APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 15, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55192
D.C. No. 2:12-cv-05735-SVW-RZ

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, A CANADIAN NONPROFIT CORPORATION; HVFG, LLC, A NEW YORK LIMITED LIABILITY COMPANY; HOT'S RESTAURANT GROUP. INC., A CALIFORNIA CORPORATION,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, ATTORNEY GENERAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California.
Stephen V. Wilson, District Judge, Presiding.

December 7, 2016, Argued and Submitted,
Pasadena, California
September 15, 2017, Filed

Appendix A

Before: Harry Pregerson, Jacqueline H. Nguyen, and John B. Owens, Circuit Judges.

Opinion by Judge Nguyen.

OPINION

NGUYEN, Circuit Judge:

In 2004, California passed legislation to prohibit the practice of force-feeding ducks or geese to produce foie gras, an expensive delicacy made from their liver. California determined that the force-feeding process, which typically involves inserting a 10-to 12-inch metal or plastic tube into the bird's esophagus to deliver large amounts of concentrated food, is cruel and inhumane. The state therefore prohibited force-feeding a bird "for the purpose of enlarging the bird's liver beyond normal size," Cal. Health & Safety Code § 25981, as well as the in-state sale of products made elsewhere from birds force-fed in such a manner, *id.* § 25982. The legislation does not ban foie gras itself, but rather the practice of producing foie gras by force-feeding. California provided a grace period of over seven and a half years for producers to transition to alternative methods of producing foie gras. *Id.* § 25984.

On July 2, 2012, the day after the state law took effect, Plaintiffs sued the state of California, challenging only Health and Safety Code section 25982, the provision that bans the sale of products made from force-fed birds. Plaintiffs initially argued that the sales ban violates the Due Process and Commerce Clauses of the U.S.

Constitution. After these claims were dismissed, Plaintiffs amended their complaint to allege that the federal Poultry Products Inspection Act (the "PPIA"), which has been on the books for over fifty years, preempts the state provision. The district court concluded that section 25982 is expressly preempted by the PPIA and granted Plaintiffs summary judgment. We reverse and remand.

I. BACKGROUND

Plaintiffs Hudson Valley Foie Gras and the Association des Éleveurs de Canards et d'Oies du Québec raise birds for slaughter and produce foie gras at their facilities in New York and Quebec, respectively; Plaintiff Hot's Restaurant Group is a restaurant in California that sells foie gras.

The foie gras products that Plaintiffs make and sell are produced by force-feeding birds to enlarge their livers. From the day they hatch, the birds undergo a regimented feeding process that lasts for about eleven to thirteen weeks. *Ass'n des* Éleveurs *de Canards et d'Oies du Québec v. Harris* (*Canards I*), 729 F.3d 937, 942 (9th Cir. 2013). For the first few months, the birds are fed various pellets that are made available to them twenty-four hours a day. *Id.* Then, for a two-week period, the feeding pellets are available only during certain times of the day. *Id.* In the final stage of the feeding process, which lasts up to thirteen days, the birds are force-fed in a process called *gavage*, during which feeders use "a tube to deliver the feed to the crop sac at the base of the duck's esophagus." *Id.*

Appendix A

A. California's Force-Feeding Ban

In 2004, the California state legislature enacted a statutory framework to end the practice of force-feeding birds to fatten their livers. Cal. Health & Safety Code §§ 25980-25984. Section 25981 makes it illegal to force-feed a bird "for the purpose of enlarging the bird's liver beyond normal size." Section 25982, the only provision challenged in this case, prohibits selling a product "in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." A "bird" is defined to include a duck or a goose, *id.* § 25980(a), and "force-feeding" is defined as a process by which a bird consumes more food than it would typically consume voluntarily, conducted through methods such as "delivering feed through a tube or other device inserted into the bird's esophagus," *id.* § 25980(b).

California's law was designed to rectify what the state considered an inhumane feeding practice. *See* 2004 Cal. Legis. Serv. Ch. 904 (S.B. 1520) (Legislative Counsel's Digest) (seeking to establish provisions for force-feeding birds similar to those already in place for "keeping horses or other equine animals"). According to the legislative analysis of the law, force-feeding commonly requires a worker to hold the bird between her knees, grasp the bird's head, insert a 10-to 12-inch metal or plastic tube into the bird's esophagus, and deliver large amounts of concentrated meal and compressed air into the bird. *See, e.g.*, Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 4-5 (June 20, 2004); Cal. Sen. Comm. on Bus. & Professions, Analysis of S.B.

1520, 2003-2004 Reg. Sess., at 5-6 (May 6, 2004). The bird is force-fed up to three times a day for several weeks and its liver grows to ten times the size of a normal liver. Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 5 (June 20, 2004). This process is apparently "so hard on the birds that they would die from the pathological damage it inflicts if they weren't slaughtered first." Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 2 (Aug. 17, 2004); Cal. Sen. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 3 (Aug. 25, 2004).

In enacting the force-feeding ban, California also considered a study conducted by the European Union's Scientific Committee on Animal Health and an Israeli Supreme Court decision. The European Union study concluded that force-feeding is detrimental to the welfare of birds, and the Israeli Supreme Court similarly concluded that force-feeding causes birds pain and suffering. Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 6-7 (June 20, 2004); Cal. Sen. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 7-8 (May 6, 2004). In light of these and other factors, California decided to enact the ban, joining a growing list of countries around the world.[1]

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1. The following countries have instituted some form of a ban on force-feeding or foie gras products: Italy, the Netherlands, the Czech Republic, India, Luxembourg, Denmark, Finland, Norway, Poland, Israel, Sweden, Switzerland, Germany, and the United Kingdom. *See, e.g.*, Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 6 (June 20, 2004);

California's legislature intended to ban not foie gras itself, but rather the practice of producing foie gras by force-feeding. The law's author, Senator John Burton, made clear when he introduced the bill that it "has nothing to do . . . with banning foie gras" and that it prohibits only the "inhumane force feeding [of] ducks and geese." Then-Governor Arnold Schwarzenegger echoed this sentiment in his signing statement: "This bill's intent is to ban the current foie gras production practice of forcing a tube down a bird's throat to greatly increase the consumption of grain by the bird. It does not ban the food product, foie gras." Signing Message of Governor Arnold Schwarzenegger, Sen. Bill 1520, 2003-2004 Reg. Sess. (Sept. 29, 2004). The legislature provided more than seven and a half years between the passage of the law and its effective date to allow producers to transition to producing foie gras without force-feeding. *Id.*; *see* Cal. Health & Safety Code § 25984(a) (This law "shall become operative on July 1, 2012.").

B. The PPIA

Originally enacted in 1957, the PPIA was intended to ensure that the nation's poultry products "are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 451; *see Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 909, 420 U.S. App. D.C.

Atish Patel, *India Bans Import of Controversial Foie Gras*, Wall St. J.: India Real Time (July 7, 2014, 7:59 PM), https://blogs.wsj.com/indiarealtime/2014/07/07/india-bans-import-of-controversial-foie-gras/; Michaela DeSoucey, Contested Tastes: Foie Gras and the Politics of Food 61 (2016).

366 (D.C. Cir. 2015) (discussing Congress's intent to protect consumer health and welfare by ensuring that poultry products are "wholesome, not adulterated, and properly marked, labeled, and packaged." (quoting 21 U.S.C. § 451)). The PPIA accomplishes this goal by, *inter alia*, authorizing the inspection of slaughterhouses and poultry-processing plants, 21 U.S.C. § 455, setting proper sanitation requirements, *id.* § 456, authorizing the Secretary of the U.S. Department of Agriculture ("USDA") to establish labeling and container standards, *id.* § 457, prohibiting the sale of adulterated, misbranded, or uninspected poultry products, *id.* § 458, establishing record-keeping requirements, *id.* § 460, and instituting storage and handling regulations, *id.* § 463. *See also Levine v. Vilsack*, 587 F.3d 986, 989 (9th Cir. 2009).

In 1968, Congress passed the Wholesome Poultry Products Act, which amended the PPIA "to provide for cooperation with appropriate State agencies with respect to State poultry products inspection programs, and for other purposes." Pub. L. No. 90-492, 82 Stat. 791 (1968); *see also* H.R. Rep. No. 90-1333, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3426, 3426-27. The 1968 amendment also added an express preemption clause to the PPIA, which states that "[m]arking, labeling, packaging, or *ingredient requirements . . . in addition to, or different than*, those made under [the PPIA] may not be imposed by any State." 21 U.S.C. § 467e (emphasis added). At issue here is whether California's ban on products made by force-feeding birds constitutes an "ingredient requirement" under the PPIA's preemption clause.

C. Procedural History

Initially, Plaintiffs claimed that section 25982 violates the Due Process Clause and the dormant Commerce Clause of the U.S. Constitution. The district court denied Plaintiffs' request to enjoin California from enforcing section 25982, *Association des Éleveurs de Canards et D'Oies du Québec v. Harris*, No. 12-CV-05735, 2012 U.S. Dist. LEXIS 191741, 2012 WL 12842942 (C.D. Cal. Sept. 28, 2012), and we affirmed the district court's ruling, *Canards I*, 729 F.3d at 942. The issue of preemption was not before us in *Canards I*.

On remand, Plaintiffs amended their complaint to allege that section 25982 is preempted by the PPIA. California moved to dismiss the complaint, and Plaintiffs moved for summary judgment on their preemption claim, arguing that the PPIA both expressly and impliedly preempts section 25982. The district court denied the State's motion to dismiss and granted Plaintiffs' motion for summary judgment. It found that section 25982 imposes an "ingredient requirement" and is expressly preempted by the PPIA. *Ass'n des Éleveurs de Canards et d'Oies du Québecc v. Harris* (*Canards II*), 79 F. Supp. 3d 1136, 1144-48 (C.D. Cal. 2015). The district court permanently enjoined California from enforcing section 25982. *Id.* at 1148.

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment. *Lee v. ING Groep, N.V.*, 829 F.3d 1158, 1160 (9th

Cir. 2016). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). We also review de novo questions of preemption and statutory interpretation. *See, e.g.*, *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011).

III. DISCUSSION

Plaintiffs invoke three separate preemption doctrines in support of their view that the state ban on the sale of foie gras produced by force-feeding methods cannot be enforced. First, they argue that the federal PPIA expressly preempts section 25982 because it imposes an "ingredient requirement" on the production of foie gras. Second, relying on the doctrine of implied preemption, Plaintiffs contend that Congress intended to comprehensively regulate the field of poultry products and thus left no room for state laws such as section 25982. Finally, Plaintiffs argue that implied preemption also applies because section 25982 stands as an obstacle to the purpose of PPIA. We address each of Plaintiffs' arguments in turn.

A. Express Preemption

Plaintiffs' main argument, and the ground upon which the district court granted summary judgment, is that California's sales ban is expressly preempted because the PPIA prohibits states from imposing "ingredient requirements" that are "in addition to, or different than," the federal law and its regulations. 21 U.S.C. § 467e.

In determining whether section 25982 is preempted by the PPIA, Congress's intent "is the ultimate touchstone." *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)). Where the federal statute contains an express preemption clause, we must determine the substance and scope of the clause. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). In so doing, we assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Lohr*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). And finally, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc.*, 555 U.S. at 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)).

We begin by noting two points of agreement between the parties. First, Plaintiffs do not dispute that California's historic police powers extend to issues of animal cruelty. *See Canards I*, 729 F.3d at 952 (citing *United States v. Stevens*, 559 U.S. 460, 469, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)); *Hughes v. Oklahoma*, 441 U.S. 322, 337, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979) (highlighting that protecting animals, like safeguarding the health and safety of citizens, is a legitimate state interest). Because animal cruelty is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required. *See Lohr*, 518 U.S. at 485. Second, the parties

also agree that Congress intended to preempt state laws regulating the *ingredients* of poultry products. The only dispute is whether California's sales ban imposes an "ingredient requirement" that is "in addition to, or different than, those made under [the PPIA]." 21 U.S.C. § 467e.

Plaintiffs argue that section 25982 imposes an "ingredient requirement" because it requires that foie gras be made only from the livers of birds who were not force-fed. Plaintiffs do not claim that foie gras produced from non-force-fed birds is in any way inferior to foie gras made from the livers of force-fed birds, only that federal law is silent on the former. The State counters that section 25982 does not address ingredients at all, but rather regulates California's market by proscribing the sale of products produced by force-feeding birds to enlarge their livers. And to the extent that section 25982 can be construed as a ban on foie gras itself, the State argues that the PPIA does not prevent a state from banning poultry products. Based on the ordinary meaning of "ingredient" and the plain language and purpose of the PPIA, we hold that section 25982 is not expressly preempted by the PPIA.

1. "Ingredient Requirements" Refers to the Physical Composition of Poultry Products

We must first determine the scope and substance of the PPIA's "ingredient requirements." *Altria Grp., Inc.*, 555 U.S. at 76. Because the PPIA does not define the term "ingredient," we look to the ordinary meaning of the term.

See, e.g., *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876, 187 L. Ed. 2d 729 (2014) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979))). "Ingredient" is defined as "one of the foods or liquids that you use in making a particular meal." Macmillan English Dictionary 776 (2nd ed. 2007); *see also* New Oxford American Dictionary 893 (3rd ed. 2010) ("any of the foods or substances that are combined to make a particular dish"); Webster's New World Dictionary 248 (mod. desk ed. 1979) ("any of the things that make up a mixture; component"). Accordingly, the term "ingredient" as used in the PPIA is most naturally read as a physical component of a poultry product.

This reading of "ingredient" also draws support from the statutory scheme as a whole. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70, 167 (2012) ("Context is the primary determinant of meaning."). For example, the PPIA allows the import of foreign poultry products only if, *inter alia*, the products "contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food." 21 U.S.C. § 466. Similarly, the PPIA's "Definitions" section contains phrases such as: "ingredients only in a relatively small proportion"; "to assure that the poultry ingredients in such products are not adulterated"; "common names of optional ingredients (other than spices, flavoring,

and coloring) present in such food"; and "fabricated from two or more ingredients." 21 U.S.C. § 453. Only a physical component can be added in "relatively small proportion," "adulterated," or "fabricated" in the manner described in the PPIA. In addition, regulations implementing the PPIA use the term "ingredient" in a manner consistent with its ordinary meaning. *See, e.g.*, 9 C.F.R. § 424.21 (approving a chart of ingredients, including: acidifiers, antifoaming agents, artificial sweeteners, food binders and extenders, coloring agents, and proteolytic enzymes). The consistent usage of "ingredient" in the PPIA and its implementing regulations further confirms that the term is used to mean a physical component of a product. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441, 189 L. Ed. 2d 372 (2014) (We ordinarily assume "that identical words used in different parts of the same act are intended to have the same meaning." (quoting *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574, 127 S. Ct. 1423, 167 L. Ed. 2d 295 (2007))).

Congress made clear that the PPIA's "ingredient requirements" address the physical components of poultry products, not the way the animals are raised. *See Wyeth*, 555 U.S. at 565 (emphasizing that "the purpose of Congress is the ultimate touchstone in every pre-emption case" (quoting *Lohr*, 518 U.S. at 485)). The PPIA regulates "ingredient requirements" for the purpose of ensuring that poultry products are "wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 451; *see id.* § 452 (declaring Congressional policy of preventing distribution of "poultry products which are adulterated or misbranded"); *see also Armour & Co. v.*

Ball, 468 F.2d 76, 80-81 (6th Cir. 1972) (explaining the purpose of "ingredient requirements" within the Federal Meat Inspection Act's ("FMIA") identical preemption clause). The PPIA therefore authorizes the USDA, acting through its Food Safety and Inspection Service ("FSIS"), to prescribe standards of identity or composition for poultry products. 21 U.S.C. § 453(h)(7); 9 C.F.R. § 381.155(a)(1). These "ingredient requirements" cannot be read to reach animal husbandry practices because the federal law "*does not regulate in any manner the handling*, shipment, or sale *of live poultry*." H.R. Rep. No. 85-465 at 1 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1630, 1630 (emphasis added).[2] The USDA has even represented in legal filings that "[t]he PPIA is wholly silent on the treatment of farm animals, (including feeding procedures) or methods of slaughter for poultry." Motion for Summary Judgment, at 2, *Animal Legal Def. Fund v. USDA*, No. 12-cv-04028 (C.D. Cal. Apr. 22, 2016), ECF No. 67; *id* at 3 ("[The FSIS] has no authority to regulate the care or feeding of birds prior to their arrival at the slaughter facility." (citing Decl. of Alice M. Thaler, Senior Director for Program Services in the Office of Public Health Science, FSIS, USDA, at ¶¶ 6-7, *Animal Legal Def. Fund v. USDA*, No. 12-cv-04028 (C.D. Cal. Nov. 28, 2012), ECF No. 26-1)).[3] Accordingly,

2. Although 21 U.S.C. § 453(g)(2)(A) makes a passing reference to "live poultry," it does so only in the context of explaining circumstances in which a final poultry product could be deemed adulterated.

3. We again reject Plaintiffs' assertion that the USDA's Policy Book *requires* foie gras to come from force-fed birds. *Canards I*, 729 F.3d at 950 ("It says nothing about the force feeding of geese and ducks."). Moreover, the background memos and letters on which

the PPIA's "ingredient requirements" are limited to the physical components of poultry products and do not reach the subjects of animal husbandry or feeding practices.

The ordinary meaning of "ingredient" (in line with the statutory context and the presumption of consistent usage) and the purpose and scope of the PPIA together make clear that "ingredient requirements" pertain to the physical components that comprise a poultry product, not animal husbandry or feeding practices. Having determined the parameters of the PPIA's "ingredient requirements," we now turn to whether section 25982 can be construed as imposing an "ingredient requirement."

2. California Law Does Not Impose a Preempted Ingredient Requirement

California's ban on the in-state sale of foie gras produced by force-feeding contrasts starkly with the PPIA's conception of "ingredient requirements." Section 25982 does not require that foie gras be made with different animals, organs, or physical components. Nor does it require that foie gras consist of a certain percentage of bird liver. *Cf. Armour & Co.*, 468 F.2d at 80-81 (holding that a state law requiring a 12% protein content in sausage meat was preempted because, *inter alia*, federal regulations required only an 11.2% protein

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Plaintiffs rely are "couched in tentative and non-committal terms." *Reid v. Johnson & Johnson*, 780 F.3d 952, 965 (9th Cir. 2015). The USDA has explicitly stated that the PPIA does not address the treatment of farm animals (including feeding procedures) and, based on the plain language and purpose of the law, we agree.

content). It simply seeks to prohibit a feeding method that California deems cruel and inhumane. Section 25982 therefore addresses a subject entirely separate from any "ingredient requirement": how animals are treated long before they reach the slaughterhouse gates.

Plaintiffs argue that while section 25982 may not appear to be an "ingredient requirement," the law functions as one because it requires the production of foie gras using non-force-fed, rather than force-fed, livers.[4] As an initial matter, it is not the livers that are force-fed, it is the birds. Regardless, Plaintiffs' reading of the PPIA would require us to radically expand the ordinary meaning of "ingredient." The difference between foie gras produced with force-fed birds and foie gras produced with non-force-fed birds is not one of ingredient. Rather, the difference is in the treatment of the birds *while alive*. "Force-fed" is not a physical component that we find in our poultry; it is a feeding technique that farmers use. The same logic applies to the difference between regular chicken and cage-free chicken. "Cage-free" is no more an "ingredient" than "force-fed." Although Plaintiffs invite us to expand the definition of "ingredients" to include animal husbandry practices, that is within Congress's bailiwick, not ours. *See, e.g.*, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725, 198 L. Ed. 2d 177 (2017) ("And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about

4. Nearly all of the cases that Plaintiffs cite in their brief are irrelevant to the issue of "ingredient requirements" because they deal with other portions of the PPIA's preemption clause.

what Congress might have done had it faced a question that, on everyone's account, it never faced."). The PPIA, which is silent on the topic of animal husbandry and feeding practices, may not be read to supplant state law on an entirely different topic. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517, 523, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

Alternatively, Plaintiffs argue that section 25982 is functionally a ban on *all* foie gras. According to Plaintiffs, section 25982 bans the "ingredient" of foie gras because it bans the *process* by which it is made, i.e. force-feeding. This argument fails for two independent reasons. First, nothing in the record before us shows that force-feeding is *required* to produce foie gras. The district court assumed, without deciding, that alternative methods of producing foie gras are available.[5] *Canards II*, 79 F. Supp. 3d at 1145 n.8. And as noted above, California never intended to ban foie gras entirely—only foie gras produced by

5. Plaintiffs do not appear to dispute that alternative methods of producing foie gras are available. In fact, it appears that high-quality foie gras can be made without force-feeding birds. *See, e.g.*, Dan Barber, *A foie gras parable*, TED, July 2008, *available at* http://www.ted.com/talks/dan_barber_s_surprising_foie_gras_parable /transcript?language=en#t-98000; Lauren Frayer, *This Spanish Farm Makes Foie Gras Without Force-Feeding*, NPR: The Salt (Aug. 1, 2016, 4:27 PM), http://www.npr.org/sections/thesalt/2016/08/01/487088946/t his-spanish-farm-makes-foie-gras-without-force-feeding (noting that the farmer's natural foie gras "won the Coup de Coeur, a coveted French gastronomy award (it's like the Olympics for foodies)").

force-feeding. *See* Signing Message of Governor Arnold Schwarzenegger, Sen. Bill 1520, 2003-2004 Reg. Sess. (Sept. 29, 2004); *Canards I*, 729 F.3d at 945 n.4 ("Section 25982, however, does not prohibit foie gras. It bans the sale of foie gras produced through force feeding, but would not ban foie gras produced through alternative methods."); Cal. Health & Safety Code § 25984 (providing an effective date over seven and a half years after passage so that producers could transition to alternative methods of producing foie gras). Section 25982 therefore precludes only Plaintiffs' preferred method of producing foie gras.

Moreover, even if section 25982 results in the total ban of foie gras regardless of its production method, it would still not run afoul of the PPIA's preemption clause. The PPIA targets the slaughtering, processing, and distribution of poultry products, 21 U.S.C. §§ 451-452, but it does not mandate that particular types of poultry be produced for people to eat. Its preemption clause regarding "ingredient requirements" governs only the physical composition of poultry products. Nothing in the federal law or its implementing regulations limits a state's ability to regulate the *types* of poultry that may be sold for human consumption. If foie gras is made, producers must, of course, comply with the PPIA. But if a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate. The fact that Congress established "ingredient requirements" for poultry products that *are* produced does not preclude a state from banning products—here, for example, on the basis of animal cruelty—well before the birds are slaughtered.

Our conclusion here is consistent with rulings in both the Fifth and Seventh Circuits. In *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, the Fifth Circuit examined whether the FMIA's identical preemption clause was triggered by a Texas law that banned horsemeat. 476 F.3d 326, 333-35 (5th Cir. 2007). The court explained that the FMIA's preemption clause governs matters such as "meat inspection and labeling requirements. It in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place." *Id.* at 333. Because the FMIA does not limit a state's ability to define which meats are available for human consumption, the court found that the federal law could not preempt Texas's horsemeat ban. *Id.*

Several months later, the Seventh Circuit reached the same conclusion. In *Cavel International, Inc. v. Madigan*, the plaintiff argued that the FMIA's preemption clause swept aside state laws that banned the slaughter of horses for human consumption. 500 F.3d 551, 553 (7th Cir. 2007). The Seventh Circuit determined that this "argument confuses a premise with a conclusion." *Id.* The court explained:

> When the [FMIA] was passed (and indeed to this day), it was lawful in some states to produce horse meat for human consumption, and since the federal government has a legitimate interest in regulating the production of human food whether intended for domestic consumption or for export . . . it was natural to make the Act applicable to horse meat. That

> was not a decision that states must allow horses to be slaughtered for human consumption. The government taxes income from gambling that violates state law; that doesn't mean the state must permit the gambling to continue. *Given* that horse meat is produced for human consumption, its production must comply with the Meat Inspection Act. But if it is not produced, there is nothing, so far as horse meat is concerned, for the Act to work upon.

Id. at 553-54. Like the Fifth Circuit, the Seventh Circuit found that the FMIA is concerned with inspecting facilities at which meat is produced for human consumption, not "preserving the production of particular types of meat for people to eat." *Id.* at 554 (quoting *Empacadora de Carnes de Fresnillo*, 476 F.3d at 333).

Like the state bans on horsemeat in *Empacadora de Carnes de Fresnillo* and *Cavel*, section 25982 is not preempted by the PPIA even if it functions as a total ban on foie gras.[6] Presumably, Congress could have authorized

6. Section 25982 was inspired, in part, by California's own ban on horsemeat. *See* Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 7 (June 20, 2004) (noting that there is only a small step between a ban on horse, cat, and dog meat and a ban on force-feeding birds). As societal values change, so too do our notions of acceptable food products. Like foie gras, horsemeat was once a delicacy. *Cavel*, 500 F.3d at 552. Today, many states, including California, ban horsemeat because they consider the idea of eating horse repugnant. *See id.*; Cal. Penal Code §§ 598c-598d. California, like a growing number of countries around the world, has concluded that force-fed foie gras is similarly

force-fed bird products, but "Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773, 99 S. Ct. 2077, 60 L. Ed. 2d 624 (1979); *see also Dodd v. United States*, 545 U.S. 353, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005) ("[W]e are not free to rewrite the statute that Congress has enacted.").

Instead of addressing *Empacadora de Carnes de Fresnillo* and *Cavel*, Plaintiffs rely on the Supreme Court's decision in *National Meat Ass'n v. Harris*, 565 U.S. 452, 132 S. Ct. 965, 181 L. Ed. 2d 950 (2012). This case, however, bears little resemblance to *National Meat*. The California statute at issue in *National Meat* governed the slaughter of nonambulatory pigs. 565 U.S. at 455. In order to ensure that slaughterhouses handled nonambulatory pigs in a particular way, the state statute included a sales ban on selling meat or products from such pigs. *Id.* at 463-64.

The Supreme Court in *National Meat* found that the state statute was preempted because it regulated matters that fall within the heart of the FMIA's regulatory scope: the activities of slaughterhouses. According to the Court, the state law interfered in the operations of slaughterhouses, imposing requirements regarding the treatment of nonambulatory pigs that did not exist

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repugnant. The PPIA and its preemption clause do not stand in the way of society's evolving standards regarding animal treatment. *Cf. Stevens*, 559 U.S. at 469 ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."); *see generally* Emily Stewart Leavitt, *Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1990* 1-47 (4th ed. 1990).

under the federal law and its regulations. *Id.* at 460-64 (emphasizing that the nonambulatory pig statute "functions as a command to slaughterhouses [on how] to structure their operations"). The Court explained that while "a slaughterhouse may take one course of action in handling a nonambulatory pig" under the FMIA and its implementing regulations, "under state law the slaughterhouse must take another [course of action]." *Id.* at 460. In distinguishing the nonambulatory pig law from the horsemeat bans in *Empacadora de Carnes de Fresnillo* and *Cavel*, the Court underscored that the horsemeat bans "work[] at a remove from the sites and activities that the FMIA most directly governs." *Id.* at 467. Unlike the horsemeat cases, the Court found that the nonambulatory pig statute "reaches into the slaughterhouse's facilities and affects its daily activities." *Id.* The Court thus concluded that the FMIA preempted California's nonambulatory pig statute.

National Meat does not apply here because it addressed a different preemption argument in the context of a very different state law.[7] As an initial matter, *National Meat* and the present case deal with different portions of the FMIA's and PPIA's parallel preemption clauses; while *National Meat* focused exclusively on the "premises, facilities and operations" portion of the

7. We also note that, unlike the FMIA at issue in *National Meat*, the PPIA does not explicitly incorporate the Humane Methods of Slaughter Act. We have not had the occasion to decide whether poultry should be considered "other livestock" under the Humane Methods of Slaughter Act, *see* 7 U.S.C. § 1902(a), and we need not decide that issue here.

FMIA's preemption clause, Plaintiffs here invoke only the "ingredient requirements" portion of the PPIA's preemption clause. Moreover, section 25982, like the horsemeat bans in *Empacadora de Carnes de Fresnillo* and *Cavel*, "works at a remove from the sites and activities that the [PPIA] most directly governs." *Nat'l Meat Ass'n*, 565 U.S. at 467. Section 25982 also does not reach into a poultry "slaughterhouse's facilities and affect[] its daily activities." *Id.* We therefore hold that the PPIA does not expressly preempt California Health and Safety Code section 25982.

B. Implied Preemption

Alternatively, Plaintiffs argue that the PPIA impliedly preempts section 25982 under the doctrines of field and obstacle preemption. Neither doctrine, however, applies here.

Under the doctrine of field preemption, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). Courts may infer field preemption from a framework of regulation so pervasive "that Congress left no room for the States to supplement it" or where the federal interest is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (quoting *Rice*, 331 U.S. at 230); *see English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Plaintiffs concede that the PPIA

does not regulate the field of animal care and feeding, but view the PPIA as broadly occupying the field of all edible products that result from raising poultry for food.

Plaintiffs' field preemption argument ignores the states' role in poultry regulation. *Cf. Arizona*, 567 U.S. at 401 ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, *even if it is parallel to federal standards*." (emphasis added)); *Campbell v. Hussey*, 368 U.S. 297, 303, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961) (finding a state law preempted because the federal law does not allow even "complementary" or "supplement[al]" state requirements). The express preemption clause at the heart of Plaintiffs' case clearly provides that the PPIA "shall not preclude any State . . . from making requirement[s] or taking other action, consistent with [the PPIA], with respect to any other matters regulated under [it]." 21 U.S.C. § 467e; *see also Bates*, 544 U.S. at 447. It also explains that state laws regarding storage and handling are preempted *only if* the Secretary of Agriculture finds those laws to "unduly interfere with the free flow of poultry products in commerce . . . ." *Id.* In addition, states may implement standards for the inspection of poultry sold in-state, even if those standards are more rigorous than the ones imposed by federal law. *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 296 (5th Cir. 1994) (en banc) ("Principles of federalism . . . led Congress to choose not to displace state inspection programs. Instead, Congress in these amendments created a complex 'marbled cake' scheme . . . ." (citing 21 U.S.C. § 454(a)) (footnote omitted)). Because the PPIA itself contemplates extensive state

involvement, Congress clearly did not intend to occupy the field of poultry products. *See Empacadora de Carnes de Fresnillo*, 476 F.3d at 334 ("Congress did not intend to preempt the entire field of meat commerce under the FMIA.").

Plaintiffs' theory of obstacle preemption fares no better. Obstacle preemption, which is a form of conflict preemption, occurs "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 399-400 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . ."). As with express preemption, courts "assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 567 U.S. at 400 (quoting *Rice*, 331 U.S. at 230).

Plaintiffs fail to explain how section 25982 stands as an obstacle to the PPIA's objectives of ensuring that poultry products are "wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 451; *see also* 21 U.S.C. § 452. The PPIA most directly regulates "official establishments," where the "inspection of the slaughter of poultry, or the processing of poultry products," occurs. 21 U.S.C. § 453(p); *see* 9 C.F.R. § 381.1; *see also Nat'l Meat Ass'n*, 565 U.S. at 467 (noting that the FMIA most

directly governs establishments where slaughtering and processing occurs). Section 25982, in contrast, prohibits what California finds to be a cruel feeding practice that occurs far away from the official establishments that the PPIA regulates. *See Empacadora de Carnes de Fresnillo*, 476 F.3d at 334-35. Moreover, nothing in section 25982 interferes with the USDA's "authority to inspect poultry producers for compliance with health and sanitary requirements, require[] inspection of poultry after slaughter, establish[] labeling requirements for poultry products, [or] allow[] for withdrawal of inspections for noncompliance and the imposition of civil and criminal penalties for the sale of adulterated products." *Levine*, 587 F.3d at 989 (citing 21 U.S.C. §§ 455-57, 461). As the Supreme Court has cautioned, we should not "seek[] out conflicts between state and federal regulation where none clearly exists." *English v. Gen. Elec. Co.*, 496 U.S. at 90 (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960)). Accordingly, we conclude that section 25982 does not stand as an obstacle to accomplishing the PPIA's purposes.

IV. CONCLUSION

Because Health and Safety Code section 25982 is not preempted by the PPIA, California is free to enforce it. We **REVERSE** the district court's grant of summary judgment, **VACATE** the district court's permanent injunction, and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JANUARY 7, 2015

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 2:12-cv-5735-SVW-RZ

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, A CANADIAN NONPROFIT CORPORATION; HVFG LLC, A NEW YORK LIMITED LIABILITY COMPANY; AND HOT'S RESTAURANT GROUP, INC., A CALIFORNIA CORPORATION.,

Plaintiffs,

v.

KAMALA D. HARRIS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; *et al.*,

Defendants.

January 7, 2015, Decided
January 7, 2015, Filed

Appendix B

ORDER DENYING DEFENDANT'S MOTION TO DISMISS [116] AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PREEMPTION CLAIM [117] AND PARTIAL JUDGMENT AS TO PREEMPTION CLAIM

I. INTRODUCTION

This action for declaratory and injunctive relief touches upon a topic impacting gourmands' stomaches and animal-rights activists' hearts: foie gras. Plaintiffs Association des Éleveurs de Canards et D'Oies du Québec (the "Canadian Farmers"), HVFG LLC ("Hudson Valley"), and Hot's Restaurant Group, Inc. ("Hot's")[1] argue that California's sales ban on liver from force-fed birds, Cal. Health & Safety Code § 25982, runs afoul of federal law and the Constitution. Plaintiffs assert, *inter alia*, that the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. §§ 451-470, preempts § 25982. This issue boils down to one question: whether a sales ban on products containing a constituent that was produced in a particular manner is an "ingredient requirement" under the PPIA.

Presently before this Court are Defendant's motion to dismiss, (Dkt. 116), and Plaintiffs' motion for partial summary judgment as to their preemption claim, (Dkt. 118). For the reasons discussed below, this Court GRANTS Plaintiff's motion for partial summary judgment and DENIES Defendant's motion to dismiss.

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1. Plaintiff Gauge Outfitters, Inc. voluntarily dismissed its claim on October 9, 2012. (Dkt. 89.)

II. FACTS AND PROCEDURAL HISTORY

The Canadian Farmers and Hudson Valley produce foie gras—a delicacy made from fattened duck liver. (Second Amended Complaint ("SAC") ¶¶ 12-13.) Hot's operates a restaurant in California that formerly sold foie gras products. (SAC ¶ 14.) Plaintiffs' foie gras products are produced using *gavage*—a method of feeding a bird through a tube inserted in its esophagus. *See* (SAC ¶¶ 44, 80.)

California Health and Safety Code § 25982 was enacted as part of a statutory scheme aimed at the practice of force feeding birds. Section 25981, which is not at issue in this case, prohibits force feeding a bird for the purpose of enlarging its liver. Cal. Health & Safety Code § 25981. Section 25982 reinforces this ban by prohibiting the sale in California of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."[2] Cal. Health & Safety Code § 25982. Section 25980(b) defines "force feeding" as "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily." Cal. Health & Safety Code § 25980. It states that "[f]orce feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird's esophagus." (*Id.*)

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2. Solely for concision's sake, the Court abbreviates the sales ban's scope as "force-fed bird livers." The use of this or similar abbreviations throughout this opinion is not meant as a construction of the statutory language.

Appendix B

Plaintiffs assert that § 25982 has caused them to lose millions of dollars worth of foie gras product sales in California. (SAC ¶¶ 86-88.) They further assert that the District Attorneys of Los Angeles, Santa Clara, and Monterey Counties threatened to prosecute Hudson Valley and at least two out-of-state distributors of Plaintiffs' foie gras products for violating § 25982 by selling foie gras products from outside California to California consumers. (SAC ¶ 89.)

Plaintiffs filed this lawsuit on July 2, 2012—the day after § 25982 became operative. (Dkt. 1.) On September 28, 2012, this Court denied Plaintiffs' motion for a preliminary injunction because Plaintiffs failed to show a likelihood of success on the merits of their vagueness or commerce clause challenges. (Dkt. 87: Order at 11-28.) The Court also rejected defendant Kamala Harris's ("Harris") contentions that the Eleventh Amendment barred Plaintiffs' suit and that the case was not ripe.

On appeal, the Ninth Circuit affirmed this Court's determination that Harris is not entitled to Eleventh Amendment immunity. *Association des Éleveurs de Canards et D'Oies du Québec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013). The Ninth Circuit stated in dicta that instead of asserting Eleventh Amendment immunity, "a state official who contends that he or she will not enforce the law may challenge plaintiff's Article III standing based on an 'unripe controversy'"—an argument not then before that Court. *Id.* at 944. The Ninth Circuit also held that § 25982's scope was limited to liver products produced as a result of force feeding a bird for the purpose of enlarging its liver. *Id.* at 945-46. Finally, the Ninth Circuit

affirmed this Court's holding that Plaintiffs failed to show a likelihood of success on the merits of their due process and commerce clause claims. *Id.* at 946-53.

On April 2, 2014, Plaintiffs filed their SAC. (Dkt. 112.) Plaintiffs' SAC asserts claims for: (1) declaratory relief regarding the application of § 25982 to imports of foie gras products where the commercial sale of such products takes place and title passes outside of the state of California; (2) declaratory relief that § 25982 is preempted by the PPIA; (3) declaratory relief that § 25982 violates the Commerce Clause because it is an extraterritorial regulation; and (4) declaratory relief that § 25982 violates the Commerce Clause because its substantial burden on interstate commerce exceeds its putative local benefits.[3] (Dkt. 112.)

III. DISCUSSION

A. JUSTICIABILITY

Defendant argues that the Court should dismiss Plaintiffs' case under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack Article III standing, because the case is not ripe, and because it fails to present a "case of actual controversy" as required by the Declaratory Judgment Act, 28 U.S.C. § 2201.[4]

3. Plaintiffs voluntarily dismissed their claims for declaratory relief regarding the application of § 25982 to foie gras products from ducks fed entirely outside of California and under the Due Process Clause. (Dkts. 123, 128.)

4. While Defendant frames her argument as one of "justiciability," Plaintiffs' opposition frames it as one of ripeness. The Court therefore addresses both ripeness and standing.

Appendix B

1. Legal Standard Under Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject matter jurisdiction to hear the claims alleged. Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may be asserted either as a facial challenge to the complaint or a factual challenge. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial challenge, the moving party asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction. *Id.*; *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). When reviewing a facial challenge, the court is limited to the allegations in the complaint, the documents attached thereto, and judicially noticeable facts. *Gould Electronics, Inc. v. United States*, 220 F.3d 169, 176 (3rd Cir. 2000). The court must accept the factual allegations as true and construe them in the light most favorable to the plaintiff. *Id.*

Regardless of the type of motion asserted under Rule 12(b)(1), the plaintiff always bears the burden of showing that federal jurisdiction is proper. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); *Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993), *aff'd* 56 F.3d. 1177 (9th Cir. 1995). "In effect, the court presumes *lack* of jurisdiction until plaintiff proves otherwise." Schwarzer, Tashima & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial § 9:77.10 (Rutter Group 2011) (citing, *inter alia, Stock West, Inc.*

v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989)) (emphasis in original). "The proponents of subject-matter jurisdiction bear the burden of establishing its existence by a preponderance of the evidence." *Remington Lodging & Hospitality, LLC v. Ahearn*, 749 F. Supp. 2d 951, 955-956 (D. Alaska 2010) (citing *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999)).

2. Legal Standard Under Article III

a. Standing

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). In order to have standing to seek injunctive relief, the plaintiff must show "the reality of the threat of repeated injury," *id.* at 107 n.8, and a "real or immediate threat . . . that he will again be wronged," *id.* at 111. The plaintiff cannot rely on mere "conjecture" or "speculation" regarding a threat of injury. *Id.* at 108.

To establish Article III standing:

> First, the plaintiff must have suffered an injury in fact, the violation of a protected interest that is (a) concrete and particularized, and (b) actual or imminent. Second, the plaintiff must establish a causal connection between the injury

> and the defendant's conduct. Third, the plaintiff must show a likelihood that the injury will be redressed by a favorable decision.

Mayfield v. United States, 599 F.3d 964, 969 (9th Cir. 2010) (internal quotations, citations, and alterations omitted).

b. Ripeness

The standing inquiry also overlaps with the constitutional and prudential doctrine of ripeness. "[I]njunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them . . . [except] in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) (internal quotations omitted). In particular, the doctrine "requires us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149.

3. Legal Standard Under the Declaratory Judgment Act

The Declaratory Judgment Act provides that a federal court may issue a declaratory judgment in "a case of actual controversy . . . whether or not further relief is sought."

28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007). "[T]he phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'controversies' that are justiciable under Article III." *MedImmune*, 549 U.S. at 126 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S. Ct. 461, 81 L. Ed. 617) (1937)). The test is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127. An actual controversy must exist at all stages of review. *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975).

4. Application

The thrust of Defendant's argument is that the case is not justiciable because she has not personally threatened to prosecute Plaintiffs under § 25982. Instead, the only alleged threats of enforcement were made by county district attorneys—and Defendant claims that their actions cannot be attributed to her. In other words, Defendant argues that Plaintiffs' claims are not justiciable because they sued the wrong defendant.

The California Constitution obligates Defendant "to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. V, § 13. Nevertheless, Defendant's supervisory authority over local district attorneys is somewhat limited. *See id.*; Cal. Gov. Code § 12550. If the Attorney General believes that a district

attorney is not adequately enforcing the law, she may step in and institute enforcement proceedings herself. Cal. Const. Art. V, § 13. She may also require district attorneys to make written reports and may take charge of an investigation or prosecution where necessary. Cal. Gov. Code § 12550. However, she does not have the ability to force a district attorney to act or to adopt a particular policy. *Goldstein v. City of Long Beach*, 715 F.3d 750, 756 (9th Cir. 2013) *cert. denied sub nom. Cnty. of Los Angeles, Cal. v. Goldstein*, 134 S. Ct. 906, 187 L. Ed. 2d 778 (2014).

Nevertheless, the parties do not dispute that under certain circumstances Defendant has the ability to institute enforcement proceedings under § 25982. Moreover, aside from any enforcement authority conferred by the California Constitution, Defendant is at least empowered to enforce § 25982 by virtue of being a peace officer. (Dkt. 87: Order at 9.)

Defendant seeks to have her paté and eat it, too. Defendant asserts that she has no present intention to exercise her authority to enforce § 25982. She thus argues that Plaintiffs' claims are therefore not justiciable as to her. However, at the hearing held on July 14, 2014, she refused to stipulate that she would never bring enforcement proceedings under § 25982. Defendant cannot credibly claim that there is no cognizable risk of her prosecuting Plaintiffs for violating § 25982 while simultaneously reserving her right to enforce it.

As this Court previously found, Plaintiffs are in the same position as the trappers who challenged California's

ban on certain animal traps and poisons in *National Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002). In *Davis*, the Ninth Circuit reversed the district court's holding that the trappers lacked standing because there was no "genuine threat of imminent prosecution." *Id.* at 855. The Ninth Circuit first found that the trappers did not need to show a genuine threat of imminent prosecution because their asserted injury was financial loss caused by ceasing certain animal trapping practices to avoid violating the challenged ban. *Id.* at 855-56. The Court next found that several factors indicated that this economic injury was caused by the enactment of the challenged proposition:

> (1) the newness of the statute; (2) the explicit prohibition against trapping contained in the text of Proposition 4 [the challenged law]; (3) the state's unambiguous press release mandating the removal of all traps banned under Proposition 4; (4) the amendment of state regulations to incorporate the provisions of Proposition 4; and (5) the prosecution of one private trapper under Proposition 4.

Id. at 856. The Court also found that the trappers' injury was redressable because they would resume using the banned traps if the proposition was declared unenforceable. *Id.*

Plaintiffs assert that they have lost millions of dollars because they were forced to either cease sales of their foie gras products in California or face prosecution. As

in *Davis*, "the gravamen of [Plaintiffs'] suit is economic injury rather than threatened prosecution." *Id.* at 856.

Also as in *Davis*, Plaintiffs' injury was caused by § 25982. The statute is relatively new—it only became effective in July 2012. It expressly prohibits the sale of liver products produced as a result of force feeding a bird for the purpose of enlarging its liver. Additionally, local district attorneys have threatened to prosecute Hudson Valley and other similar foie gras producers under § 25982. Even assuming *arguendo* that these threats are not attributable to Defendant, they illustrate the causal relationship between § 25982 becoming operative and Plaintiffs' economic injury from ceasing sales in California. Moreover, Defendant is both obligated to ensure that § 25982 is adequately enforced and authorized to enforce it herself. Defendant's recent refusal to stipulate that she won't enforce § 25982 reinforces the conclusion that a causal relationship exists.

Plaintiffs' injury is redressable. They assert that they sold their foie gras products in California before the sales ban and that they lost significant revenue as a result of stopping. Presumably they would resume their sales if § 25982 were declared unenforceable. Moreover, at the very least a declaratory judgment or injunction against Defendant would prevent her from using her own authority to enforce § 25982 against Plaintiffs. Plaintiffs' need for certainty that Defendant won't prosecute them for selling their foie gras products is understandable—particularly given Defendant's coy reservation of the right to enforce § 25982. Plaintiffs thus have standing to assert their claim.

Additionally, this is not a case where more facts surrounding enforcement will assist the Court. Plaintiffs "injury is established, and the legal arguments are as clear as they are likely to become." *Davis*, 307 F.3d at 857. In relevant part, Plaintiffs assert that the PPIA preempts § 25982. This is purely a question of statutory interpretation; its resolution would not vary based on the specific facts surrounding enforcement. The potential hardship to Plaintiffs also favors adjudication. They will continue to lose revenue by ceasing sales of their foie gras products in California unless and until the sales ban is declared invalid. Plaintiffs' claim against Defendant is thus ripe. *Id.*

For the same reasons, Plaintiffs satisfy the Declaratory Judgment Act's "case of actual controversy" requirement. *See Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1042 (E.D. Cal. 2014) (finding declaratory relief appropriate where a state enforcement agency and private entities disputed whether a state law was preempted).

For the aforementioned reasons, the Court finds that Plaintiffs' claims are justiciable. The Court therefore DENIES Defendant's motion to dismiss Plaintiffs' complaint under Rule 12(b)(1).[5]

5. As discussed below, the Court also denies Defendant's motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).

Appendix B

B. PREEMPTION

Plaintiffs move for partial summary judgment on their claim that the PPIA preempts § 25982.

1. Legal Standard for a Motion for Summary Judgment

Federal Rule of Civil Procedure 56 requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On an issue for which the moving party does not have the burden of proof at trial, the moving party may satisfy this burden by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Once the moving party has met its initial burden, the nonmoving party must affirmatively present admissible evidence and identify specific facts sufficient to show a genuine issue for trial. *See id.* at 323-24; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A scintilla of evidence or evidence that is not significantly probative does not present a genuine issue of material fact. *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

2. Express Preemption

Under the Supremacy Clause of the Constitution, Congress has the power to preempt state law. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) *cert. denied sub nom. Arizona v. Valle Del Sol, Inc.*, 134 S. Ct. 1876, 188 L. Ed. 2d 911 (2014). Preemption may be express or implied. *See id.* Express preemption "arises when the text of a federal statute explicitly manifests Congress's intent to displace state law." *Id.* (quoting *United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir.2012)).

The PPIA regulates the distribution and sale of poultry and poultry products. *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 743 (9th Cir. 1994) (per curiam). This includes foie gras and other products made "wholly or in part from any [goose or duck] carcass or part thereof." *See* 21 U.S.C. §§ 453(e) & (f).

The PPIA expressly preempts states from imposing:

> [m]arking, labeling, packaging, or ingredient requirements (or storage or handling requirements . . . [that] unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this chapter [the PPIA] with respect to articles prepared at any official establishment in accordance with the requirements under this chapter[.][6]

6. Another portion of that clause which is not at issue in this case preempts additional or different requirements "with respect to

21 U.S.C. § 467e. This clause sweeps broadly. *See Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 132 S. Ct. 965, 970, 181 L. Ed. 2d 950 (2012) (finding that the nearly identical preemption provision set forth in the Federal Meat Inspection Act ("FMIA") sweeps broadly). An "official establishment" is "any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this chapter." 21 U.S.C. § 453(p). Thus, the PPIA preempts § 25982 if a sales ban on poultry products resulting from force feeding a bird imposes an ingredient requirement that is in addition to or different than those imposed by the PPIA.

Plaintiffs' foie gras products are prepared at official establishments.[7] (Henley Decl. ¶¶ 3-4; Henley Decl., Exs. A & B; Cuchet Decl. ¶¶ 3-5; Cuchet Decl., Ex. A.)

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premises, facilities and operations of any official establishment[.]" 21 U.S.C. § 467e. There is also a savings clause permitting states to impose recordkeeping requirements that are not inconsistent with the Act and to issue regulations "consistent with this chapter, with respect to any other matters [aside from those expressly preempted] regulated under this chapter." *Id.*

7. The Court rejects Defendant's assertion that Plaintiffs failed to submit sufficient evidence showing that their foie gras products are prepared at official establishments. Plaintiffs submitted testimony that their products are "prepared" at "official establishments" along with United States Department of Agriculture ("USDA") approval documents indicating an "establishment number" and describing the "processing procedures." (Henley Decl. ¶¶ 3-4; Henley Decl., Exs. A &B; Cuchet Decl. ¶¶ 3-5; Cuchet Decl., Ex. A.) Taken together, this evidence is sufficient to establish that Plaintiffs' foie gras products are prepared at official establishments.

Defendant argues that § 25982 regulates a feeding process occuring before Plaintiffs' birds enter an official establishment. Defendant thus asserts that § 25982 does not apply with respect to an article produced at an official establishment. Defendant further argues that § 25982 regulates a process rather than an "ingredient" because it regulates the manner of producing the fattened bird livers rather than the use of a particular ingredient.

The Court recognizes that "[t]he line between regulating the sale of a finished product and establishing product standards will not always be easy to draw. Any finished product can be described in terms of its components or method of manufacture." *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428, 434-35 (2d Cir. 2013). Nevertheless, here the line is clear: Section 25982 expressly regulates only the sale of products containing certain types of foie gras products—i.e. foie gras from force-fed birds.[8] Section 25982 does not ban the practice of force feeding; this practice is the subject of a separate provision.

Additionally, it does not matter whether foie gras obtained from force-fed birds is a different product from non-force-fed bird foie gras. It is undisputed that the PPIA and its implementing regulations do not impose any requirement that foie gras be made with liver from

8. The Court assumes, but does not decide, that foie gras may be produced without force feeding birds to enlarge their livers. Nevertheless, the Court would find that § 25982 imposes an ingredient requirement regardless of whether foie gras can be produced without force feeding.

non-force-fed birds. Thus, Plaintiffs' foie gras products may comply with all federal requirements but still violate § 25982 because their products contain a particular constituent—force-fed bird's liver. Accordingly, § 25982 imposes an ingredient requirement in addition to or different than the federal laws and regulations.[9] *See Nat'l Broiler Council.*, 44 F.3d at 745 (finding that a California law imposed a labeling requirement in addition to the PPIA where "plaintiffs' members can label [certain specified] poultry products . . . as 'fresh' and comply with all federal labeling requirements but not comply with the California Act"); *Armour & Company v. Ball*, 468 F.2d 76, 83-85 (6th Cir. 1972) (holding that the FMIA's analogous preemption provision preempted Michigan's sales ban on Grade 1 sausage containing non striated muscle meat because it imposed requirements in addition to or different than the federal requirements).

a. *National Meat Association v. Harris*

Defendant asserts that Plaintiffs' preemption argument is foreclosed by the Supreme Court's reasoning in *National Meat Association v. Harris*. In *National Meat* the Court considered whether the FMIA preempts California's statute regulating the treatment and sale of

9. For similar reasons the Court need not address whether the USDA's definitions and standards regarding foie gras products set forth in its Standards and Labeling Policy Book or Policy Memo 076 regarding foie gras product standards is admissible. Moreover, the fact that § 25982 is phrased as a prohibition rather than an affirmative requirement does not exclude it from the PPIA's preemptive sweep. *See Nat'l Broiler Council*, 44 F.3d at 745.

nonambulatory swine. In addressing that issue the Court applied only the first sentence of the preemption clause, which preempts requirements within the FMIA's scope "with respect to premises, facilities and operations of any establishment . . . in addition to, or different than those made under this [Act]." *Nat'l Meat Ass'n*, 132 S. Ct. at 969 (quoting 21 U.S.C. § 678) (alterations in original). The California statute at issue barred: (1) selling or buying nonambulatory animals for human consumption; (2) producing meat for human consumption from nonambulatory animals; and (3) selling meat for human consumption from nonambulatory animals. *Id.* at 970. It also imposed a host of other requirements regarding the treatment of nonambulatory animals. *Id.* The plaintiff was a trade association representing meatpackers and processors, including operators of swine slaughterhouses. *Id.*

The Court rejected the argument that the statute was not preempted because it applied only to animals that would not be turned into meat. *Id.* at 973. The Court found that the FMIA's scope included animals not destined to become meat for human consumption. *Id.* The Court distinguished cases holding that the FMIA does not preempt bans on slaughtering horses for human consumption, stating that those cases applied "at a [distance] from the sites and activities that the FMIA most directly governs." *Id.* at 974. According to the Court, unlike the California statute before it, the horse-butchering bans prevented horses from ever being delivered to, inspected at, or handled by a slaughterhouse. *Id.*

Additionally, the Court considered whether the sales ban on meat from nonambulatory animals avoided preemption because it applied only after the slaughterhouse's activities concluded. The Court rejected this argument, relying on a functional interpretation of the sales ban as it functioned within the statute as a whole. *Id.* at 972-73. The Court found that the sales ban helped to implement and enforce the statute's other requirements directly regulating activities on Slaughterhouse's premises by ensuring that slaughterhouses remove nonambulatory swine from their production process. *Id.* at 972. The Court thus stated that the sales ban"functions as a command to slaughterhouses to structure their operations in the exact way the remainder of [the California statute] mandates." *Id.* at 973. Based on this functional interpretation, the Court found that the sales ban was preempted as an additional or different requirement with respect to the premises, facilities, or operation of an FMIA-covered establishment. *Id.* According to the Court, if the sales ban weren't preempted "then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision."

National Meat's application to this case is far from clear. On its face, the California ban on sales of meat from nonambulatory pigs appears analogous to California's ban on sales of foie gras from force-fed birds. Additionally, the need to prevent states from avoiding preemption via strategic legislative drafting applies with equal force to § 25982. Thus, if the nonambulatory pig sales ban is

preempted by the FMIA then § 25982 should also be preempted by the analogous PPIA.

However, the Court's functional approach to statutory construction suggests that § 25982 should be understood as a ban on force-feeding birds rather than as a sales ban. Under this reading, Defendant might be correct that § 25982 does not impose an ingredient requirement because it regulates a process. If so, then § 25982 would not be preempted.

However, this result would turn the Supreme Court's reasoning on its head: Instead of hindering crafty draftsmanship, this analysis would use a functional approach to enable states to creatively avoid preemption. Under this analysis, any state would be able to avoid preemption of ingredient and labeling requirements by purporting to regulate the process of producing an ingredient rather than directly regulating the ingredient's use.

As this discussion illustrates, there is a critical distinction between *National Meat* and the case at bar: *National Meat* considered a different portion of the preemption clause than the one here at issue.[10] Much of the Court's analysis relied on the fact that the statute expressly preempts regulations with respect to "premises, facilities and operations" of covered establishments. It did not consider the portion of the FMIA's preemption clause

10. Both the FMIA and PPIA contain preemption clauses with a section applicable to operations and another applicable to ingredients and labeling. See 21 U.S.C. § 467e; 21 U.S.C. § 678.

applicable to ingredient and labeling requirements. Thus, much of the Court's analysis does not apply to the case at bar.

In particular, the distinction that the Court drew between the California nonambulatory animal statute and a horse-slaughtering ban is not helpful in the context of Plaintiffs' case. It may be true that, like a horse-slaughtering ban, § 25982 regulates only activities that occur apart from official establishments' operations. However, this fact is irrelevant to the question of whether § 25982 imposes an additional or different ingredient requirement. In contrast to the operations and premises clause, the clause dealing with ingredient and labeling requirements inherently contemplates preempting regulations applicable outside of the operations and facilities of official establishments. By stating that it applies "with respect to articles prepared at any official establishment," 21 U.S.C. § 467e, the statute makes clear that it applies beyond the activities actually conducted by or at an official establishment.

Additionally, unlike in *National Meat*, § 25982's sales ban appears in a separate statue from the ban on the act of force feeding birds. While this division would be unimportant if it were purely formalistic, Plaintiffs' case illustrates that the divide is functional. Plaintiffs only assert that the sales ban applies to their foie gras products. They do not challenge the conduct ban, nor do they argue that the conduct ban applies to their force-feeding of birds outside of California. In contrast, the plaintiff in *National Meat* challenged both the conduct

and sales bans, and was apparently impacted by both.[11] Thus, unlike in *National Meat*, it makes little sense here to consider § 25982 alongside § 25981 and thus to interpret § 25982 as the functional equivalent of § 25981's conduct ban.

Given this ambiguity regarding whether or how *National Meat* applies to Plaintiffs' case, the Court concludes that the best approach is to apply *National Meat* 's reasoning to reach a result consistent with the goals that the Supreme Court embraced. The Court therefore concludes that *National Meat* requires the Court, in deciding Plaintiffs' express preemption claim, to prevent California from circumventing the PPIA's preemption clause (or as *National Meat* said, from "mak[ing] a mockery" of it) through creative drafting. Thus, California cannot regulate foie gras products' ingredients by creatively phrasing its law in terms of the manner in which those ingredients were produced.

For the aforementioned reasons, the Court finds that the PPIA expressly preempts § 25982. The Court therefore GRANTS Plaintiffs' motion for partial summary judgment.[12]

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11. *See Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1096-97 (9th Cir. 2010) *rev'd sub nom. Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 132 S. Ct. 965, 181 L. Ed. 2d 950 (2012) (stating that some of the plaintiff organization's members claimed the statute "would prevent the slaughter of approximately 2.5% of their pigs").

12. In light of this holding, the Court need not reach any of the other arguments raised in the parties' motions.

IV. ORDER

1. For the aforementioned reasons, the Court GRANTS Plaintiffs' motion for partial summary and ENTERS JUDGMENT in favor of Plaintiffs on their third cause of action concerning preemption. The Court therefore PERMANENTLY ENJOINS AND RESTRAINS Defendant and her agents, servants, employees, representatives, successors, and assigns from enforcing California Health and Safety Code § 25982 against Plaintiffs' USDA-approved poultry products containing foie gras.

2. For the aforementioned reasons, the Court DENIES Defendant's motion to dismiss.

IT IS SO ORDERED.

Dated: January 7, 2015

/s/ Stephen V. Wilson
STEPHEN V. WILSON
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 9, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55192

D.C. No. 2:12-cv-05735-SVW-RZ
U.S. District Court for the Central District of California, Los Angeles

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, A CANADIAN NONPROFIT CORPORATION; HVFG, LLC, A NEW YORK LIMITED LIABILITY COMPANY; HOT'S RESTAURANT GROUP. INC., A CALIFORNIA CORPORATION,

Plaintiffs - Appellees,

v.

XAVIER BECERRA, ATTORNEY GENERAL,

Defendant - Appellant.

ORDER

Before: PREGERSON, NGUYEN, and OWENS, Circuit Judges.

Appendix C

The panel voted to deny the petition for rehearing *en banc*. Judge Nguyen and Judge Owens voted to deny the petition for rehearing *en banc*, and Judge Pregerson has so recommended. The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing *en banc* is DENIED.