates against interstate commerce.

Id. See *Police Powers*, NOLO, <https://www.nolo.com/dictionary/police-powers-term.html> (last visited Sept. 23, 2019) [<https://perma.cc/L2WG-M3R2>] (describing states' police powers).

The fundamental right of a government [is] to make all necessary laws. In the United States, state police power comes from the Tenth Amendment to the Constitution, which

Commerce Clause deems that interstate commerce must be regulated by the federal government and “implies a limitation on state authority to interfere with interstate commerce”⁵³ However, the Court “has recognized the importance of state sovereignty in the market sphere”⁵⁴ Further, while Congress maintains authority over interstate commerce regulations, a state holds an interest in those regulations when it is acting as a “guardian and trustee for its people”⁵⁵

California has consistently shown a high regard for animal welfare in general.⁵⁶ The Cruelty Free Cosmetics Act is a crucial move by California to protect its citizens’ interest in creating a system that legally protects animals, which may provide California with a way around the Act’s

gives states the rights and powers “not delegated to the United States.” States are thus granted the power to establish and enforce laws protecting the welfare, safety, and health of the public.

Id.

⁵³ See U.S. CONST. art. I, § 8, cl. 3 (indicating Congress’s control over interstate commerce); see also *Friends of the Eel River v. N. Coast R.R. Auth.*, 399 P.3d 37, 61 (Cal. 2017) (supporting notion that states may not burden interstate commerce). “[I]t is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad’s ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce.” *Friends of the Eel River*, 399 P.3d at 61 (quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008)).

⁵⁴ See *Friends of the Eel River*, 399 P.3d at 73 (explaining states may have limited authority to regulate interstate commerce if applicable to state sovereignty).

⁵⁵ See *id.* (describing possible exception to federal regulation of interstate commerce).

The high court has cautioned that notwithstanding the scope of Congress’s authority under the commerce clause, “[r]estraint in this area is . . . counseled by considerations of state sovereignty, the role of each State ‘as guardian and trustee for its people,’ and ‘the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’”

Id. (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 438–39 (1980)).

⁵⁶ See *Donnellan*, *supra* note 13 (discussing California’s measures to ban cruel animal tests); *Sheridan & Keough*, *supra* note 36 (explaining California’s ban on sale of animals skins and furs); Greg Henderson, *California Passes Animal Welfare Law*, AGWEB (Nov. 7, 2018, 5:17 PM), <https://www.agweb.com/article/california-passes-animal-welfare-law/> [<https://perma.cc/27SR-ENCT>] (discussing California’s approval of Proposition 12).

Proposition 12, which would require all eggs sold in . . . [California] come from cage-free hens by 2022, was approved with 59% of the vote. . . . The new law also adds provisions that would affect veal and pork production, setting new minimum requirements on the size of pens for sows and calves raised for veal, and it bans the sale in California of products from hens, calves and pigs raised in other states that do not meet California’s standards.

Henderson, *supra* note 56.

interstate commerce implications.⁵⁷ This is an issue to be decided by the courts, which may experience an influx in suits related to animal testing in 2020, as it is unlikely that cosmetic companies currently performing animal tests will simply conform to California's new regulation.⁵⁸

In *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, the court considered a similar California animal welfare law and its potential Commerce Clause violation.⁵⁹ Plaintiffs, three sellers of foie gras, brought suit to enjoin California representatives and the State of California from enforcing a statute banning the sale of foie gras from force-fed animals.⁶⁰ Plaintiffs' challenged the statute on multiple grounds, including a violation of the Commerce Clause.⁶¹ The Court of Appeals for the Ninth Circuit denied that claim, affirming the District Court's findings that the statute does

⁵⁷ See *Friends of the Eel River*, 399 P.3d at 73 (indicating exception to Congress's authority relative to interstate commerce). Despite Congress's control of interstate commerce, state sovereignty allows regulation when the state is acting as a "guardian [of] its people." *Id.*

⁵⁸ See Kathleen Sanzo, Collie James, & Amaru Sanchez, *INSIGHT: New California Law Will Ban Sale of Cosmetics Tested on Animals*, BLOOMBERG LAW (Nov. 1, 2018, 8:27 PM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/insight-new-california-law-will-ban-sale-of-cosmetics-tested-on-animals> [<https://perma.cc/VFZ2-Y9BH>] (outlining extensive steps cosmetic companies will require to prepare compliance with California's new law). In preparation for the "relatively short time line for the effective date of the new law, cosmetic manufacturers" will need to develop record keeping strategies "in the event that any claim is asserted against [them]," review their supply chains to ensure ingredients were not tested on animals, review contracts with suppliers to ensure compliance with the new law, and develop new ways to "evaluate the safety of new ingredients." *Id.*

⁵⁹ See 729 F.3d 937, 941 (9th Cir. 2013) (upholding California's ban on sale of liver acquired from force-feeding birds).

⁶⁰ See *id.* at 942–43 (identifying parties and statute involved in claim).

[Plaintiffs] are [two] non-California entities that raise ducks for slaughter and are producers and sellers of foie gras. . . . [and] a restaurant in California that sold foie gras before [the statute] came into effect The statutory provision Plaintiffs seek to enjoin, § 25982, is within the statute entitled 'Force Fed Birds.' Section 25982 states: 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 Plaintiffs filed a lawsuit to enjoin [Defendants] . . . Attorney General Kamala Harris, Governor Edmund Brown, and the State of California . . . from enforcing the statute.

Id. at 942-43 (internal quotations omitted). See *Foie Gras: Cruelty to Ducks and Geese*, PETA, <https://www.peta.org/issues/animals-used-for-food/factory-farming/ducks-geese/foie-gras/> (last visited Oct. 2, 2019) [<https://perma.cc/Y5RN-D4ER>] (describing torturous process of force-feeding caged birds to produce foie gras). Foie gras is a French term that means "fatty liver" and is produced by force-feeding caged male ducks to enlarge their livers. *Id.* The process often results in death when food "is forced into the ducks' lungs or when birds choke on their own vomit" due to forced over-consumption. *Id.*

⁶¹ See *Harris*, 729 F.3d at 946-47 (describing plaintiff's challenges). "Plaintiffs contend that . . . § 25982 violates the Commerce Clause because the statute: (1) discriminates against interstate commerce; and (2) directly regulates interstate commerce." *Id.* at 947.

not violate the Commerce Clause because it does not discriminate against interstate commerce, does not directly regulate interstate commerce, and does not substantially burden interstate commerce.⁶² If the Cruelty Free Cosmetics Act is challenged for a Commerce Clause violation, the court is likely to reach a similar conclusion to the *Harris* decision.⁶³

Similar to the statute challenged in *Harris*, the Cruelty Free Cosmetics Act does not discriminate against interstate commerce because it bans cosmetic products based only on the method of production rather than the location of production.⁶⁴ The Act bans the sale of cosmetic products that were produced using animal testing both in California and out of state.⁶⁵ Additionally, the Act does not directly regulate interstate commerce because it is not solely aimed at out-of-state manufacturers and only imposes production standards on cosmetics sold in California.⁶⁶ Moreover, it is not a price-fixing statute and does not produce a definite effect of conflicting legislation.⁶⁷ An argument that the Act substantially burdens interstate

⁶² See *id.* at 947–53 (discussing court’s reasoning in support of holding that statute does not violate Commerce Clause). The statute’s “economic impact does not depend on *where* the items were produced, but rather *how* they were produced.” *Id.* at 948. “Because § 25982 bans the sale of both intrastate and interstate products that are the result of force feeding a bird, it is not discriminatory.” *Id.* (quoting *Pac. Nw. Venison Producers v. Smith*, 20 F.3d 1008, 1012 (9th Cir., 1994)). The Ninth Circuit also found that the statute does not directly regulate interstate commerce because (1) it is not aimed solely at out of state producers, (2) only imposes standards on foie gras sold in California, (3) does not impose any prices for the products, and (4) does not produce a definite effect of conflicting legislation. *Id.* at 948–51. The statute does not substantially burden interstate commerce because (1) it is not discriminatory, (2) it does not produce inconsistent regulation of nationally uniform activities, (3) any burden is outweighed by the local interest to prevent animal cruelty by outlawing the actual practice and sale of foie gras, and (4) the State’s legitimate belief that the ban would discourage consumption of such products. *Id.* at 951–52.

⁶³ See *Harris*, 729 F.3d at 951–52 (deciding statute banning sale of foie gras produced using force feeding does not violate Commerce Clause).

⁶⁴ See CAL. CIV. CODE § 1834.9.5 (Deering 2018) (banning sale of cosmetics produced through animal testing beginning in 2020). “Notwithstanding any other law, it is unlawful for a manufacturer to import for profit, sell, or offer for sale in this state, *any* cosmetic, *if the cosmetic was developed or manufactured using an animal test* that was conducted or contracted by the manufacturer, or any supplier of the manufacturer . . .” *Id.* (emphasis added).

⁶⁵ See *id.* (asserting ban does not apply solely to out of state cosmetics). The Act bans the sale of “*any* cosmetic, *if the cosmetic was developed or manufactured using an animal test . . .*” *Id.* (emphasis added).

⁶⁶ See *id.* (indicating place of cosmetic’s production is irrelevant). The Act only regulates the sale of cosmetic products in California by stating, “it is unlawful for a manufacturer to import for profit, sell, or offer for sale *in this state . . .*” *Id.* (emphasis added).

⁶⁷ See *id.* (supporting Act does not infringe on specific Commerce Clause issues). The Act does not include any language to suggest imposing price fixation or that produces definite conflicting litigation. *Id.*; see also *Harris*, 729 F.3d at 951 (indicating mere possibility of producing conflicting legislation). “The [Supreme] Court has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting

commerce is also unlikely to succeed due to the notion that it does not discriminate against interstate commerce.⁶⁸ Further, it does not impose any state regulations inconsistent with nationally uniform regulations, as no federal regulations regarding animal testing in the cosmetic industry currently exist.⁶⁹ Finally, California has long displayed a strong local interest in preventing animal cruelty.⁷⁰ Its prohibition on the use of animal tests in the cosmetic industry and the sale of cosmetics produced through animal testing is meant to protect that local interest by discouraging the consumption of cosmetic products tested on animals.⁷¹

California is one of the only states with laws banning cosmetic animal testing, and its Cruelty Free Cosmetics Act puts it even further ahead

legislation.” *Harris*, 729 F.3d at 951 (quoting *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 470 (9th Cir. 2001)).

⁶⁸ See CAL. CIV. CODE § 1834.9.5 (implying Cruelty Free Cosmetics Act does not discriminate against interstate commerce).

⁶⁹ See *id.* § 1834.9.5(c) (providing Act’s limitations on animal testing regulations).

(c) The prohibitions in subdivision (a) do not apply to . . . [a]n animal test of any cosmetic that is required by a federal . . . regulatory authority if all of the following apply: (A) The ingredient is in wide use and cannot be replaced by another ingredient capable of performing a similar function. (B) A specific human health problem is substantiated and the need to conduct animal tests is justified and is supported by a detailed research protocol proposed as the basis for the evaluation. (C) There is not a nonanimal alternative method accepted for the relevant endpoint by the relevant federal . . . regulatory authority.

Id. See *Animal Testing and Cosmetics*, *supra* note 8 (stating ruling federal legislation). The FD&C Act is the United States’ primary federal authority for regulating safety guidelines for food, drugs, and cosmetics. *Id.* It fails to provide any regulations on cosmetic animal testing. *Id.* See *Animal Welfare Act*, *supra* note 26 (stating sole federal regulation surrounding animals used for research purposes). The Animal Welfare Act is “the only Federal law in the United States that regulates the treatment of animals in research” but does not provide any regulations on animal testing in the cosmetic industry. *Id.*

⁷⁰ See *Donnellan*, *supra* note 13 (explaining history of animal testing regulations in California); *Sheridan & Keough*, *supra* note 36 (identifying California’s specific ban on sale of skins and furs); *Henderson*, *supra* note 56 (discussing California’s new regulations on hen, calf, and pig enclosures); see also *Beltran v. Avon Prods.*, 867 F. Supp. 2d 1068 (C.D. Cal. 2012) (indicating importance of cruelty free cosmetics for Avon customers); *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1216 (C.D. Cal. 2012) (describing class action fraudulent concealment claim against cosmetic company).

⁷¹ See *Harris*, 729 F.3d at 952 (indicating state statute did not substantially burden interstate commerce). California’s local interest in preventing animal cruelty outweighs the potential burden on interstate commerce. *Id.* “The district court found that the State has pursued its interest in preventing animal cruelty ‘both by outlawing the actual practice of force-feeding birds for the purpose of enlarging their livers . . . and the sale of such products . . .’” *Id.* “[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies.” *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 469 (2010)).

of other pro-animal welfare states.⁷² Although the Act is scrutinized due to its exceptions and its potential interstate commerce implications, it is an important milestone in creating a system of regulations that is representative of the collective conscience of California's citizens with regard to animal welfare.⁷³

V. CONCLUSION

Despite the historic belief that animals are inanimate and incapable of suffering, modern science has led to a more accurate understanding of animals' sentience. Accordingly, the public no longer tolerates inhumane treatment of animals and there has been a trend to protect animals' rights. With regard to animal testing, there has been a global movement toward eliminating the practice from the cosmetic industry entirely. Although the United States does not have any federal laws regulating cosmetic animal testing, some states, including California, have adopted their own regulations.

Cosmetic companies in California have been banned from using animal testing methods since 2000. In 2018, California enacted the Cruelty Free Cosmetics Act which bans the sale of cosmetic products that have been tested on animals. The Act goes into effect on January 1, 2020 and will require cosmetic companies selling products in California to begin using alternative testing methods. The courts may experience an influx in suits brought by cosmetic companies against the State of California, and a Commerce Clause violation is likely to be alleged given the Act's obvious potential effects on interstate commerce. However, that allegation will likely be denied because the Act does not discriminate against interstate commerce, does not directly regulate interstate commerce, and does not substantially burden interstate commerce. Rather, the Act bans the sale of cosmetics based on production methods and reflects a prominent local interest to protect animal welfare. That local interest outweighs any potential burden to interstate commerce.

Although the Act includes some exceptions, it is an essential victory for animals and animal welfare supporters alike. Supporters of the Act hope

⁷² See Sheridan & Keough, *supra* note 36 (outlining California's dedication to protect animal welfare). "California was the first state in the nation to ban actual animal testing, [and] . . . New York, New Jersey, and Virginia have similar laws barring animal testing." *Id.*

⁷³ See Hanson, *supra* note 49 (discussing Cruelty Free Cosmetics Act's limitations); Sheridan & Keough, *supra* note 54 (explaining Cruelty Free Cosmetics Act's potential interstate commerce violation); Donnellan, *supra* note 13, at 272–74 (outlining California's attempts to regulate cosmetic animal testing).

that its enactment will encourage the federal government to reconsider the Humane Cosmetics Act. The Humane Cosmetics Act would federally ban the sale of cosmetics produced using animal testing and would allow the United States to join the numerous countries which have already implemented similar legislation.

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