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## Chapter 314: The Foundation for New Cosmetic Safety Laws

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**Chapter 314: The Foundation for New Cosmetic Safety  
Laws**

Allison Dotta\*

*Code Section Affected*

Health and Safety Code § 111663 (new).  
AB 2762 (Muratsuchi); 2020 STAT. CH. 314.

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I. INTRODUCTION

In 2019, a Sacramento woman hurried to the hospital room for trouble walking, slurred speech, and numbness in her feet and hands.<sup>1</sup> According to her son, the doctors tested the woman’s cosmetic products to figure out the source of the illness, and they found a high level of mercury in her anti-wrinkle cream.<sup>2</sup> The doctors then diagnosed her with mercury poisoning.<sup>3</sup> The son said that she used the cream twice every day for seven years.<sup>4</sup> As a result of the poisoning, the woman fell into a semi-coma and never fully recovered.<sup>5</sup> Even with the doctors’ treatment, she could not speak or take care of herself, which required her to have ongoing tube feeding.<sup>6</sup>

Sadly, this woman’s reaction is not unique.<sup>7</sup> Mercury poisoning from cosmetic products is not uncommon in the United States (“U.S.”).<sup>8</sup> The Sacramento County Department of Health Services revealed that mercury-tainted skin creams caused more than sixty poisonings in nine years.<sup>9</sup>

Other substances with similar toxic qualities as mercury are in U.S. cosmetic products.<sup>10</sup> These toxic ingredients can cause cancer, reproductive problems, and

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1. Lateshia Beachum, *A Woman has Been in a Coma for Weeks After Using Mercury-Tainted Skin Cream*, THE WASH. POST (Sept. 12, 2019, 9:11 AM), <https://www.washingtonpost.com/health/2019/09/11/woman-has-been-coma-weeks-after-using-mercury-tainted-skin-cream/> (on file with the *University of the Pacific Law Review*).

2. *Sacramento Woman Gets Mercury Poisoning from Skin Cream from Mexico*, KCRA (Sept. 12, 2019, 11:59 AM), <https://www.kcra.com/article/sacramento-woman-gets-mercury-poisoning-from-skin-cream-from-mexico/28983068> (on file with the *University of the Pacific Law Review*).

3. Beachum, *supra* note 1.

4. Beachum, *supra* note 1; *Family Says Woman Used Mercury Tainted-Skin Cream Twice A Day for Seven Years*, CBS SACRAMENTO (Dec. 26, 2019, 10:24 PM), <https://sacramento.cbslocal.com/2019/12/26/woman-mercury-tainted-skin-cream-seven-years/> (on file with the *University of the Pacific Law Review*).

5. Beachum, *supra* note 1.

6. Anita Mudon et al., *Notes from the Field: Methylmercury Toxicity from a Skin Lightening Cream Obtained from Mexico – California, 2019*, CTR. FOR DISEASE CONTROL AND PREVENTION: MORBIDITY AND MORTALITY WKLY. REP. (Dec. 20, 2019), <http://www.cdc.gov/mmwr/volumes/68/wr/mm6850a4.htm> (on file with the *University of the Pacific Law Review*).

7. See Beachum, *supra* note 1 (“There have been more than 60 poisonings linked to . . . skin creams tainted with a less-toxic form of mercury.”).

8. Beachum, *supra* note 1.

9. *Mercury in Skin Creams*, DEP’T HEALTH SERVS. (July 27, 2020), <https://dhs.sacounty.net/PUB/Pages/Mercury-in-Skin-Creams.aspx> (on file with the *University of the Pacific Law Review*).

10. Scott Faber, *The Toxic Twelve Chemicals and Contaminants in Cosmetics*, EWG (May 5, 2020), <https://www.ewg.org/californiacosmetics/toxic12> (on file with the *University of the Pacific Law Review*).

kidney damage—among other health problems.<sup>11</sup> Additionally, consumers increase the exposure and likelihood of adverse effects from the ingredients when they use multiple cosmetic products daily.<sup>12</sup>

Although the cosmetics industry has been expanding, the U.S. has fallen behind forty other countries, including all European Union (“E.U.”) countries.<sup>13</sup> The E.U. has prohibited over 1,300 toxic ingredients in cosmetics, including mercury.<sup>14</sup> Because of the federal government’s lack of action, individual states must take action for cosmetics regulations to keep up with the cosmetics industry.<sup>15</sup>

The California Legislature enacted Chapter 314 to address Californians’ concerns about ingredients in their cosmetic products.<sup>16</sup> Chapter 314 aims to align California with E.U. cosmetics standards by prohibiting the use of twenty-four ingredients—including mercury—from cosmetics in California’s stream of commerce.<sup>17</sup> By prohibiting these toxic ingredients from cosmetics, the Legislature imposes the strictest cosmetics standards in the U.S.<sup>18</sup> In California’s attempt to promote consumer safety by aligning with E.U. standards, Chapter 314 updates current U.S. cosmetic laws while conforming to the Supremacy and Dormant Commerce Clauses.<sup>19</sup>

## II. LEGAL BACKGROUND

The federal government has not changed its cosmetics standards in over eighty years, and California mirrors federal cosmetics laws.<sup>20</sup> Since then, the cosmetics industry has grown immensely, and other countries—including the entire E.U—

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11. *Id.*

12. See *Personal Care Products Safety Act Would Improve Cosmetics Safety*, EWG (May 27, 2020), <https://www.ewg.org/Personal-Care-Products-Safety-Act-Would-Improve-Cosmetics-Safety> (on file with the *University of the Pacific Law Review*) (“[C]osmetics’ in the law . . . include lotion, toothpaste, body wash, shampoo, deodorant and many other products that people use daily.”).

13. Scott Faber, *On Cosmetics Safety, U.S. Trails More Than 40 Nations*, EWG (Mar. 20, 2019), <https://www.ewg.org/news-and-analysis/2019/03/cosmetics-safety-us-trails-more-40-nations> (on file with the *University of the Pacific Law Review*).

14. See Commission Regulation 1223/2009, annex II, 2009 O.J. (L 342) 83–127 (EC) (listing the prohibited substances in cosmetic products).

15. See *The Toxic-Free Cosmetics Act: AB495-Muratsuchi*, ASSEMBLY MEMBER AL MURATSUCHI (Dec. 20, 2019), <https://a66.asmdc.org> (follow “Fact Sheet +” button) (on file with the *University of the Pacific Law Review*) (showing the background as to why California could not rely on the federal government for cosmetics safety and why they decided to enact Chapter 314).

16. Assembly Floor, Floor Analysis of AB 2762, at 2 (May 18, 2020).

17. *Id.* at 1, 3.

18. See *State Laws*, CAMPAIGN FOR SAFE COSMETICS (May 27, 2020), <http://www.safecosmetics.org/get-the-facts/regulations/state-laws/> (on file with the *University of the Pacific Law Review*) (showing how AB 2762 is the strictest law when compared to the Minnesota ban, California Safe Cosmetics Act, Washington’s Children’s Safe Product Act, and the Professional Cosmetics Labeling Requirement).

19. See *infra* Sections IV.A–B.

20. Scott Faber, *80 Years Later, Cosmetic Chemicals Still Unregulated*, EWG (June 25, 2018), <https://www.ewg.org/news-and-analysis/2018/06/80-years-later-cosmetics-chemicals-still-unregulated> (on file with the *University of the Pacific Law Review*).

have taken steps to enhance cosmetic safety.<sup>21</sup>

Knowledge of E.U., federal, and California laws is essential to understand Chapter 314's importance.<sup>22</sup> Section A explains the E.U.'s standards for cosmetic products.<sup>23</sup> Section B describes the U.S.'s federal cosmetic standards.<sup>24</sup> Section C discusses California's current cosmetic standards.<sup>25</sup> Section D examines constitutional issues under the Supremacy Clause and Dormant Commerce Clause.<sup>26</sup>

#### A. *The European Union and Cosmetics Standards*

The E.U. is at the forefront of consumer safety for cosmetics standards.<sup>27</sup> Its regulations prohibit a total of 1,328 substances in cosmetics.<sup>28</sup> The E.U. shifts the burden of compliance to the “responsible person.”<sup>29</sup> Before placing each product on the market, the responsible person must complete a safety assessment.<sup>30</sup> The regulations require a qualified person in pharmacy, medicine, or a similar field conduct the safety assessment.<sup>31</sup> Further, the responsible person must keep records for the product with the method of its manufacture and safety compliance available to the authorities.<sup>32</sup>

E.U. member states are responsible for regulating the products on the market and have options to check records and take samples at both the manufacturing facilities and laboratories.<sup>33</sup> If a product does not comply with the standards, the manufacturer must either remove it from the market or recall it.<sup>34</sup>

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21. *FDA Statement: Statement from FDA Commissioner*, U.S. FOOD & DRUG ADMIN. (Mar. 5, 2019), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-and-susan-mayne-phd-director-center-food-safety-and> (on file with the *University of the Pacific Law Review*); see Faber, *supra* note 13 (showing the countries in the E.U. are some of the forty who have stricter cosmetics standards than the U.S.).

22. See Assembly Floor, Floor Analysis of AB 2762, at 2–3 (May 18, 2020) (breaking down the background of the cosmetics law for California, federal, and E.U. law to understand the background of Chapter 314).

23. *Infra* Section II.A.

24. *Infra* Section II.B.

25. *Infra* Section II.C.

26. *Infra* Section II.D.

27. Faber, *supra* note 13.

28. Commission Regulation 1223/2009, annex II, 2009 O.J. (L 342) 83–127 (EC); *International Laws, CAMPAIGN FOR SAFE COSMETICS* (July 29, 2020), <http://www.safecosmetics.org/get-the-facts/regulations/international-laws/> (on file with the *University of the Pacific Law Review*).

29. Commission Regulation 1223/2009, art. 4, 2009 O.J. (L 342) 65 (EC).

30. Commission Regulation 1223/2009, art. 10, 2009 O.J. (L 342) 67 (EC); Ludger Giesberts, *New EU Cosmetics Regulation Already in Effect — 9 Things Manufacturers and Importers to Know*, DLA PIPER (Sept. 18, 2013), <https://www.dlapiper.com/en/us/insights/publications/2013/09/new-eu-cosmetics-regulation-already-in-effect>—\_/ (on file with the *University of the Pacific Law Review*).

31. Commission Regulation 1223/2009, art. 10, 2009 O.J. (L 342) 67 (EC).

32. Commission Regulation 1223/2009, art. 11, 2009 O.J. (L 342) 67–68 (EC).

33. Commission Regulation 1223/2009, art. 22, 2009 O.J. (L 342) 74 (EC).

34. Commission Regulation 1223/2009, art. 25, 2009 O.J. (L 342) 75 (EC).

## B. The Federal Government and Cosmetics Standards

In the U.S., the first federal cosmetics law passed in 1938 and became known as the Food, Drugs, and Cosmetic Act (“FDCA”).<sup>35</sup> The cosmetics law includes the U.S. Food and Drug Administration (“FDA”) as the enforcement branch.<sup>36</sup>

The FDCA focuses on adulterated and misbranded cosmetics, and the FDA enforces these FDCA regulations.<sup>37</sup> Subsection 1 addresses the federal cosmetics standards under the FDCA.<sup>38</sup> Subsection 2 discusses the FDA’s enforcement authority of the FDCA.<sup>39</sup>

### 1. Federal Standards for Cosmetic Products

The FDCA is the U.S.’s first federal cosmetics law.<sup>40</sup> It has 829 pages for drugs and food but only 2 pages for cosmetics.<sup>41</sup> The cosmetics law focuses on “adulterated” and “misbranded” cosmetic products.<sup>42</sup> The FDCA prohibits adulterated cosmetic products, and adulterated products result from the product’s ingredients, exterior conditions, containers, and color additives.<sup>43</sup> Misbranded cosmetic products are prohibited under the FDCA as well.<sup>44</sup> Misbranded cosmetic products concern a product’s packaging and labeling.<sup>45</sup> The product’s label and packaging must not be misleading and must identify the product’s manufacturer, packer, or distributor.<sup>46</sup> Additionally, no state may have a labeling or packaging requirement different from or additional to the FDCA’s standard.<sup>47</sup>

### 2. Agency Enforcement of Federal Cosmetics Standards

The FDA enforces the FDCA’s regulations, and the FDA’s rules prohibit eleven substances that make a cosmetic adulterated.<sup>48</sup> However, the FDA has limits

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35. 21 U.S.C. § 301 (2018); AMALIA CORBY-EDWARDS, CONG. RESEARCH SERV., R42594, FDA REGULATION OF COSMETICS AND PERSONAL CARE PRODUCTS 5 (2012).

36. 21 U.S.C. § 393(a) (2018).

37. 21 U.S.C. §§ 331(a), 393(a) (2018).

38. *Infra* Subsection II.B.1.

39. *Infra* Subsection II.B.2.

40. CORBY-EDWARDS, *supra* note 35.

41. Faber, *supra* note 10.

42. 21 U.S.C. § 331(a) (2018).

43. 21 U.S.C. § 331(a) (2018); *see* 21 U.S.C. § 361 (2018) (describing sections (a)–(e)).

44. 21 U.S.C. § 331(a) (2018).

45. *See* 21 U.S.C. § 362 (2018) (describing sections (a)–(f)).

46. 21 U.S.C. §§ 362(a)–(b), (d) (2018).

47. 21 U.S.C. § 379s(a) (2018).

48. 21 U.S.C. § 393(a) (2018); *Prohibited & Restricted Ingredients in Cosmetics*, U.S. FOOD & DRUG ADMIN. (Nov. 3, 2017), <https://www.fda.gov/cosmetics/cosmetics-laws-regulations/prohibited-restricted-ingredients-cosmetics> (on file with the *University of the Pacific Law Review*).

on its authority in other aspects.<sup>49</sup> Cosmetic products and ingredients do not require FDA approval before going to market, and cosmetics manufacturers have no obligation to give the FDA safety information.<sup>50</sup> Cosmetics manufacturers do not have to register or disclose formulations, product names, or ingredients to the FDA.<sup>51</sup> However, manufacturers may volunteer this information to the FDA’s Voluntary Cosmetic Registration Program (“VCRP”).<sup>52</sup> The VCRP benefits both the FDA and registered companies.<sup>53</sup> The FDA gains information about the ingredients, and companies work with the FDA early to ensure no delays in sales or imports because of labeling or packaging.<sup>54</sup>

The FDA may only take administrative action against a manufacturer after placement of a product on the market.<sup>55</sup> If a product violates the FDCA, the FDA cannot require the manufacturer to recall the product.<sup>56</sup> The FDA can ask the manufacturer to do so and can issue a statement to warn consumers if the manufacturer refuses.<sup>57</sup> The only legal action the FDA can take is to bring a lawsuit against the manufacturer.<sup>58</sup>

No other industry governed by the FDA is as self-regulated as the U.S. cosmetics industry.<sup>59</sup> Because of the federal government’s lack of regulation, states are trying to implement their own cosmetics laws with stricter regulations.<sup>60</sup>

### *C. California and Cosmetics Standards*

In 1996, California enacted the Sherman Food, Drug, and Cosmetic Law (“Sherman Law”) mirroring the FDCA almost exactly.<sup>61</sup> For example, it uses the same standards and terminology as the FDCA.<sup>62</sup> An adulterated cosmetic—defined

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49. Letter from Dayle Cristinzio, Acting Assoc. Comm’r for Legislation, Food and Drug Admin., to Dianne Feinstein, Senator, U.S. Senate 1 (Oct. 5, 2016) [hereinafter Cristinzio Letter] (on file with the *University of the Pacific Law Review*); see Faber, *supra* note 13 (“[T]hose provisions sharply limit its authority to regulate chemicals and contaminants that pose chronic risks.”).

50. Cristinzio Letter, *supra* note 49, at 2.

51. Cristinzio Letter, *supra* note 49, at 3.

52. Cristinzio Letter, *supra* note 49, at 2.

53. See *FDA VCRP Cosmetics Registration*, COSMERE (Aug. 27, 2018), <https://cosmereg.com/fda-vcrp-cosmetic-registration/> (on file with the *University of the Pacific Law Review*) (describing the benefits for the FDA and the manufacturer).

54. *Id.*

55. Cristinzio Letter, *supra* note 49, at 2.

56. Cristinzio Letter, *supra* note 49, at 4.

57. *Id.*

58. *Id.*

59. CORBY-EDWARDS, *supra* note 35, at Summary.

60. See MURATSUCHI, *supra* note 15 (showing the background as to why California could not rely on the federal government for cosmetics safety and why they decided to enact Chapter 314 with stricter regulations).

61. *Id.*

62. Compare 21 U.S.C. § 361(a) (2018) (using the terminology of “poisonous and deleterious” to define adulterated cosmetics), with CAL. HEALTH & SAFETY CODE § 111670 (West 2020) (using the terminology of “poisonous and deleterious” to define adulterated cosmetics).

as relating to the product’s ingredients, exterior conditions, containers, and color additives—in California’s stream of commerce violates the Sherman Law.<sup>63</sup> As with the FDCA, the ingredients in cosmetics cannot be “poisonous or deleterious.”<sup>64</sup>

The California Department of Public Health (“Department”) enforces the Sherman Law.<sup>65</sup> The Department may confiscate adulterated products and issue penalties for companies that violate the Sherman Law.<sup>66</sup> Cosmetics manufacturers may register with the Department, but—as with the FDCA—registration is optional.<sup>67</sup> Following the FDCA’s lead, the Sherman Law generally allows California cosmetic manufacturers to largely self-regulate.<sup>68</sup>

To increase consumer knowledge and safety, California enacted the California Safe Cosmetics Act (“SCA”) in 2005.<sup>69</sup> The SCA operates in conjunction with the Sherman Law and requires manufacturers to disclose cosmetics containing ingredients known or suspected to cause reproductive harm or cancer.<sup>70</sup> Further, the SCA requires the Department to create an online public database displaying this information.<sup>71</sup>

#### D. Constitutional Concerns with Federal and State Power

The U.S. Constitution allows the federal government to exercise its authority throughout the country, while limiting its powers to what is in the Constitution.<sup>72</sup> Powers the Constitution does not grant to the federal government are for the states or the people.<sup>73</sup> This separation of powers creates a system of limited central government where every exercise of federal authority is linked to a power granted by the Constitution.<sup>74</sup> Because of this mechanism, states sometimes raise

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63. See CAL. HEALTH & SAFETY CODE § 111700 (West 2020) (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any cosmetic that is adulterated.”); CAL. HEALTH & SAFETY CODE § § 111670, 111680, 111685, 111690 (West 2020) (describing the ways a cosmetic can become adulterated).

64. CAL. HEALTH & SAFETY CODE § 111670 (West 2020).

65. CAL. HEALTH & SAFETY CODE § 110045 (West 2020).

66. CAL. HEALTH & SAFETY CODE §§ 111825(a), 111875 (West 2020).

67. CAL. HEALTH & SAFETY CODE § 111795(a) (West 2020).

68. See CORBY-EDWARDS, *supra* note 35, at Summary (“[C]osmetics are arguably more self-regulated than other FDA-regulated products.”).

69. CAL. HEALTH & SAFETY CODE § 111791 (West 2020).

70. CAL. HEALTH & SAFETY CODE § 111792(a) (West 2020); see *Cosmetic Regulations in California: What You Should Know*, BLOG CONSUMER GOODS (Apr. 17, 2018), <https://www.inno-foodproducts-brainbox.com/2018/04/17/cosmetic-regulations-in-california-what-you-should-know> (on file with the *University of the Pacific Law Review*) (giving the California Department of Public Health authority to oversee reporting of cosmetics).

71. CAL. HEALTH & SAFETY CODE § 111792(e) (West 2020).

72. See U.S. CONST. art. I § 8 (describing powers enumerated to the federal government).

73. U.S. CONST. amend. X.

74. See *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“[T]he powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried



constitutional questions about whether federal or state law controls.<sup>75</sup>

The constitutional questions that arise from Chapter 314 pertain to the Supremacy Clause and Dormant Commerce Clause.<sup>76</sup> Subsection 1 gives a brief overview of federal preemption under the Supremacy Clause.<sup>77</sup> Subsection 2 describes the Dormant Commerce Clause.<sup>78</sup>

### *1. A Brief Overview of the Supremacy Clause*

The U.S. Constitution's Supremacy Clause states that federal law is "supreme" over state laws.<sup>79</sup> In other words, if a state enacts a law in an area that Congress has already regulated, federal regulation preempts state regulation in that area to the extent it conflicts.<sup>80</sup> The categories where a conflict may arise between state and federal laws are express, field, and conflict preemption.<sup>81</sup>

Express preemption is where Congress writes the law to explicitly preempt state law.<sup>82</sup> By doing so, Congress can define the existence and scope of preemption.<sup>83</sup> In *Egelhoff v. Egelhoff*, a husband designated his wife as beneficiary of his life insurance policy and pension plan.<sup>84</sup> His employer provided the insurance policy and pension plan, and federal law governed them.<sup>85</sup> The federal law contained a preemption section stating it supersedes any state laws concerning employee benefit plans.<sup>86</sup> The husband later divorced his wife and died soon after.<sup>87</sup> His children tried to get the insurance and pension money because state law revokes the designation of a spouse as beneficiary upon divorce.<sup>88</sup> The Supreme Court found the state law related to the employee benefit plan; therefore, the federal law expressly preempted the state law.<sup>89</sup>

Field preemption is when the scheme of federal regulation is so extensive that it is reasonable to infer Congress did not leave any room for the states to

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into execution . . .").

75. *McCulloch v. Maryland*, 17 U.S. at 330–31.

76. See U.S. CONST. art. VI, cl 2 (describing the Supremacy Clause in the U.S. Constitution); U.S. CONST. art. I, § 8 cl. 3 (describing the Commerce Clause in the U.S. Constitution where the Dormant Commerce Clause originates from).

77. *Infra* Subsection II.D.1.

78. *Infra* Subsection II.D.2.

79. U.S. CONST. art. VI, cl. 2.

80. *McCulloch v. Maryland*, 17 U.S. at 326–27; see *Gibbons v. Ogden*, 22 U.S. 1, 41 (1824) ("Each being sovereign as to power, may use it in any form, and in relation to any subject; and to guard against a conflict in practice, the law of Congress is made supreme.").

81. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

82. *Id.*

83. *Id.* at 109.

84. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 141(2001).

85. *Id.*

86. *Id.* at 146.

87. *Id.* at 141.

88. *Id.*

89. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. at 141.

supplement the regulations.<sup>90</sup> In *Hines v. Davidowitz*, the federal Alien Registration Act (“FAR”) required “aliens” to register with the federal government.<sup>91</sup> The FAR had a comprehensive plan and rigid requirements.<sup>92</sup> A state enacted its own registration law that imposed additional requirements.<sup>93</sup> Based on the FAR’s regulatory scheme, the Supreme Court concluded Congress enacted the FAR to establish uniform, national immigration laws.<sup>94</sup> Therefore, FAR occupied the field and preempted state law.<sup>95</sup>

Conflict preemption is another type of implied preemption where the state law directly conflicts with federal law.<sup>96</sup> Conflict preemption has two categories: impossibility and obstacle.<sup>97</sup> Impossibility preemption occurs when it is impossible to comply with both state and federal law.<sup>98</sup> An example is when state law requires physicians to prescribe marijuana to cancer patients if they request it, but federal law prohibits physicians from prescribing it to patients.<sup>99</sup> So a doctor faced with a cancer patient requesting the drug finds it impossible to comply with both state and federal law; therefore, federal law would preempt state law.<sup>100</sup>

Obstacle preemption is when a state law interferes with a federal objective or purpose.<sup>101</sup> In *Geier v. American Honda Motor Company, Inc.*, the Federal Motor Vehicle Safety Standard 208 allowed car manufacturers to consider multiple options for passive restraints in new cars.<sup>102</sup> The law allowed options like automatic seatbelts or airbags.<sup>103</sup> The goal was to provide flexible options for manufacturers, but a state law passed requiring manufacturers to install airbags in new cars.<sup>104</sup> Since the state law did not allow for the flexibility the federal law envisioned, the Supreme Court found the state law interfered with the federal law’s goal; therefore, federal law preempted state law.<sup>105</sup>

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90. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

91. *Hines v. Davidowitz*, 312 U.S. 52, 60 (1941).

92. *Id.*

93. *Id.* at 53.

94. *Id.* at 74.

95. *See id.* at 74. (describing how FAR was meant to be part of the national immigration and naturalization laws so as to have a single national registration system, and so the state law is not enforceable).

96. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (recognizing conflict preemption as one of two types of implied preemption).

97. *See id.* at 98 (describing the two types of conflict preemption).

98. *Id.* at 98; *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

99. CHRISTOPHER N. MAY & ALLAN IDES, *CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM* 275 (5th ed. 2010).

100. *Id.*

101. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. at 98.

102. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 878 (2000).

103. *Id.*

104. *Id.* at 874–75.

105. *Id.* at 881.

2. *A Brief Overview of the Dormant Commerce Clause*

The U.S. Constitution's Commerce Clause grants Congress the power to regulate interstate and foreign commerce.<sup>106</sup> The Dormant Commerce Clause arises from the Commerce Clause because it interprets this grant of power as imposing a negative restraint on states.<sup>107</sup> This negative restraint means that states cannot discriminate against or substantially burden interstate commerce, and state laws in either category violate the Commerce Clause.<sup>108</sup>

State law discriminates against interstate commerce when it is a trade barrier against out-of-state competitors or consumers because it gives an advantage to local consumers or businesses.<sup>109</sup> When a state law discriminates in such a manner, a court will generally invalidate it.<sup>110</sup> The only exception is if the local government can show the regulation furthers a local purpose and no reasonable non-discriminatory alternatives are available.<sup>111</sup>

In *Hunt v. Washington Apple Advertising Commission*, North Carolina enacted a state law about the apples in its chain of commerce.<sup>112</sup> The law required labeling the apples with a U.S. Department of Agriculture grade when selling or shipping to the state.<sup>113</sup> Other states had higher standards for grading systems, and out-of-state growers would have to abandon their grading systems to sell their apples in North Carolina.<sup>114</sup> The Supreme Court determined the state law was discriminatory toward the out-of-state growers and shielded the in-state growers from the same burden.<sup>115</sup>

If a state law is not discriminatory but incidentally burdens interstate commerce, then its burden must weigh against its benefit.<sup>116</sup> This weighing of benefits and burdens creates a balancing test for courts to determine state laws' constitutionality.<sup>117</sup> If there is a local interest to the state law, the court determines the degree of its benefit based on the state law's goal.<sup>118</sup> If the local interest is a

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106. U.S. CONST. art. I § 8, cl. 3.

107. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 98 (1994).

108. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. at 98; *cf. Maine v. Taylor*, 477 U.S. 131, 138 (1986) (determining whether a state has overstepped its power to regulate interstate commerce requires determining whether the state's statutes incidentally burden interstate commerce or affirmatively discriminates against interstate commerce).

109. *Pike v. Bruce Church*, 397 U.S. 137, 145 (1970).

110. *Id.*

111. *See Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. at 100–01 (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)) (“[The local statute] must be invalidated unless . . . can ‘show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’”).

112. *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 335 (1977).

113. *Id.*

114. *Id.* at 336–37.

115. *Id.* at 353.

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

117. *Id.*

118. *MAY & IDES*, *supra* note 99, at 373.

state police power, such as public health, it generally stands as constitutional.<sup>119</sup> The degree of the state law's burden depends on the strength of its benefit.<sup>120</sup> For example, if a state law imposes substantial burdens on interstate commerce and the benefits to the state are minimal, courts tend to strike down the state law.<sup>121</sup>

### III. CHAPTER 314

Unhappy with current cosmetics laws, California created the strictest cosmetics law in the U.S.<sup>122</sup> Chapter 314 prohibits toxic ingredients in cosmetics in California.<sup>123</sup> In essence, Chapter 314 adopts a small-scale version of the E.U.'s standards for cosmetic products.<sup>124</sup> Instead of following the prohibited ingredient list under the FDCA, Chapter 314 shifts to follow the E.U.'s ingredient prohibition.<sup>125</sup>

Chapter 314 prohibits twenty-four ingredients in cosmetic products.<sup>126</sup> The law focuses on these ingredients because of their toxic properties.<sup>127</sup> For example, two ingredients have a link to cancer, and two are endocrine disrupters, which adversely affect hormones.<sup>128</sup> Moreover, Chapter 314 prohibits manufacturers from introducing a product with a prohibited ingredient into California's stream of commerce and prohibits anyone from transporting, selling, or holding them.<sup>129</sup>

### IV. ANALYSIS

Chapter 314 is the U.S.'s strictest cosmetics law with its prohibition of ingredients in cosmetics.<sup>130</sup> By enacting Chapter 314, California takes an important

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119. See *Huron Portland Cement Co. v. City of Detroit Mich.*, 362 U.S. 440, 448 (1960) ("State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.").

120. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

121. *MAY & IDES*, *supra* note 99, at 373.

122. See Assembly Floor, Floor Analysis of AB 2762, at 2 (May 18, 2020) (describing how the federal and California laws are inadequate); see also CAMPAIGN FOR SAFE COSMETICS, *supra* note 18 (showing how AB 2762 is the strictest law when compared to other states).

123. Assembly Floor, Floor Analysis of AB 2762, at 3 (May 18, 2020).

124. Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 2 (May 14, 2020).

125. Evan Symon, *Cosmetics Chemical Banning Bill Passed in Committee*, CAL. GLOBE (May 15, 2020, 2:46 PM), <https://californiaglobe.com/section-2/cosmetics-chemical-banning-bill-passed-in-committee/> (on file with the *University of the Pacific Law Review*).

126. CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314).

127. Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020).

128. Faber, *supra* note 10 (showing per- and polyfluoroalkyl substances and m- and o-phenylenediamine have links to cancer and dibutyl and diethylhexyl phthalates and isobutyl and isopropyl parabens are endocrine disrupters).

129. CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314).

130. See CAMPAIGN FOR SAFE COSMETICS, *supra* note 18 (showing that the other state cosmetics laws in the U.S. are not as strict as Chapter 314).

step to ensure the safety of all Californians, while avoiding constitutional issues under the Supremacy Clause and Dormant Commerce Clause.<sup>131</sup>

Chapter 314 raises concerns about its constitutionality and whether Californians need the law with the emergence of clean beauty products on the market.<sup>132</sup> Section A analyzes the constitutional issue of federal preemption under the Supremacy Clause.<sup>133</sup> Section B explores Chapter 314 in light of the Dormant Commerce Clause.<sup>134</sup> Section C discusses the clean beauty movement and California's need for Chapter 314.<sup>135</sup>

#### *A. Chapter 314 and Federal Preemption*

Because a federal cosmetics law is already in place, it may appear the FDCA preempts Chapter 314.<sup>136</sup> Invalidating Chapter 314 would be detrimental to Californians because its update to current cosmetic laws is one of the few ways to ensure accessible, safer cosmetics for all.<sup>137</sup>

The FDCA may preempt Chapter 314 three different ways: express, field, or conflict preemption.<sup>138</sup> Subsection 1 analyzes whether the FDCA expressly preempts Chapter 314.<sup>139</sup> Subsection 2 discusses challenges for Chapter 314 posed by field preemption.<sup>140</sup> Subsection 3 explores the applicability of conflict preemption for Chapter 314.<sup>141</sup>

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131. See Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

132. See CAL. HEALTH & SAFETY CODE § 111663 (enacted by Chapter 314) (prohibiting twenty-four ingredients in cosmetics in California); see also MAY & IDES, *supra* note 99, at 271 (“State law must conform to the dictates of the Constitution, and yield to constitutionally valid federal law whenever a conflict between the two arises. . . no state may transgress the norms of the Constitution or interfere with the constitutional exercise of federal authority.”).

133. *Infra* Section IV.A.

134. *Infra* Section IV.B.

135. *Infra* Section IV.C.

136. See *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819) (“The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any states to the contrary notwithstanding . . .”).

137. See Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

138. *Gade v. Nat’l Solid Waste Management Ass’n*, 505 U.S. 88, 98 (1992).

139. *Infra* Subsection IV.A.1.

140. *Infra* Subsection IV.A.2.

141. *Infra* Subsection IV.A.3.

### 1. Express Preemption

The FDCA does not indicate Congress's intent to preempt state laws that regulate a cosmetic product's ingredients.<sup>142</sup> The FDCA has language that preempts state laws that pertain to packaging and labeling cosmetics.<sup>143</sup> State laws cannot differ from federal packaging and labeling cosmetic laws, but Chapter 314 does not regulate packaging or labeling.<sup>144</sup> Rather, it prohibits ingredients that comprise a cosmetic product, not the product's labeling and packaging.<sup>145</sup> Chapter 314 is not within the scope of the FDCA's express preemption because it does not expressly forbid states from enacting differing laws for cosmetic ingredients.<sup>146</sup> Therefore, the FDCA does not expressly preempt Chapter 314.<sup>147</sup>

### 2. Field Preemption

When the federal government exclusively governs a field, the states may not regulate in that area.<sup>148</sup> Since the federal government has regulations and interests in cosmetics, those regulations and interests may be enough to occupy the field.<sup>149</sup> Despite the federal government's regulations and interests in cosmetics, California's need for Chapter 314 and stricter cosmetic standards is for the public health and safety of all Californians.<sup>150</sup>

Chapter 314 prevents Californians from exposure to toxic ingredients through cosmetics, and the argument for field preemption is weak because Chapter 314 regulates public health and safety.<sup>151</sup> There is a presumption that state health laws can usually coexist with federal laws; therefore, courts rarely infer preemption of a whole field related to health and safety.<sup>152</sup> The argument for field preemption

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142. See 21 U.S.C. § 379s(a) (2018) (providing that no state may create a requirement for cosmetic labeling or packaging different from or additional to the federal law).

143. 21 U.S.C. § 379s(a) (2018).

144. *Id.*; see CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (prohibiting adding certain ingredients into cosmetic products in California's stream of commerce).

145. See CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (“[N]o person or entity shall manufacturer . . . any cosmetic product that contains any of the following intentionally added ingredients.”).

146. Compare 21 U.S.C. § 379s (2018) (pertaining to cosmetic packaging and labeling), with CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (pertaining to cosmetic ingredients).

147. Compare 21 U.S.C. § 379s (2018) (preempting state cosmetic packaging and labeling laws), with CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (relating to ingredients in cosmetics).

148. See *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (“[W]here the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . .’”).

149. See *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. at 98 (“[W]here the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it.”) (internal quotations omitted).

150. Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020).

151. See *id.* (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

152. *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 718 (1985).

becomes even weaker considering the regulatory scheme of cosmetics relies more on self-regulation than federal regulation.<sup>153</sup> Therefore, courts are not likely to infer a federal intent to occupy the field of cosmetics, and Chapter 314 would avoid field preemption.<sup>154</sup>

### 3. Conflict Preemption

Conflict preemption is when it is impossible to comply with both state and federal laws or where the state law is an obstacle to executing the full objectives of Congress.<sup>155</sup> Chapter 314 faces these issues of impossibility and obstacle preemption.<sup>156</sup> Subsection A analyzes Chapter 314 and impossibility preemption.<sup>157</sup> Subsection B examines obstacle preemption in terms of Chapter 314.<sup>158</sup>

#### a. Impossibility Preemption

Under Chapter 314, it is possible to comply with both the FDCA and Chapter 314 simultaneously.<sup>159</sup> The FDCA has standards for cosmetics that prohibit eleven ingredients, and Chapter 314 expands that list to thirty-five.<sup>160</sup> Entities in California's stream of commerce can follow all the FDCA standards, but the difference is that Chapter 314 adds additional restrictions.<sup>161</sup> The FDCA does not preempt Chapter 314 because it is possible to comply with the FDCA and Chapter 314.<sup>162</sup>

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153. See CORBY-EDWARDS, *supra* note 35, at Summary (“[C]osmetics are arguably more self-regulated than other FDA-regulated products.”).

154. See *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. at 718 (presuming that state regulations relating to health and safety can usually coexist with federal regulations; therefore, courts will rarely infer an intent to preempt a field related to safety and health); see also CORBY-EDWARDS, *supra* note 35, at Summary (describing how the FDA's cosmetic authority is less comprehensive than its authority over any other FDA product in many aspects).

155. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

156. Compare CAL. HEALTH & SAFETY CODE § 111663 (enacted by Chapter 314) (law regulating ingredients in cosmetic products in California), with *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. at 98 (describing impossibility preemption and obstacle preemption).

157. *Infra* Subsection IV.A.3.a.

158. *Infra* Subsection IV.A.3.b.

159. Compare CAL. HEALTH & SAFETY CODE § 111663 (enacted by Chapter 314) (prohibiting twenty-four cosmetics ingredients in California's stream of commerce), with U.S. FOOD & DRUG ADMIN., *supra* note 48 (prohibiting eleven cosmetic ingredients in cosmetics in the U.S.).

160. U.S. FOOD & DRUG ADMIN., *supra* note 48; see CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (prohibiting twenty-four cosmetic ingredients in California's stream of commerce).

161. Compare CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (prohibiting twenty-four cosmetic ingredients in California's stream of commerce), with U.S. FOOD & DRUG ADMIN., *supra* note 48 (prohibiting eleven cosmetic ingredients in the U.S.).

162. Compare CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (prohibiting twenty-four cosmetic ingredients in California's stream of commerce without conflicting with the federal cosmetic ingredient prohibition), with U.S. FOOD & DRUG ADMIN., *supra* note 48 (prohibiting eleven cosmetic ingredients

*b. Obstacle Preemption*

Obstacle preemption is when a state law poses an obstacle to the objectives of Congress.<sup>163</sup> Based on Chapter 314's public health goal for cosmetics, there is a presumption that it is constitutional.<sup>164</sup> When Congress enacted the FDCA, it focused on protecting the health and safety of consumers because of fatal incidents caused by toxic ingredients in food, drugs, and cosmetics.<sup>165</sup> The FDCA bases its laws on risk evaluation, and legislators perceived cosmetics as posing less risk than food or drugs, resulting in minimal regulations and enforcement power.<sup>166</sup>

Congress's goal was to protect consumers with information available at the time—allowing room for states to supplement it—not to establish a national standard.<sup>167</sup> Chapter 314 does not provide an obstacle to the federal goal, rather it complements federal law with its prohibitions that protect Californians.<sup>168</sup> In sum, the FDCA does not preempt Chapter 314 through obstacle preemption.<sup>169</sup>

*B. Chapter 314 and the Dormant Commerce Clause*

Under the Dormant Commerce Clause, there are two ways a state law is unconstitutional.<sup>170</sup> The state law either discriminates against or substantially burdens interstate commerce.<sup>171</sup> Whether Chapter 314 violates the Dormant Commerce Clause depends on if it falls into one of these two categories.<sup>172</sup> Subsection 1 discusses whether Chapter 314 is discriminatory.<sup>173</sup> Subsection 2

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in cosmetics in the U.S.).

163. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

164. *See Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 718 (1985) (“Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations . . .”).

165. *See* David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 DUKE L.J. 1, 20 (1939) (describing a fatal drug incident that happened before the Congressional session and how the bill passed without debate as soon as Congress was in session).

166. U.S. FOOD & DRUG ADMIN., *supra* note 21.

167. *See* CORBY-EDWARDS, *supra* note 35, at Summary (describing the effects of the federal cosmetics law such as the lack of authority over cosmetics compared to other FDA-regulated products and the self-regulatory nature of the industry); *see also* U.S. FOOD & DRUG ADMIN., *supra* note 21 (describing how because the statute is based on risk, products with more risks have more standards and less risks, like cosmetics, have less standards).

168. *See* Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

169. *Compare* Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020), *with* Cavers, *supra* note 165, at 20 (describing a fatal drug incident that happened before the Congressional session and how the bill passed without debate as soon as Congress was in session because consumer safety was at the heart of the law).

170. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994).

171. *Id.*

172. *See id.* (describing how regulations are invalid if they are in one of the two categories).

173. *Infra* Subsection IV.B.1.



explores whether Chapter 314 substantially burdens interstate commerce.<sup>174</sup>

### *1. Determining Whether Chapter 314 is Discriminatory*

From Chapter 314's text, it is apparent that the law is not discriminatory.<sup>175</sup> Chapter 314 treats out-of-state interests the same as in-state interests because it affects in-state cosmetic manufacturers as much as out-of-state manufacturers.<sup>176</sup> If any manufacturer wants to sell its product in California, it must comply with Chapter 314, demonstrating a product's origin is irrelevant under Chapter 314.<sup>177</sup> Because Chapter 314 applies evenly to all manufacturers who place cosmetics into California's stream of commerce, its effects on interstate commerce are incidental.<sup>178</sup>

### *2. Chapter 314 and its Burden on Interstate Commerce*

Since Chapter 314 is not discriminatory, the only other means to determine its constitutionality is to balance its burden on interstate commerce against local benefits of Chapter 314.<sup>179</sup> If the burden outweighs the benefit, Chapter 314 would not be valid.<sup>180</sup> Subsection A discusses Chapter 314's burden on interstate commerce.<sup>181</sup> Subsection B explores the local benefits of Chapter 314.<sup>182</sup> Subsection C weighs Chapter 314's burden against its benefit.<sup>183</sup>

#### *a. Burden on Interstate Commerce*

Interstate commerce involves a product moving across state lines; therefore, a California manufacturer releasing a product in California is not interstate

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174. *Infra* Subsection IV.B.2.

175. See CAL. HEALTH & SAFETY CODE § 111663 (enacted by Chapter 314) (showing the provisions that constitute Chapter 314).

176. See CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (“[N]o person or entity shall manufacture, sell, deliver, hold, or offer for sale, in commerce any cosmetic product that contains any . . . ingredients.”).

177. See CAL. HEALTH & SAFETY CODE § 111663 (enacted by Chapter 314) (“[N]o person or entity shall manufacture, sell, deliver, hold, or offer for sale, in commerce any cosmetic product that contains any . . . ingredients.”) (emphasis added); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (“Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.”).

178. See *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

179. *Id.*

180. *Id.*

181. *Infra* Subsection IV.B.2.a.

182. *Infra* Subsection IV.B.2.b.

183. *Infra* Subsection IV.B.2.c.

commerce.<sup>184</sup> Chapter 314's burden stems from out-of-state companies who place their cosmetic product in California's stream of commerce but have to adhere to Chapter 314's heightened standards.<sup>185</sup> In a way, California law imposes a burden on out-of-state entities because a manufacturer that uses a prohibited ingredient cannot place its product in California's stream of commerce.<sup>186</sup> To do so, the manufacturer may have to reformulate its product to comply with Chapter 314, which is expensive.<sup>187</sup>

However, many cosmetic companies manufacture and sell cosmetic products in the E.U. already.<sup>188</sup> Large companies like Johnson & Johnson sell their products in the E.U., which prohibits the same ingredients California now bans under Chapter 314.<sup>189</sup> Therefore, companies that manufacture and sell products in the E.U. already comply with Chapter 314, so it would not create a burden to reformulate products under those circumstances.<sup>190</sup>

Without Chapter 314, California consumers buy and use lower quality products than consumers shopping for the same products in the E.U.<sup>191</sup> For example, Johnson & Johnson sold formaldehyde-free baby products in the E.U. but sold the formaldehyde version in the U.S.<sup>192</sup> At the time, people knew formaldehyde could cause cancer, but the company continued to sell the formaldehyde version in the U.S. despite having a version without the chemical.<sup>193</sup> Johnson & Johnson only started selling the formaldehyde-free product in the U.S. years after the public realized the toxic ingredient was in their baby products.<sup>194</sup>

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184. *Key Legal Concepts for Cosmetics Industry: Interstate Commerce, Adulterated, and Misbranded*, U.S. FOOD & DRUG ADMIN. (July 29, 2020), <https://www.fda.gov/cosmetics/cosmetics-laws-regulations/key-legal-concepts-cosmetics-industry-interstate-commerce-adulterated-and-misbranded> (on file with the *University of the Pacific Law Review*).

185. See CAL. HEALTH & SAFETY CODE § 111663 (enacted by Chapter 314) (prohibiting any person or entity from placing a cosmetic with a listed ingredient in California's stream of commerce); U.S. FOOD & DRUG ADMIN., *supra* note 184 (defining interstate commerce).

186. See CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (“[N]o person or entity shall manufacture, sell, deliver, hold, or offer for sale . . . .”) (emphasis added); see also *New Formula and Improved Cosmetics: What the Brands Aren't Telling You*, COSMETIST (July 5, 2020), <https://thecosmetist.com/new-formula-cosmetics-brands-truth/> (on file with the *University of the Pacific Law Review*) (“Some ingredients are no longer allowed . . . so formulas that don't comply with these new standards have to be modified to comply with regulations.”).

187. See COSMETIST, *supra* note 186 (discussing how when regulations change, products that do not comply may have to reformulate, which is expensive).

188. Assembly Floor, Floor Analysis of AB 2762, at 3 (May 18, 2020); see Stacy Malkan, *Johnson & Johnson is Just the Tip of the Toxic Iceberg*, TIME (Mar. 2, 2016, 12:01 PM), <https://time.com/4239561/johnson-and-johnson-toxic-ingredients/> (on file with the *University of the Pacific Law Review*) (describing how Johnson & Johnson sells their products in the E.U. and the U.S.).

189. Malkan, *supra* note 188 (describing how Johnson & Johnson sold formaldehyde-free versions of their products in the E.U. while selling the formaldehyde versions in the U.S.).

190. See *id.* (describing how Johnson & Johnson sold formaldehyde-free versions of their products in the E.U.).

191. Assembly Floor, Floor Analysis of AB 2762, at 3 (May 18, 2020).

192. Malkan, *supra* note 188.

193. *Id.*

194. *Id.*

Chapter 314 takes a step to ensure that cosmetics do not needlessly expose consumers to toxic ingredients and that a cosmetic's quality does not depend on where you live.<sup>195</sup>

However, not all companies export their product to the E.U., and their current formulations would not necessarily comply with Chapter 314, which might require reformulation of their products.<sup>196</sup> Chapter 314 could make it difficult for smaller cosmetics companies to sell their products in California because of the financial burden.<sup>197</sup> Nevertheless, there has been a recent clean beauty movement where cosmetic companies do not use harmful ingredients in their products to provide alternatives to cosmetics with toxic ingredients.<sup>198</sup> Some of these smaller cosmetic companies, like Beautycounter, do not export their products to the E.U., yet their products already comply with Chapter 314.<sup>199</sup> Thus, reformulation would not be necessary to sell the products in California.<sup>200</sup> The number of cosmetic companies that need to reformulate decreases, and the burden is not born on all companies that do not export to the E.U.<sup>201</sup> Therefore, although Chapter 314 creates an economic burden on cosmetic companies, the number of companies unaffected by the expense of reformulation minimizes the burden.<sup>202</sup>

#### *b. Legitimate Local Interests*

The local interest Chapter 314 serves in California is substantial because Chapter 314 protects the health and safety of Californians.<sup>203</sup> The reason for

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195. Assembly Floor, Floor Analysis of AB 2762, at 3 (May 18, 2020).

196. See COSMETIST, *supra* note 186 (describing how when regulations change, manufacturers have to reformulate their product to comply).

197. See COSMETIST, *supra* note 186 (“[T]he niche brands, the smaller ones, get in trouble for not having the money to pay for these mandatory modifications. . . . The little brands, the ones with limited funds but grand ambitions, are often shoved aside like that.”).

198. See *What Does “Clean Beauty” Mean in 2020?*, GOOD FACE PROJECT (Aug. 3, 2020), <https://thegoodfaceproject.com/articles/what-is-clean-beauty> (on file with the *University of the Pacific Law Review*) (“At its core, clean beauty means that you can use a product without risking your own health. The ingredients label must contain only safe, non-toxic ingredients.”).

199. See *FAQs*, BEAUTYCOUNTER (Aug. 3, 2020), <https://www.beautycounter.com/faqs> (on file with the *University of the Pacific Law Review*) (“At this time, Beautycounter products are available in the United States and Canada.”); see also *Safety FAQs*, BEAUTYCOUNTER (Aug. 3, 2020), <https://www.beautycounter.com/faqs> (on file with the *University of the Pacific Law Review*) (explaining that the list of ingredients that are not in their products includes the ingredient’s prohibited by the E.U.).

200. See *Safety FAQs*, BEAUTYCOUNTER (Aug. 3, 2020), <https://www.beautycounter.com/faqs> (on file with the *University of the Pacific Law Review*) (explaining that the company voluntarily follows the E.U. cosmetic standards for ingredients and more).

201. See GOOD FACE PROJECT, *supra* note 198 (describing clean beauty products as those that use only non-toxic, safe ingredients); see also COSMETIST, *supra* note 186 (describing how when companies use ingredients that do not comply with new standards, they must reformulate).

202. See CAL. HEALTH & SAFETY CODE § 111663 (enacted by Chapter 314) (prohibiting anyone placing a cosmetic with a prohibited ingredient in California’s stream of commerce); see also COSMETIST, *supra* note 186 (“Formulas that don’t comply with these new standards have to be modified to comply with new regulations. But . . . reformulation is expensive.”).

203. See Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB

Chapter 314 was Californians' worry about the health effects of chemicals allowed in cosmetics.<sup>204</sup> Chapter 314's goal is to protect California consumers from cosmetic products containing ingredients that cause cancer and reproductive problems.<sup>205</sup> Because of Chapter 314's prohibition of some toxic ingredients in cosmetic products, Californians will not worry about exposure and effects of toxic ingredients in their cosmetics.<sup>206</sup>

Additionally, promoting public health and safety is a state police power; because Chapter 314 is an extension of California's power, it weighs heavily in presuming constitutionality.<sup>207</sup> The way Chapter 314 protects California consumers and California's power to enact laws for public health shows that the local interests served by Chapter 314 are substantial.<sup>208</sup>

*c. Weighing the Burden Against Local Benefits*

To presume the constitutionality of Chapter 314 under the Dormant Commerce Clause, its burden on interstate commerce must weigh less than the local benefits it produces.<sup>209</sup> California's authority and Chapter 314's protection of Californians outweighs the financial burdens on cosmetic companies in interstate commerce and presumes Chapter 314's constitutionality.<sup>210</sup>

*C. The Need for Chapter 314 Despite the Clean Beauty Movement*

Chapter 314's opponents may argue the clean beauty movement already brings safe cosmetics to California consumers and with time maybe all companies will stop using toxic ingredients.<sup>211</sup> However, waiting for companies to stop using toxic ingredients leaves cosmetic companies in charge of consumers' health, which is

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2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

204. Assembly Floor, Floor Analysis of AB 2762, at 2 (May 18, 2020).

205. *Id.* at 3.

206. *Id.*

207. See *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985) ("The regulation of health and safety matters is primarily, and historically, a matter of local concern.").

208. See *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. at 719 (describing how the regulation of health and safety is primarily a state concern); Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

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

210. See *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. at 719 ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.").

211. See Rina Raphael, *What's Driving the Billion-Dollar Natural Movement*, FAST COMPANY (May 26, 2017), <https://www.fastcompany.com/3068710/whats-driving-the-billion-dollar-natural-beauty-movement> (on file with the *University of the Pacific Law Review*) (describing how clean products are mainstream and the clean industry is growing fast).

problematic.<sup>212</sup> Cosmetic companies knowingly use ingredients that cause serious problems like cancer.<sup>213</sup> For instance, the SCA requires all manufacturers with cosmetics in California to disclose their products that contain ingredients known or suspected to cause reproductive harm or cancer.<sup>214</sup> Therefore, cosmetic manufacturers that use the particular ingredients are aware of the ingredients' danger, and most companies keep using them anyways.<sup>215</sup> Out of the 85,515 products companies reported to the Department, manufacturers only discontinued 13,117 products.<sup>216</sup> The number of discontinued products may look large, but it still leaves 67,952 cosmetics with those toxic ingredients in California's market.<sup>217</sup> Chapter 314 ensures companies cannot use prohibited ingredients regardless of convenience.<sup>218</sup>

Additionally, Chapter 314 provides safer cosmetics to all Californians, not just an exclusive few.<sup>219</sup> Products in the clean beauty movement are generally not affordable.<sup>220</sup> The average cost of a clean brand's basic product is over \$40, and there are many cosmetics in consumers' daily lives.<sup>221</sup> Buying only clean products quickly becomes unaffordable, and people with lower incomes do not have the luxury of avoiding toxic chemicals in cosmetics.<sup>222</sup> Chapter 314 provides all Californians with safer cosmetics irrespective of socioeconomic status.<sup>223</sup> Clean

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212. See *Pledge to Be Toxic-Free*, U.S. PIRG (Aug. 8, 2020), <https://uspirg.org/issues/usp/pledge-to-be-toxic-free?page=20> (on file with the *University of the Pacific Law Review*) (“[N]o one wants to get cancer—or any of the other negative health effects linked to chemicals in many of these products. So why let companies profit by exposing you to chemicals that aren’t proven safe . . .”).

213. See *Current Data Summary*, CAL. DEP’T PUB. HEALTH (Jan. 7, 2020), <https://www.cdph.ca.gov/Programs/CCDCPHP/DEODC/OHB/CSCP/Pages/SummaryData.aspx> (on file with the *University of the Pacific Law Review*) (showing the number of manufacturers’ products reported that contain ingredients known or suspected to cause cancer or reproductive harm).

214. *About the California Safe Cosmetics Program*, CAL. DEP’T PUB. HEALTH (Oct. 2, 2017), <https://www.cdph.ca.gov/Programs/CCDCPHP/DEODC/OHB/CSCP/Pages/About-CSCP.aspx> (on file with the *University of the Pacific Law Review*).

215. See CAL. DEP’T PUB. HEALTH, *supra* note 214 (describing how the SCA requires the manufacturer to disclose the products with ingredients suspected or known to cause cancer or reproductive harm).

216. CAL. DEP’T PUB. HEALTH, *supra* note 213.

217. See CAL. DEP’T PUB. HEALTH, *supra* note 213 (showing the total number of products reported and subtracting the number of products discontinued).

218. See CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (“[N]o person or entity shall manufacture, sell, deliver, hold or offer for sale, in commerce, any cosmetic product that contains any of the . . . ingredients.”).

219. See CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (prohibiting ingredients in all cosmetics everywhere in California).

220. See Jessica Chia, *How More Affordable Clean Beauty Products Mean a More Just Society: Is Clean Beauty Only for the 1 Percent?*, ALLURE (July 7, 2019), [www.allure.com/story/affordable-clean-beauty-products](http://www.allure.com/story/affordable-clean-beauty-products) (on file with the *University of the Pacific Law Review*) (“[W]hen it comes to clean beauty your right to choose ends where your budget stops. And it isn’t likely to go far . . . you’re likely going to pay a premium price.”).

221. *Id.*; see EWG, *supra* note 12 (“[C]osmetics’ in the law . . . include lotion, toothpaste, body wash, shampoo, deodorant and many other products that people use daily.”).

222. Chia, *supra* note 220.

223. See CAL. HEALTH & SAFETY CODE § 111663(a) (enacted by Chapter 314) (prohibiting twenty-four ingredients in all cosmetics in California).

cosmetic companies may cater to every budget in the future, but consumers should not depend on the cosmetic companies to do so.<sup>224</sup>

## V. CONCLUSION

For years, cosmetic companies sold products with toxic ingredients to consumers while complying with federal and state cosmetics laws.<sup>225</sup> Chapter 314 attempts to mitigate the current shortcomings in cosmetics laws by prohibiting twenty-four ingredients from cosmetics in California's stream of commerce.<sup>226</sup> This prohibition is for Californians' health and safety, and unlike at the FDCA's creation, it comes at a time when research is available on ingredients in cosmetics.<sup>227</sup> Chapter 314 incorporates new research and takes a practical approach to integrate the research into the law.<sup>228</sup>

Californian's concern with consumer health and safety was the driving force behind Chapter 314, and Chapter 314's prohibition ensures cosmetics will not needlessly expose Californians to toxic ingredients.<sup>229</sup> Chapter 314 places Californians' health and safety as a priority; hopefully, other states will follow California's lead and enact similar laws.<sup>230</sup>

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224. See Dina ElBoghdady, *What Does Clean Beauty Mean?*, WASH. POST (Mar. 11, 2020 6:00 AM), [https://www.washingtonpost.com/lifestyle/wellness/clean-beauty-has-taken-over-the-cosmetics-industry-but-thats-about-all-anyone-agrees-on/2020/03/09/2ecfe10e-59b3-11ea-ab68-101ecfec2532\\_story.html](https://www.washingtonpost.com/lifestyle/wellness/clean-beauty-has-taken-over-the-cosmetics-industry-but-thats-about-all-anyone-agrees-on/2020/03/09/2ecfe10e-59b3-11ea-ab68-101ecfec2532_story.html) (on file with the *University of the Pacific Law Review*) (describing how recently mainstream stores like Target have their own list of forbidden ingredients in cosmetics).

225. See CAL. DEP'T PUB. HEALTH, *supra* note 213 (showing the number of manufacturers' products reported and subsequently discontinued for having toxic ingredients).

226. See Assembly Floor, Floor Analysis of AB 2762, at 1–3 (May 18, 2020) (describing the benefits of prohibiting the twenty-four ingredients from cosmetics in California).

227. See Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

228. See Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit what we now know to be some of the most toxic ingredients in cosmetics).

229. See Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would protect Californians from some of the most toxic ingredients in cosmetics).

230. See Assembly Committee on Environmental Safety and Toxic Materials, Committee Analysis of AB 2762, at 3 (May 14, 2020) (describing how Chapter 314 would make it a law to prohibit some of the most toxic ingredients in cosmetics to protect Californians from products they use daily).

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