No. 15-55192

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC; HVFG LLC; AND HOT'S RESTAURANT GROUP, INC.
Plaintiffs—Appellees

v.

KAMALA D. HARRIS
Defendant—Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
STEPHEN V. WILSON, DISTRICT JUDGE • CASE NO. 2:12-CV-5735-SVW (RZX)

ANSWERING BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Association des Éleveurs de Canards et d'Oies du Québec is a Canadian non-profit corporation. It has no parent corporation nor is there any publicly held corporation that owns 10% or more of its stock.

HVFG LLC is a New York limited liability company. It has no parent corporation nor is there any publicly held corporation that owns 10% or more of its stock.

Hot's Restaurant Group, Inc., is a California corporation. It has no parent corporation nor is there any publicly held corporation that owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The United States District Court for the Central District of California had original jurisdiction of this action under 28 U.S.C. § 1331 because it arises under 42 U.S.C. § 1983 and under, *inter alia*, Article VI, clause 2, of the U.S. Constitution and raises a federal question as to the constitutionality of a state statute.

The order and judgment from which Defendant appeals are final because the district court granted Plaintiffs' motion for summary judgment, entered judgment in favor of Plaintiffs on their third cause of action concerning preemption, and permanently enjoined and restrained Defendant (and her agents, servants, employees, representatives, successors, and assigns) from enforcing section 25982 of the California Health and Safety Code against the sale of Plaintiffs' USDA-approved poultry products containing foie gras. (ER 3, 18.) This Court therefore has jurisdiction under 28 U.S.C. § 1291.

On January 9, 2015, the district court ordered the case closed as of the date of its judgment, January 7, 2015. (ER 2.) On February 4, 2015, Defendant timely filed notice of appeal of the order "enjoining Defendant from enforcing statute" and of the judgment "granting summary judgment to Plaintiffs." (ER 1.) Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE PRESENTED

Whether California's requirement that federally-approved poultry products sold in the state not contain any duck liver which is the result of force-feeding imposes a requirement as to the ingredients of a poultry product and is thus preempted by the federal Poultry Products Inspection Act.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES (Ninth Circuit Rule 28-2.7)

The pertinent provision of the U.S. Constitution is the Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI., cl. 2.

The pertinent federal statute is the Poultry Products Inspection Act, 21 U.S.C. §§ 451 *et seq*., which provides in relevant part:

> [I]ngredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any official establishment in accordance with the requirements under this chapter[.]

21 U.S.C. § 467e.

The pertinent state statute is section 25982 of the California Health and Safety Code:

> A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size.

Cal. Health & Safety Code § 25982.

STATEMENT OF THE CASE

I. California Bans the Sale of Poultry Products that Are Lawful under Federal Law.

A. Plaintiffs produce foie gras. Their products are USDA-approved as wholesome and fully comply with federal requirements governing the sale of poultry products.

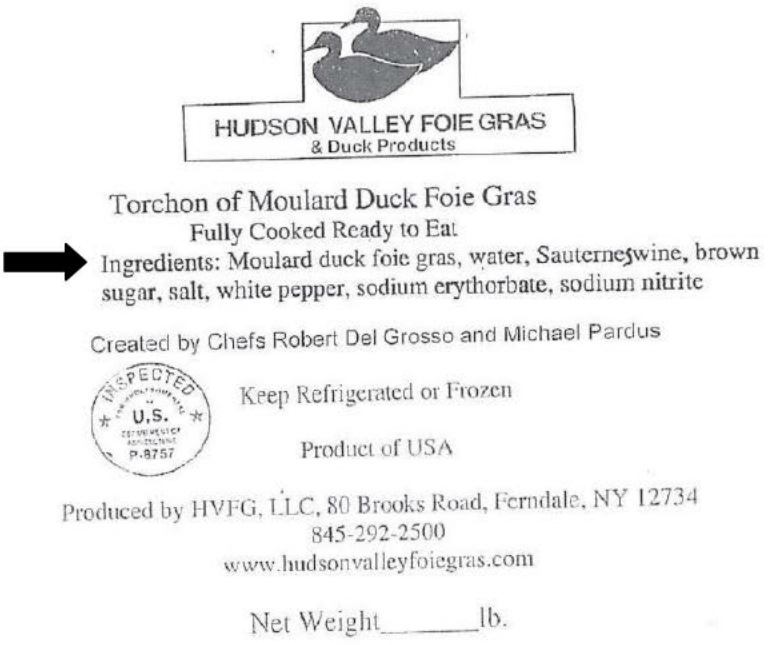
Plaintiffs HVFG LLC, which does business as Hudson Valley Foie Gras ("Hudson Valley"), and the Association des Éleveurs de Canards et d'Oies du Québec (the "Canadian Farmers") produce foie gras products at their facilities in New York and Quebec. (ER 5; SER 40–41, 47–48) Every one of their foie gras products is prepared in an "official establishment," 21 U.S.C. § 453(p), and every one is inspected and certified as wholesome by the U.S. Department of Agriculture (the "USDA") for sale in the United States. (ER 13; SER 40–41, 47–48.) Indeed, the federal Poultry Products Inspection Act (the "PPIA") and USDA regulations would forbid their sale if they were adulterated or misbranded. 21 U.S.C. § 458(a)(2); 9 C.F.R. § 381.190(b)(1).

Federal law authorizes the sale of "single-ingredient" poultry products as well as all others that conform to the standards set forth in the USDA's Food Standards and Labeling Policy Book without agency label pre-approval. 9 C.F.R. § 381.133(a), (b). In addition, Hudson Valley and the Canadian Farmers often seek the USDA's

special approval for foie gras products not listed in the agency's Food Standards and Labeling Policy Book, which requires them to specify the ingredients of each. For example, before one of the Canadian Farmers, Palmex, started selling its "Whole duck foie gras torchon style" in the U.S., it obtained special approval from the USDA based on a listing of ingredients that specified "Duck Foie Gras" as constituting 95.35% of the product formula. (SER 41, 44.) Similarly, Hudson Valley obtained USDA approval for its "Mulard Duck Foie Gras" and "Torchon of Moulard Duck Foie Gras" products based on the submission of product formulas that specified the percentage of "Mulard Duck Foie Gras" as the ingredients. (SER 47–48, 52, 55.)

The following are just two examples of the USDA-approved foie gras products produced by Hudson Valley and the Canadian Farmers, the labels of which show duck foie gras as the primary ingredient:

(SER 45.)



(SER 56.)

Hudson Valley and the Canadian Farmers comply with all federal requirements under the PPIA and USDA regulations for producing foie gras products for sale in the United States. (SER 40, 47.) (The applicable requirements are set forth at greater length in the Argument section below.) The USDA does not impose any requirement that Plaintiffs' foie gras products be made from the liver of (or otherwise be the "result of") a non-force-fed duck.

B. California enacts Health and Safety Code § 25982, which requires that Plaintiff's poultry products be made from the livers of non-force-fed ducks.

On July 1, 2012, sections 25981 – 25984 of the California Health and Safety Code took effect. Section 25981 provides that "[a] person may not force feed a bird for the purpose of enlarging the bird's liver

beyond normal size, or hire another person to do so." Cal. Health & Safety Code § 25981.[1] Section 25980(b) defines "force feeding" to mean "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(b).[2] By virtue of this provision, which regulates the "process" of feeding a bird, the California Legislature ensured that no duck or goose will be force fed in California. Indeed, the only producer of foie gras in California ceased operations in the State before § 25981 took effect on July 1, 2012. (SER 61.)

Section 25982, meanwhile, goes well beyond California's traditional police power of preventing what it perceives as animal cruelty within its borders. Instead, § 25982 requires that a poultry product "may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25982. Section 25982 was not intended to ban foie gras products.[3]

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[1] Unspecified statutory references are to the California Health and Safety Code.

[2] The statute further provides 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.*

[3] Everyone from the author of the legislation to the Governor who signed it to Defendant herself — and even this Court — has emphasized

Section 25980(a) provides that a bird "includes, but is not limited to, a duck or goose." Cal. Health & Safety Code § 25980(a); *see also* 21 U.S.C. § 453(e), (f); 9 C.F.R. 381.1(b). And, as Defendant agrees, § 25982 "applies only to products made from a force-fed bird ***liver***; it does not extend to non-liver products made from a force-fed bird, such as duck breasts or down jackets." (AOB 5 [emphasis added].) Section 25982 thus bans the sale of a poultry product that contains any liver of a duck or goose if the liver is the result of "force feeding" the duck or

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that § 25982 does ***not*** ban foie gras but that it "merely" seeks to ban foie gras made from force-fed ducks and geese. Introducing Senate Bill 1520 in the California Senate on April 26, 2004, Senator John Burton declaimed: "***This bill has nothing to do***, uh — despite the mail that many of us get from restaurants — ***with banning, uh, foie gras***. What it does is prohibit, uh, what a process of which most people, uh, consider to be an inhumane of force feeding ducks and geese for the purpose of unnaturally enlarging their liver beyond the normal size." (SER 20.) In his letter to the California State Senate upon signing Senate Bill 1520, Governor Arnold Schwarzenegger made clear: "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.***" (SER 24.) In her answering brief on Plaintiffs' preliminary injunction appeal, Defendant argued: "Moreover, section 25982 ***does not ban the sale of all foie gras***, but only the sale of foie gras produced by means of prohibited animal cruelty." (Case No. 12-56822, ECF No. 16-1 at ECF p. 51.) And this Court has previously explained with respect to "The Scope of § 25982": "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." *Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 945 n.4 (9th Cir. 2013) (emphasis added).

goose for the purpose of enlarging it "beyond normal size."

In other words, by virtue of these definitions, § 25982 imposes a unique requirement on the sale of poultry products in California, namely, that poultry products not contain force-fed duck or goose liver. If a poultry product meets this special requirement, California allows its sale; if a poultry product does not, California bans it and imposes a penalty of up to $1,000 per sale per day. Cal. Health & Safety Code § 25983(b). No other State imposes such a requirement.

While the author of the bill, then California Senator John Burton, apparently believed the feeding method was "so hard on the birds that they would die" (and the quotes in Defendant's citation to an Assembly committee's bill analysis come only from him), the California Department of Food and Agriculture — i.e., the state agency charged with regulating agricultural production methods — issued an Enrolled Bill Report concerning Senate Bill 1520 in which it explained: "Production of Foi[e] Gras in California does not involve cruelty at any time," and "Foi[e] Gras production is a food production industry well established in conformity with humane animal management, safe food practices and environmentally protective

provisions of State and Federal law." (SER 7.)[4]

Based on the additional and different requirement imposed by § 25982, Plaintiffs feared prosecution under § 25982 from the date it took effect until the district court entered a final judgment in favor of Plaintiffs and permanently enjoined the enforcement of § 25982 against the sale of their USDA-approved foie gras products. (SER 41, 48–49.) Indeed, during the ban, the District Attorneys of at least three California counties threatened to enforce § 25982 not only against the sale of Hudson Valley's and the Canadian Farmers' products in California but also — going far beyond the language in § 25982 — against the offer for sale and import of those products from other States into California. (SER 21.) During the two and a half years it was in effect, the ban caused Plaintiffs to suffer losses in the many millions of dollars. (SER 41, 48–49, 58.)

[4] If the Court grants the proposed amici leave to file their proposed brief, it should not give it any weight. The proposed amici miss the point of this case in arguing: "The Foie Gras Law regulates the market for *cruelty*, not anything about the ingredients of those products." (Dkt. 17-2 at p.22 [emphasis in original].) But the preemption issue that is the focus of this appeal has nothing to do with cruelty, and, in any event, the proposed amici's view is contrary to the finding of the California government agency charged with regulating foie gras production.

II. The Relevant Procedural History

A. Plaintiffs file suit to challenge § 25982 and seek a preliminary injunction on their Due Process and dormant Commerce Clause claims.

Plaintiffs filed this action on July 2, 2012, i.e., the first court day that § 25982 was in effect. (ER 51.) Plaintiffs alleged that § 25982 was unconstitutional under the Due Process Clause and the dormant Commerce Clause. (Dist. Ct. Dkt. 1.) Plaintiffs sought a declaratory judgment and permanent injunction against Defendant to enjoin her from enforcing § 25982 against Plaintiffs and their USDA-approved foie gras products. (*Id.*)

Within days of filing, Plaintiffs also applied ex parte for a temporary restraining order and order to show cause why a preliminary injunction should not issue to enjoin Defendant from enforcing § 25982. (Dist. Ct. Dkts. 3–9.) The district court denied the application without any discussion of the merits but invited briefing on a motion for preliminary injunction. (Dist. Ct. Dkts. 35, 51–52.)

In ruling on Plaintiffs' motion for a preliminary injunction under the Due Process Clause and dormant Commerce Clause, the district court noted that Plaintiffs had not based the motion on their preemption claim, and it therefore did consider that claim. (Dist. Ct.

Dkt. 87 at p. 16, n.3.) The district court found that Plaintiffs were likely to suffer irreparable harm, but it nonetheless denied the motion. (Dist. Ct. Dkt. 87.) Plaintiffs appealed the denial of the motion, and this Court affirmed, noting that "the issue of preemption is not before us." *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 950 n.8 (9th Cir. 2013).

B. The district court grants summary judgment on Plaintiffs' preemption claim.

On remand from this Court, Plaintiffs filed a Second Amended Complaint with additional allegations that § 25982 is preempted by the PPIA. (Dist. Ct. Dkt. 112.) Defendant moved to dismiss (Dist. Ct. Dkt. 116), and Plaintiffs moved for summary judgment on their preemption claim (Dist. Ct. Dkts. 117–118). Plaintiffs' motion argued that the PPIA both expressly and impliedly preempts section 25982. (*Id.*) Defendant did not submit any evidence in opposition to Plaintiff's motion for summary judgment.

On January 7, 2015, the district court denied Defendant's motion to dismiss and granted Plaintiffs' motion for partial summary judgment. (ER 4-18.)[5] In a 15-page order, the district court stated the

[5] The district court's order rejected Defendant's various arguments that Plaintiffs lacked Article III standing, that the dispute was not ripe,

crux of the dispute as follows: "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." (ER 4–5.) The district court concluded that it did and consequently that the PPIA expressly preempted § 25982. (ER 12–18.)

The district court first cited this Court's holding in *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 743 (9th Cir. 1994) (per curiam), that the PPIA "regulates the distribution and sale of poultry and poultry products and contains an express preemption clause." (ER 13.) It explained that the PPIA defines "poultry products" to include "foie gras and other products made 'wholly or in part from any [goose or duck] carcass or part thereof.'" (ER 13 [brackets in original]). The district court also recognized the Supreme Court's recent holding in *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012), that this preemption clause, like the one in the Federal Meat Inspection Act (the "FMIA"), "sweeps broadly." (ER 13.)

In the key part of its ruling, the district court observed that "[i]t is undisputed that the PPIA and its implementing regulations do not

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and that it did not present a "case of actual controversy" under the Declaratory Judgment Act. (ER 6-12.) Defendant has not appealed any aspect of those rulings.

impose any requirement that foie gras be made with liver from 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." (ER 14.)[6]

The district court rejected Defendant's argument that § 25982 regulates a "process" rather than an ingredient. The district court explained that "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." (ER 14 [footnote omitted].) The district court noted that California's regulation of the process of force-feeding is "the subject of a separate provision," i.e., section ***25981*** of the California Health and Safety Code. (*Id.*)

The district court carefully reviewed the Supreme Court's opinion in *National Meat*, noting that the California ban on sale of meat from non-ambulatory pigs in that case could not avoid preemption merely because it applied only after the slaughterhouse's activities had

[6] The district court thus noted that it "would find that § 25982 imposes an ingredient requirement regardless of whether foie gras can be produced without force feeding." (ER 14 at n.8.)

concluded. (ER 15.) Recognizing the Supreme Court's "functional approach" in construing the effect of the state ban, the district court quoted its holding that, if such a ban were not 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." (ER 15-16, citing *National Meat*, 132 S. Ct. at 973.)

The district court then took a "functional approach" to § 25982 and explained that, if Defendant could avoid preemption merely by characterizing § 25982 as a ban on a process (i.e., force-feeding), then 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." (*Id.*)

After noting several irrelevant distinctions between *National Meat* and this case, the district court concluded 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." (ER 18.)

The district court therefore granted Plaintiffs' motion for partial summary judgment, entered a final judgment in Plaintiffs' favor on their preemption claim, and permanently enjoined Defendant from enforcing section 25982 against Plaintiffs' USDA-approved poultry products containing foie gras. (ER 3, 18.) In light of its ruling that § 25982 was expressly preempted, the district court did not reach Plaintiffs' arguments concerning field preemption and obstacle preemption, which provided additional grounds to find the statute preempted. (ER 18.)

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's final judgment and permanent injunction barring enforcement of California's law prohibiting the sale of poultry products that contain any liver from force-fed ducks or geese because the state law is preempted by the federal Poultry Products Inspection Act (the "PPIA"). This Court has long recognized the supremacy of federal law in holding that "[t]he PPIA regulates the distribution and sale of poultry and poultry products and contains an express preemption clause." *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 743 (9th Cir. 1994) (per curiam).

Under the PPIA, Congress empowered the United States Department of Agriculture (the "USDA") to establish the standards of identity or composition and ingredient requirements for all poultry products sold in America. Congress provided that compliance with the USDA's uniform ingredient requirements for poultry products ***expressly preempts*** any State laws that would impose any additional or different requirement — whether the product is an ordinary sausage or the finest foie gras. Section 467e of the PPIA declares Congress's intent in unmistakable terms: "[I]ngredient requirements … ***in addition to, or different than***, those made under this chapter may

not be imposed by any State … with respect to articles prepared at any official establishment in accordance with the requirements under" the PPIA. 21 U.S.C. § 467e.

As relevant to this case, the federal government establishes the ingredient requirements for poultry products containing foie gras. Foie gras is defined as the liver "obtained ***exclusively from specially fed and fattened geese and ducks***." (ER 20.) This definition reflects a longstanding agreement between the United States and France, i.e., following international negotiations that only the federal government can undertake. Relying on the French standards, federal law defines the ingredient requirements of no less than 14 poultry products that are made with foie gras, ranging from "Whole Duck Foie Gras" to "Pate of Duck Liver." (ER 20-24.)

Against this federal backdrop, the California Legislature passed California Senate Bill 1520 in 2004, which added sections 25981 through 25984 to the California Health and Safety Code, effective July 1, 2012. In contravention of the Supremacy Clause, § 25982 purports to impose an "additional" and "different" requirement on poultry products sold in California. Specifically, § 25982 provides that a poultry product "may not be sold if it is the result of force feeding a

bird," which § 25980(a) defines to include a "duck or goose."

Defendant — as well as the author of the bill, the Governor who signed it, and even this Court — interprets section 25982 to mean that a foie gras product may only be sold in California if it does not contain any ***liver*** from a force-fed duck or goose. But federal law does not include any such requirement, and the PPIA thus expressly preempts § 25982. Indeed, federal law actually requires that the liver in foie gras products be "obtained exclusively from specially fed and fattened geese and ducks." (ER 20, 23.) As the district court correctly held, citing this Court's PPIA precedent in *Voss*, 44 F.3d at 745, "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." (ER 14.)

Defendant's sole argument in defense of § 25982 is that a ban on the sale of a USDA-approved poultry product based on the presence of an ingredient which is the result of an agricultural process the state disfavors is somehow not an ingredient requirement. But a requirement that the ingredients in poultry products sold in California

be from non-force-fed ducks is no less an ingredient requirement merely because the condition for including the ingredient is creatively phrased based on the process for producing the ingredient. As the Supreme Court has recently reiterated, "Pre-emption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1398 (2013).

Finally, given Congress's "comprehensive" regulation of the composition of poultry products to ensure their uniformity and further their sale in commerce, § 25982 is also unconstitutional as impliedly preempted under the doctrines of field and obstacle preemption — doctrines the district court did not need to reach below in light of its finding that § 25982 is expressly preempted.

STANDARD OF REVIEW

A court of appeals reviews a district court's grant of summary judgment *de novo*. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012). The court's review "is governed by the same standard used by the district court under Federal Rule of Civil Procedure 56(a)." *Id.* Rule 56(a) provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[7] This Court "may affirm a grant of summary judgment on any ground supported by the record." *Nat'l Ass'n of Optometrists*, 682 F.3d at 1147.

[7] Defendant erroneously quotes a case from 1999 citing Rule 56*(c)* as providing the legal standard. (AOB 15.) But the federal rules were amended in 2010 to restate the legal standard with slightly different language and to place it in Rule 56*(a)*. In any event, there can be no genuine dispute as to any material fact in this case because Defendant did not submit ***any*** evidence in opposition to Plaintiffs' motion for summary judgment.

ARGUMENT

I. Federal Preemption Doctrines Recognize that Congress May Preempt State Law — as It Has Done Here — to Effectuate Its Intent of Creating a National Market with Uniform Standards for Poultry Products.

A. Congress may preempt state law in any of three ways.

Under the Supremacy Clause of the U.S. Constitution, "the Laws of the United States" are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Indeed, it is a "fundamental principle of the Constitution [] that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). "There are 'three classes of preemption': express preemption, field preemption, and conflict preemption." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013).

"The first, express preemption, arises when the text of a federal statute explicitly manifests Congress's intent to displace state law." *Id.* Under the second, field preemption, "the 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." *Id.* Field preemption can be "inferred from a framework

of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* at 1022-23 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012)). Third, "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby*, 530 U.S. at 372. "Conflict preemption, in turn, has two forms: impossibility and obstacle preemption. Courts find impossibility preemption 'where it is impossible for a private party to comply with both state and federal law.' Courts will find obstacle preemption where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Whiting*, 732 F.3d at 1023 (quoting *Crosby*, 530 U.S. at 372).

B. Congress intended to preempt state laws regulating the ingredients of poultry products.

Congressional intent is the "ultimate touchstone of preemption analysis." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Here, the whole point of the PPIA was to ensure that poultry products that satisfy federal standards are sold, unburdened, in interstate commerce. Indeed, the very first sentence of the PPIA states

Congress's intent: "Poultry and poultry products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion moves in interstate or foreign commerce. . . . [R]egulation by the Secretary of Agriculture and cooperation by the States . . . as contemplated by this chapter are appropriate ***to prevent and eliminate burdens upon such commerce***, to effectively regulate such commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 451 (emphasis added).

Section 452 of the PPIA declares "the policy of the Congress" to provide for the inspection of poultry products and to "otherwise regulate the processing and distribution of such articles as hereinafter prescribed to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded." 21 U.S.C. § 452; 9 C.F.R. § 381.1(b)(viii). A poultry product is deemed "adulterated" if, *inter alia*, "any ***valuable constituent*** has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor." 21 U.S.C. § 453(g)(8) (emphasis added); 9 C.F.R. § 381.1(b). A poultry product is "misbranded" if, *inter alia*, "if it purports to be or is represented as a food for which a definition and

standard of identity or composition has been prescribed by regulations of the Secretary [of Agriculture] under section 457 of this title unless," *inter alia*, "it conforms to such definition and standard." 21 U.S.C. § 453(h)(7)(A).

C. There is no reason to disfavor preemption in view of the plain language of the PPIA's express preemption clause.

While the preparation of many foods remains within a State's historic police powers, that is not the case with poultry products in this nation — at least not since 1957, when Congress passed the PPIA, and especially not since 1968, when Congress made the USDA's power exclusive and preemptive in the regulation of everything from the slaughter of poultry birds to the ingredients that may be included in poultry products ranging from fried chicken to foie gras, as Defendant recognizes. (AOB 7-9.) Congress's clear and manifest purpose was to displace the States' police powers with a uniform, national standard. "Congress thus subjected all domestic poultry production sold in *inter*state commerce to a single, federal program with uniform standards." *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 295-96 (5th Cir. 1994); *see also infra* section III.A.

Indeed, although some cases talk of a "presumption against

preemption," any such presumption makes little sense in the face of an ***express*** preemption clause. *Cf. Altria Grp., Inc. v. Good*, 555 U.S. 70, 98-99 (2009) (Thomas, J., dissenting) (noting that Court's "reliance on the presumption against pre-emption has waned in the express pre-emption context" and that most decisions since *Cipollone* "have refrained from invoking the presumption in the context of express pre-emption").[8] There is no reason to disfavor preemption here. While the "historic police powers of the States" are not superseded unless it is "the clear and manifest purpose of Congress," *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), there can be no question that federal law preempts state law where, as here, Congress expresses its intent to preempt through explicit statutory language that is plain on its face. This is especially true where, as here, a unanimous Supreme Court has recently held that the preemption clause in the PPIA "sweeps widely." *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012).

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[8] As other federal courts have acknowledged, the Justices of the Supreme Court are hardly in agreement on the existence of any "presumption against preemption." *See, e.g., Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1275 n.13 (11th Cir. 2015) (citing authorities and noting that the presumption is "hotly debated" in the Justices' recent opinions). Fortunately, this Court need not reach the issue in light of Congress's "clear and manifest" expression of intent in the PPIA's express preemption clause here and its comprehensive regulation of the field of poultry product ingredients.

II. The PPIA Expressly Preempts § 25982 Because California's Requirement that Poultry Products May Only Be Sold If Made from the Livers of Non-Force-Fed Ducks Is "In Addition to, or Different Than" the Ingredient Requirements for Foie Gras Products under Federal Law.

A. The federal Poultry Products Inspection Act and federal regulations preempt state regulation of the composition or ingredients of any poultry product sold in the United States.

Most relevant here, Congress has expressly placed the regulation of the ingredient requirements for all poultry products within the exclusive domain of the USDA and has explicitly prohibited the States from attempting to impose any "additional" or "different" requirements. 21 U.S.C. § 467e. Specifically, to ensure national uniformity, the PPIA was amended in 1968 by the passage of the Wholesome Poultry Products Act, Pub. L. No. 90-492, § 17, 82 Stat. 807 (1968), to include an express preemption provision:

> Marking, labeling, packaging, or ***ingredient requirements*** (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) ***in addition to, or different than***, those made under this chapter ***may not be imposed by any State*** … with respect to articles prepared at any official establishment in accordance with the requirements under this chapter ….

21 U.S.C. § 467e (emphasis added). The PPIA does not "preclude any State … from making requirement or taking other action, ***consistent with this chapter***, with respect to any other ***matters regulated***

under this chapter." *Id.* (emphasis added).

Under § 457 of the PPIA, the Secretary of Agriculture, "whenever he determines such action is necessary for the protection of the public, may prescribe … definitions and standards of identity or composition [f]or articles subject to this chapter[.]" 21 U.S.C. § 457(b)(2). Federal regulations further reflect that the Secretary of Agriculture has delegated to the Administrator of the Food Safety and Inspection Service (the "FSIS") within the USDA "the responsibility for exercising the functions of the Secretary of Agriculture under various statutes." 9 C.F.R. §§ 300.2(a), 300.4(a).

As part of its comprehensive regulation of poultry products, Congress also regulates the ***sale*** of poultry products in commerce. The PPIA provides that "[n]o person shall … sell … [or] offer for sale … any poultry products which are capable of use as human food and are adulterated or misbranded at the time of such sale … [or] offer for sale." 21 U.S.C. § 458(a)(2); *see also* 9 C.F.R. § 381.190(b)(1). Also, no poultry products may be imported into the United States "unless they are healthful, wholesome, fit for human food, not adulterated, and contain no … ***ingredient*** which renders them unhealthful, unwholesome, adulterated, or unfit for human food" — and also comply

with all other rules and regulations for poultry products produced here. 21 U.S.C. § 466(a), (d); 9 C.F.R. §§ 381.195-381.209.

In other words, federal law governs what domestic or foreign poultry products may be sold in the U.S. and mandates that they include all "valuable constituents," contain all conforming "ingredients," and meet the "definition and standard of identity or compensation" established by the USDA. The PPIA directs the Secretary of Agriculture to "promulgate such other rules and regulations as are necessary to carry out the provisions of this chapter." 21 U.S.C. § 463(b).

B. Federal law establishes the definitive standards and ingredients for foie gras products.

Beyond the explicit language of the PPIA and federal regulations, the federal agency materials that Plaintiffs submitted in support of their motion for summary judgment set forth the only requirements that the USDA — through its authority under the PPIA — imposes on the ingredients of foie gras products. These materials — which this Court has held are entitled to "controlling weight" — show not only that the USDA has no requirement that foie gras products be made from the livers of "non-force-fed" ducks or geese. *See Voss*, 44 F.3d at 747 (giving "controlling weight to USDA's Policy Memo

reflecting agency's construction of PPIA's regulatory scheme"). In fact, the USDA actually requires that foie gras products be made from livers "obtained ***exclusively*** from specially fed and fattened geese and ducks." (ER 20, 23 [emphasis added].) As explained below, by this the agency clearly understood, from the very definitions it established in consultation with the French government for foie gras products sold in the United States, that the birds would be force fed. (*Id.*)

As authorized by Congress, the USDA has established the ingredient requirements for virtually every poultry product, ranging from *arroz con pollo* to turkey chops. USDA regulations authorize the Administrator "to establish ***specifications or definitions and standards of identity or composition***, covering the ***principal constituents*** of any poultry product with respect to which a specified name of the product or other labeling terminology may be used, whenever he determines such action is necessary to prevent sale of the product under false or misleading labeling." 9 C.F.R. § 381.155(a)(1) (emphasis added). But the Administrator's power under the federal regulations goes beyond mere labeling and is intended to serve the broader interest of public protection. "Further, the Administrator is authorized to prescribe ***definitions and standards of identity or***

composition for poultry products whenever he determines such action is otherwise necessary for the protection of the public." *Id.* Pursuant to its congressional authority, the USDA has prescribed such definitions and standards of identity or composition in its Food Standards and Labeling Policy Book, which establishes standards for no less than 14 poultry products containing foie gras. (ER 19-24.)

The USDA's definitions and standards for "FOIE GRAS PRODUCTS, DUCK LIVER AND/OR GOOSE LIVER" are among the most detailed in the book. (ER 20-24.) The starting point is the federal definition and standard for foie gras: "Goose liver and duck liver foie gras (fat liver) ***are obtained exclusively from specially fed and fattened geese and ducks***." (ER 20.) The USDA's Food Standards and Labeling Policy Book refers producers to "Policy Memo 076[,] dated September 21, 1984." (ER 22.) That Policy Memo, written by the Director of the USDA's Standards and Labeling Division, addresses the following issue: "What are the standards and labeling requirements for duck liver and/or goose liver 'foie gras' products?" (ER 23.) It, too, provides that "[g]oose liver and duck liver foie gras (fat liver) ***are obtained exclusively from specially-fed and fattened geese and ducks***." (*Id.* [emphasis added])

Policy Memo 076 further explains that the standards for foie gras products have their origin in a petition from the French government and a subsequent agreement between our national governments to follow the French standards and ingredient requirements for these products:

> In 1975, representatives of the French government petitioned the USDA to adopt the French standards for foie gras products. ***An agreement was reached between our respective governments to follow these standards*** pending a rulemaking procedure. Although a rulemaking was not finalized at that time, ***over the years the French standards were followed and applied to foie gras products***.
>
> ***In June of 1980, the French government and trade associations revised their 1973 standards for foie gras products*** and requested our renewal and approval of the new regulations. Since the standards followed over the years for the imported product have become obsolete and the marketing and consumption of these products have become more popular, ***SLD has decided to follow these requirements*** with some modifications including the English translation of French terms, the requirements for product name qualifiers, and other general policy requirements. ***The adoption of these requirements will eliminate confusion and provide a descriptive classification for these products.***

(ER 24 [emphasis added].)[9]

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[9] Indeed, French law — which the USDA follows for foie gras products — specifies that foie gras *must* be the result of *gavage*, i.e., a term used in California law for the hand-feeding of birds. *See* Cal. Health & Safety Code § 122320(c) (defining "hand-feeding" of birds in pet shop to mean "the process by which a bird is manually fed by a

The USDA classifies products in which foie gras is used into the following three classifications based on the minimum content of goose or duck liver foie gras:

> (1) "Whole Goose Foie Gras" and "Whole Duck Foie Gras." "These are products in which goose liver or duck liver foie gras are the only animal tissues present."
>
> (2) "Goose Foie Gras," "Duck Foie Gras," "Block of Goose Foie Gras," "Block of Duck Foie Gras," "Parfait of Goose Foie Gras," and "Parfait of Duck Foie Gras." "These products are composed of a minimum 85 percent goose liver or duck liver foie gras, although 'parfaits' may contain mixtures of goose liver and/or duck liver foie gras."
>
> (3) "Pate of Goose Liver," "Pate of Duck Liver," "Galantine

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human through the use of … oral gavage"). The "revised" standards referenced in the USDA Policy Memo above — and adopted as the "requirements" under American law — were translated at the time to specify: "The 'foie gras' (livers) must ***exclusively come from specially crammed*** and suitably bleeded geese and ducks." [emphasis added].) (SER 35.)

In May 1983, i.e., a year before the USDA issued Policy Memo 076, the USDA wrote to the French Embassy "concerning the French regulations for the composition … of imported 'foie gras' products." (SER 37.) In that letter, the USDA indicated that it will "continue to monitor all 'foie gras' products entering this country for compliance with the French regulations" and "will also continue to deny approval for any of these products which are not in compliance with these standards." (*Id*.) The Director even referred to the these preliminary decisions by the USDA "as an agreement between our two governments." (SER 38.)

In 2006, French law codified the definition of foie gras as follows: "Foie gras is a part of the protected cultural and gastronomic heritage of France. Foie gras means the liver of a duck or of a goose specially fattened by *gavage*" — with *gavage* translated by an official translator as "force-feeding." (SER 2, 18, 21.)

> of Goose Liver," "Galantine of Duck Liver," "Puree of Goose Liver," and "Puree of Duck Liver." "These products must contain a minimum of 50 percent duck liver and/or goose liver foie gras and may also contain a wrapping or stuffing of the lean or fat of pork, veal, or poultry, pork liver, aspic jelly, extenders, and/or binders."

(ER 21, 23-24.) There is absolutely no requirement that the most valuable constituent ingredient, i.e., the goose or duck liver foie gras, be from a non-force-fed duck.

C. Section 25982 imposes a requirement on the ingredients of foie gras products sold in California, as the district court correctly concluded.

There can be no question that the PPIA expressly preempts any state law that imposes any "additional" or "different" ingredient requirement for such USDA-approved products. 21 U.S.C. § 467e. Where, as here, there is no requirement that poultry products exclude force-fed duck liver under federal law, California's requirement that poultry products be made with livers from ducks that are *not* the result of the state's idiosyncratic definition of force feeding thus imposes an "additional" and "different" ingredient requirement on the sale of Plaintiffs' poultry products and is therefore preempted by the PPIA. As a result, application of § 25982 to Plaintiffs' federally-regulated poultry products violates the Supremacy Clause.

As this Court has recognized, "The PPIA regulates the

distribution and ***sale of poultry and poultry products*** and contains an express pre-emption clause." *Voss*, 44 F.3d at 743 (emphasis added). The PPIA's preemption clause invalidates any "ingredient requirements" that are "in addition to, or different than, those made under" the PPIA if "imposed by any State … with respect to articles prepared at any official establishment in accordance with the requirements of" the PPIA. 21 U.S.C. § 467e. Here, every single one of Plaintiffs' products is prepared, as it is required to be, at an official establishment. (ER 13; SER 40, 47.)

The USDA also establishes the ingredient requirements for all foie gras products sold in the United States based on an agreement between the American and French national governments. For example, the ingredient requirements for Plaintiffs' "Whole Duck Foie Gras" require that "the only animal tissues present" be duck liver foie gras, and they define duck liver foie gras as "obtained ***exclusively from specially fed and fattened geese and ducks***." (ER 20, 23.) There is absolutely no additional requirement that the livers — which are the *most* "valuable constituent," *see* 21 U.S.C. § 453(g)(8); 9 C.F.R. § 381.1(b) — be obtained from non-force-fed ducks.

Likewise, the ingredient requirements for Plaintiffs' "Mulard

Duck Foie Gras" require that they be "composed of a minimum 85 percent goose liver or duck liver foie gras," again with duck liver foie gras defined by federal law as "obtained exclusively from specially fed and fattened geese and ducks." (ER 20, 23.) There is absolutely no requirement that the livers be those of non-force-fed ducks — or that the ducks have been fed in any particular manner or limited to any particular amount of food (just as there is no requirement that the livers be from a French duck or a brown duck or a duck that drank only bottled water during its lifetime). And Defendant herself acknowledges that "'ingredient requirements' under federal law involve the ***type*** and [not just the] amount of ingredients that may be contained in a poultry product." (AOB 22 [emphasis added].)

In an attempt to characterize § 25982 as somehow not imposing a requirement on the ingredients in Plaintiffs' USDA-approved foie gras products, Defendant claims that "[s]ection 25982, for example, does not mandate or prohibit any substance from being added to any foie gras product" and further contends that § 25982 "says nothing about the physical composition of foie gras or foie gras products, such as the proportion of liver meat a foie gras product may or must contain." (AOB 23-24.) But, unless the Court were to ignore the

reality of how § 25982 functions, of course it does. Under § 25982, would Defendant stipulate that Plaintiffs' "Whole duck foie gras torchon style" and "Mulard Duck Foie Gras" may be sold in California with more than 95% of these products' ingredients consisting of force fed duck liver? Section 25982 obviously operates in every practical sense to prohibit a USDA-approved duck liver ingredient from being included in Plaintiffs' USDA-approved foie gras products. Indeed, Defendant herself admits that, under the "plain meaning" of the term "ingredients," "the PPIA describes 'ingredients' as things that can be 'contained in' a product." (AOB 13.)

It is therefore wrong to contend, as Defendants and her proposed amici do, that § 25982 somehow does not impose a requirement on the ingredients of the USDA-approved poultry products sold by Plaintiffs. Section 25982 provides that "[a] product may not be sold in California if it is the result of force feeding bird for the purpose of enlarging the bird's liver beyond normal size." There is no question that the statute's requirements are targeted at poultry products. Indeed, while there are countless species of birds, the statutory definition in § 25980(a) "[a] bird includes, but is not limited to, a duck or goose." Cal. Health & Safety Code § 25980(a). Under the PPIA, ducks and

geese are quintessential poultry animals. 21 U.S.C. § 453 (defining "poultry" as "any domesticated bird, whether live ***or dead***" [emphasis added]).

Moreover, there is no question that the requirements of § 25982 are targeted at the poultry *livers* that are included in poultry products. Defendant admits that, as this Court has construed the statute, the "[t]he prohibition applies ***only*** to products made from a force-fed bird ***liver***; it does not extend to non-liver products made from a force-fed bird, such as duck breasts or down jackets." (AOB 5 [emphasis added].) In the case of foie gras products, the specially fattened liver from a duck or goose is not just an ingredient but the ***principal*** ingredient in such poultry products.

In its instructive opinion in *National Broiler Council v. Voss*, 44 F.3d 740 (9th Cir. 1994), this Court affirmed summary judgment in favor of an industry association that similarly challenged a California statute as preempted by the PPIA. Section 26661(a)(2) of the California Food and Agricultural Code prohibited a poultry product from being sold as "fresh" if its internal temperature had ever been 26 degrees or below or if it had ever been stored for 24 hours or more at an average temperature of 26 degrees or below. *Id.* at 743 & n.1. The

industry association noted that the PPIA had no such requirement and argued that the PPIA's preemption clause as to "marking, labeling, packaging, or ingredient requirements" preempted § 26661. *Id.* This Court agreed. *Id.*

The state defendant first tried to argue that, because § 26661 was not phrased as a "requirement" but, instead, as a "prohibition," it was not a "labeling requirement" subject to preemption under the PPIA. *Id.* In our case, Defendant suggests the same of § 25982, in arguing that it is not phrased as a "requirement" that the ingredients in poultry products sold in California come from non-force-fed ducks but, rather, as a "prohibition" on the sale of poultry products that are the result of force feeding. But *Voss* soundly rejected this argument, explaining that "the term 'requirements' ordinarily includes prohibitory obligations" and that "there is no practical difference between a command that requires that the opposite of an action be taken … as opposed to one that prohibits the very action." *Id.* Indeed, analyzing the PPIA, this Court: (1) affirmed that "Congress did not intend a distinction between 'requirements' and 'prohibitions,'" (2) emphasized that "the term 'requirements' in the PPIA pre-emption clause unambiguously includes prohibitory enactments," and

(3) concluded that the prohibition in the California statute "impose[d] a 'labeling requirement' within the meaning of § 467e" of the PPIA. *Id.* at 743-45.

This Court in *Voss* thus had no trouble recognizing that California's prohibition on the use of the word "fresh" for poultry products was preempted as "in addition to" the requirements under the PPIA, since the plaintiffs had fully complied with federal law. *Id.* at 746. Similarly, Hudson Valley and the Canadian Farmers produce foie gras products made from the livers of specially fed and fattened ducks in full compliance with all federal requirements for their sale. But § 25982 nevertheless prohibits the sale of Plaintiffs' wholesome products by imposing the "additional" (and "different") requirement that they not contain any liver from a force-fed duck. Put another way, because § 25982's requirements for the sale of poultry products containing duck liver foie gras are not identical to the USDA's, they are preempted. Indeed, as this Court affirmed in *Voss*, the terms "'[n]ot identical' and 'in addition to, or different than' are not distinguishable under any fair construction of the phrases." *Id.* at 745.

Here, Plaintiffs' foie gras products are inspected and certified as wholesome by the USDA and, because they conform to all federal

standards, may be sold without restriction pursuant to § 458(a)(2) of the PPIA. *See also* 9 C.F.R. § 381.190(b)(1). But § 25982 imposes an additional and different ingredient requirement on any poultry product made from a duck or goose, namely, that it be made from the liver of a non-force-fed duck or goose. This requirement is plainly "in addition to," and very "different than" those made by the USDA pursuant to the PPIA. One need only imagine a USDA inspector and a local cop observing the attempted sale of one of Plaintiffs' foie gras products in California. Even though the product is fully approved for sale under federal law, § 25982 would require the California cop to cite the seller based solely on the presence of a liver ingredient from a force-fed duck.

Section 25982 imposes a requirement on the ingredients of poultry products sold in California — a requirement which is nowhere to be found in federal law. As the district court rightly concluded, Plaintiffs' USDA-approved poultry 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." (ER 14 [footnote omitted].)

Section 25982 is thus expressly preempted by § 467e of the PPIA.

D. Courts have recognized even the most well-intentioned state laws to be preempted under the PPIA's express preemption clause.

Countless cases recognize the PPIA's preemptive effect on even the most well-intentioned state laws. When Michigan tried to impose what it believed to be a "higher" standard on the sale of sausage in that State, the Sixth Circuit in *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), recognized the law as preempted under language identical to that in the PPIA. Indeed, in addressing the scope of the same preemption clause just three years ago, the Supreme Court even rejected the notion that "states are free to decide which animals may be turned into meat," *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 973 (2012) ("We think not."), and instead declared a California statute banning both the allegedly "inhumane" slaughter of non-ambulatory pigs and sale of the resulting meat to be soundly preempted by USDA regulations.

States have rarely ventured to do what California has done in the form of § 25982 here. But at least one case is on all fours with ours. In *Armour & Co.*, 468 F.2d at 79, a Michigan statute governed the "sale of meat that 'has been subjected to a ***process*** whereby it has

been reduced to minute meat particles,'" i.e., to create sausage. (*Id.* at 79 [emphasis added].) The plaintiff sausage manufacturers challenged the Michigan law as preempted by the Federal Meat Inspection Act (the "FMIA") and sought to enjoin its enforcement as to "'sausage manufactured or processed by plaintiffs which has passed federal inspection.'" *Id.* at 77. (The express preemption provision in the FMIA is identical to that in the PPIA and provides that "ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State." 21 U.S.C. § 678.)[10]

The plaintiffs argued that the Michigan law was invalid because "'the federal act entirely preempts the field of meat labeling and ingredient requirements.'" *Armour & Co.*, 468 F.2d at 78. As with Plaintiffs' USDA-approved duck products here, all of the meat manufacturers' "sausage products shipped into Michigan are subject to federal inspection." *Id.* at 79. The court cited the nearly identical provisions in the FMIA as those quoted from the PPIA above.

The court observed that one purpose of the statutory language was to "empower the Secretary to adopt definitions and standards of

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[10] "The legislative history of the two Acts and subsequent amendments indicate a congressional intent to construe the PPIA and the FMIA consistently." *Kenney v. Glickman*, 96 F.3d 1118, 1124 (8th Cir. 1996)

identify or composition so that the 'integrity' of meat food products could be 'effectively maintained'" and that "[w]ithout such standards it would be impossible to carry out the express congressional policy." *Id.* at 81. As the court noted, the federal statute delegated to the USDA the authority to prescribe the "ingredients" in meat products — just as the PPIA does for poultry products — and "[p]rescribing the 'ingredients' is essential to determine the 'identity' of the finished product and to protect the consumer from 'economic adulteration.'" *Id.* The court concluded "that the phrase 'definitions and standards of identity or composition' is the functional equivalent of the term 'ingredient requirements'" found in the preemption provision. *Id.* (quoting 21 U.S.C. § 678).

Michigan claimed to impose a "higher" standard on the sale of sausage in that State. *Id.* at 83. For example, it only allowed sausage to be made from certain parts of cattle, swine, or sheep, whereas federal regulations allowed goat meat as an ingredient. *Id.* at 85-86. The Michigan law required a certain protein content, whereas there was no federal regulation governing protein content. *Id.* at 87. And the Michigan statute banned the use of such parts as the animal's heart, ***liver*** cracklings, lungs, eyes, lips, ears, or snout in order for the

sausage to be saleable in that State, whereas federal regulations permitted all of these ingredients. *Id.* at 86. Yet the Court of Appeals recognized that, even if Michigan's law would have resulted in arguably *more wholesome* sausage, it was still preempted. *Id.* at 83. "The Federal Act itself manifests a congressional intent to prescribe ***uniform standards of identity and composition***," and non-conformity with the federal requirements would result in the product being "misbranded." *Id.* (emphasis added). "[T]he congressional purpose to standardize identity and composition of meat food products would be defeated if states were free to require ingredients, however wholesome, which are not within the Secretary's standards." *Id.*

Accordingly, the Sixth Circuit had no trouble resolving the "ultimate issue" of whether the ingredient provisions of the Michigan statute were "in addition to, or different than" the USDA regulations, such that Michigan's law would be unenforceable against the plaintiffs' products prepared for shipment in commerce and consequent sale in Michigan. *Id.* The Supreme Court had said in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of

persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." The Court of Appeals in *Armour & Co.* could not have been more emphatic about the preemptive effect of the very language in the FMIA that is found verbatim in the PPIA:

> Thus, by prohibiting a state's imposition of … ["]ingredient requirements" which are "in addition to, or different than [those made by the Secretary]," Congress has "unmistakably … ordained" that ***the Federal Act fixes the sole standards***.
>
> ["I]ngredient requirements" prescribed by the Secretary ***completely preempt this field*** of commerce. [¶] [A] state would not be permitted to prevent the distribution in commerce of any article that "conforms" to the "definition and standard of identity or composition." Thus, ***Congress is ordaining uniform national ingredient requirements*** prescribed by the Secretary.

Armour & Co., 468 F.2d at 84 (emphasis added).

Other courts have regularly recognized the preemptive effect of the PPIA, even where the state's concern may differ from that of Congress and the USDA. *See Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047, 1052-54 (E.D. Cal. 2013) (granting summary judgment and permanent injunction to plaintiff on preemption claim against application of non-conflicting California statute banning sale of poultry products with nonfunctional slack fill, i.e., empty space in package filled to less than capacity — even though federal law said

nothing about slack fill — because "FMIA and PPIA comprehensively regulate meat and poultry products" packaging and, as the Supreme Court explained, preemption clause "sweeps widely");[11] *see also Northwestern Selecta, Inc. v. Munoz*, 106 F. Supp. 2d 223, 230-31 (D.P.R. 2000) (recognizing that, because no federal regulation under the PPIA required inspection date of bird used in poultry product to appear on certificate, Puerto Rico's requirement of document accrediting such date imposed marking requirement "in addition to those mandated by federal law" and was "preempted by section 467e of the PPIA").

These PPIA preemption cases are legion. *See, e.g., Kuenzig v. Hormel Foods Corp.*, 505 Fed. Appx. 937, 938 (11th Cir. 2013) (per curiam) (affirming preemption of state law claims under PPIA because poultry producers complied with federal requirements regarding fat percentages); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *5 (N.D. Cal. July 25, 2013) (holding that PPIA preempted claims under California consumer protection statutes that chicken soup containing genetically modified corn was not "100% Natural"); *Meaunrit v. The Pinnacle Food Grps., LLC*, No. C 09-04555

[11] The district court's judgment in *Del Real* is presently on appeal as Case No. 13-16893.

CW, 2010 WL 1838715, at *6-*7 (N.D. Cal. May 5, 2010) (explaining that PPIA preempted state law claims that USDA-approved labels on frozen pot pies were required to instruct consumers to heat to 170° to avoid bacterial contamination); *Kraft Foods N. Am., Inc. v. Rockland Cty. Dep't of Weights & Measures*, No. 01 Civ. 6980(WHP), 2003 WL 554796, at *6 (S.D.N.Y. Feb. 26, 2003) (interpreting PPIA to preempt enforcement of state laws as to package weight where New York inspectors used less tolerant method "'different from' that required under federal law"); *see also Am. Meat Inst. v. Leeman*, 180 Cal.App.4th 728, 735 (2009) (affirming grant of summary judgment to plaintiff meat associations in preemption challenge to application of Proposition 65 to sale of USDA-approved meat products).

E. Section 25982 operates for all practical purposes as a requirement on the ingredients in federally-approved poultry products.

Contrary to Defendant's creative characterization of it, section 25982 operates for all practical purposes to impose a requirement on the ingredients in Plaintiffs' USDA-approved foie gras products. Defendant and the proposed animal rights amici attempt to create a false distinction between an "ingredient" requirement and a "process" requirement. (AOB 32 ["ingredients as understood in the PPIA are

not the same as animal-feeding practices"].) But the Court should reject this semantic sleight-of-hand. In the first place, Defendant herself acknowledges that the type of liver ingredient Plaintiffs use in their foie gras products is ineluctably the result of the particular process that § 25982 proscribes. (AOB 6 [noting that the "method of feeding results in the bird's liver swelling to about ten times its normal size"].)

Moreover, Plaintiffs do not dispute that an "ingredient" means a constituent that is physically present in a final product. (AOB 3, 18.) But this definition only emphasizes how § 25982 functions as a requirement on the ingredients in poultry products sold in California. Defendant tries to argue that "it is the treatment of live animals with which section 25982 is concerned." (AOB 31.) But what constitutes an actual violation of § 25982 is the sale of a foie gras product — with the liver of a dead, force-fed duck in it — *in California*.

No California sheriff is policing the farms in New York State and in Quebec, where the farmer Plaintiffs raise and feed their ducks. Nor does California have any police power to regulate the treatment of livestock in another state or country. The statute providing for the enforcement of § 25982 only allows a California peace officer to issue a

citation when a product is sold in California with force-fed duck liver "present in" the product at the time of sale. In Defendant's own words, this is precisely a requirement as to the "physical components" that can be "contained" or "present in" a poultry product. (*See* AOB 18 ["Again, only physical components can be "present in" food and be listed as a component of a poultry product."].)

In addition, Defendant cannot avoid how § 25982 functions in practice by claiming that the statute defines the prohibited ingredient only by the process of which it is a "result." That § 25982 operates as an ingredient requirement based on the "process" that was used to produce the ingredient does not make it any less an ingredient requirement. Otherwise, a state could always circumvent federal preemption simply by defining its requirements as to the ingredients in a product by how they are produced. If federal law provided that ice was a required ingredient in a particular product, then, using Defendant's logic, California could make a mockery of preemption by simply phrasing its ban on any product that "is the result of process of reducing water to less than 32° Fahrenheit."[12]

[12] To take yet another example, under the interpretation urged by Defendant and her proposed amici, a ban on poultry products made from the livers of Canadian ducks could be characterized as a

Defendant further argues that § 25982 is not preempted as an ingredient requirement under the PPIA because "[n]othing in the federal statute addresses how birds are raised or fed while they are alive." (AOB 3.) But this is a non-sequitur. As Defendant had insisted in defending against Plaintiffs' dormant Commerce Clause claim at the preliminary injunction stage, it is not the force-feeding of ducks in New York that § 25982 makes unlawful, but, rather, the ***presence*** of any liver from force-fed ducks as an ingredient in foie gras products at the time of sale in California. In contrast, as the district court correctly observed, California already has a statute aimed at the "process" of force feeding: § 2598***1***, which provides that "[a] person may not force feed a bird for the purpose of enlarging the bird's liver beyond normal size."[13] All that Defendant has been enjoined from doing is what Congress intended in the PPIA to prevent California from doing, namely, imposing any additional or different requirements

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"geographic" requirement. That the requirement for the ingredient may be defined by reference to its geographic origin (or any other criterion) does nothing to change the fact that such a ban imposes a requirement on the ingredients of a poultry product in contravention of the PPIA.

[13] California certainly remains free to enforce that provision, since Plaintiffs — who do not force feed any ducks in California — have not challenged the state's authority to regulate the feeding of ducks within its borders.

on the ingredients that go into USDA-approved poultry products.[14]

There is no question here that if California had said, "A product may not be sold in California if it contains any ingredient that is the result of force feeding a duck . . .," then no one could reasonably argue that it imposes an ingredient requirement on the sale of a poultry product. Instead, the only reason Defendant and her proposed amici are able to engage in the exercise in semantics that forms the basis for this appeal is that § 25982 was drafted without the word "ingredient." But the statute need not be so blatant to fall within the preemptive scope of the PPIA here — which the Supreme Court has said "sweeps widely." *Nat'l Meat Ass'n*, 132 S. Ct. at 970. Using the high court's "functional approach" to statutory interpretation in the preemption context, the actual effect of section 25982 is to render a USDA-approved poultry product unlawful for sale in California whenever it contains any liver from a force-fed duck.

As the Supreme Court has recently reiterated, "Pre-emption is

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[14] A state such as California certainly remains free under the PPIA to encourage the sale of poultry products that comply with federal ingredient requirements and that also happen to have come from animals that enjoyed special treatment during their lives. But, given the clear preemptive effect of § 467e, a state cannot impose a requirement that has the practical effect of banning the sale of a wholesome, USDA-approved poultry product that includes an ingredient the state may wish had come from a different animal.

not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1398 (2013). Here, the only difference between a more explicit ingredient requirement and the one in § 25982 is that California has described the requirement for the ingredient in a poultry product by virtue of the process by which the ingredient is made. It is no different than a ban on any poultry product that is not "the result of," say, organic farming or fair trade.

A simple example illustrates the point: If chicken is an ingredient in grandma's recipe for chicken soup, then a requirement that no chicken product may be sold in California if it is the result of caging a bird is the same thing as requiring that the principal ingredient in grandma's soup be "cage-free" chicken. (In fact, the same USDA Food Standards and Labeling Policy Book that sets the standards for various foie gras products requires that "Poultry Soup" must contain "[a]t least 2 percent poultry meat" — but imposes no requirement that the poultry meat be "cage-free." (*See* AOB 26 n.3, 27; www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf.)

Likewise here, a requirement that none of Plaintiff's USDA-approved foie gras products may be sold if it is the result of force feeding a duck is the same as requiring that the principal ingredient in them be "non-force-fed" duck liver (to the extent it could even be produced). But the PPIA includes no such requirement — and expressly preempts state legislation that purports to impose any such additional or different requirements on the type of livers that may be used as ingredients in USDA-approved foie gras products.

F. Contrary to Defendant's argument, the Supreme Court's recent preemption decision in *National Meat* is instructive here.

National Meat concerned a perhaps well-intentioned but constitutionally misguided California law that, like here, sought to regulate the sale of a USDA-approved meat or poultry product based on the way the animal was treated prior to slaughter. It involved the same preemption clause that the Supreme Court said "sweeps widely." *Nat'l Meat Ass'n*, 132 S. Ct. 970. And it involved the same Defendant (and even three of Defendant's proposed amici as parties) in a case that Defendant lost 9-0 by making the same argument she asserts here. Contrary to Defendant's suggestion that *National Meat* "has little application to this case" (AB 14), it is instructive.

Defendant spends an entire point in her opening brief arguing that the district court "misinterpreted and misapplied" *National Meat*. But the district court's order reflects that it carefully weighed the considerations at work in that case. (ER 15-18.) This Court should draw from the Supreme Court's most analogous case the same salutary principles that guided the district court's sound decision here.

Defendant claims that all § 25982 does is prevent the sale of a foie gras product that comes from a particular type of duck — a force-fed duck — while allowing the sale of such a product if it is made from a duck that has not been force fed. But that is hardly different than what Defendant and her proposed amici argued unsuccessfully in *National Meat* in attempting to defend a California ban on the sale of USDA-approved pork products made from pigs that could not walk at the time of slaughter. Even assuming that it were possible to produce foie gras from non-force-fed birds, the Supreme Court has held that, given the PPIA's express preemptive effect, California is not free to decide which ducks get turned into meat. *Id*. at 973 ("According to the Court of Appeals, 'states are free to decide which animals may be turned into meat.' … We think not.").

Defendant misses the point of *National Meat*. It is true that the

case addressed a ban on sale as it affects the operations of a slaughterhouse, which operations fall with the scope of the FMIA's parallel express preemption clause. But the Supreme Court's logic — and its recognition of how the sales ban in that case functioned as a practical matter — applies with equal force to the express preemption clause covering poultry product "ingredients" here. Justice Kagan explained that, in practical terms, California's ban on the sale of meat from non-ambulatory pigs functioned "as a command to slaughterhouses to structure their operations" in a way that California insisted but that federal law did not require. *Id.* at 973. "And indeed, if the sales ban were to avoid the FMIA's preemption clause, 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." *Id.* at 973.

In the same way, California's ban on the sale of poultry products from force-fed ducks functions as a command to producers of foie gras products at official establishments (where all of Plaintiffs' foie gras products are prepared) to remove or substitute the principal ingredients in their products as a condition to their sale in California. And, in the same way, California cannot avoid PPIA preemption "just

by framing [§ 25982] as a ban on the sale of [poultry] produced in whatever way the State disapproved." As Defendant acknowledges about the identical preemption clause from the FMIA in *National Meat*, "it was precisely the regulation of [poultry product ingredients] that the [PPIA] reserved to federal law." (AOB 30.)[15]

Indeed, since deciding *National Meat*, the Supreme Court has emphasized that it meant what it said about looking to how a state law operates in the real world and disregarding the kind of word-play that Defendant and her proposed amici have urged here. "Pre-emption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos*, 133 S. Ct. at 1398.

Citing to its decision in *National Meat*, the Supreme Court in *Wos* explained again why California's attempt to defend a ban on the sale of USDA-approved meat products must be rejected: "California sought to defend the law on the ground that it did not regulate the activities of slaughterhouses but instead restricted what type of meat

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[15] The identical preemption language in the FMIA is at 21 U.S.C. § 678 ("[i]ngredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State").

could be sold in the marketplace after the animals had been butchered." *Id.* As the Court reiterated, "In a pre-emption case, . . . a proper analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it." *Id.*

If the PPIA were read, as Defendant urges, to allow California to ban the sale of any poultry product that it is "the result of" what some in the Legislature may believe to be "cruelty" to an animal, then California could just as readily ban ***all*** poultry ingredients by imposing a requirement that a poultry product may not be sold if it is the result of any bird that was fed or fattened for the purpose of being turned into food, thereby effectively banning all poultry products. While this might enable Defendant's proposed amici to implement their vegan agenda by force of law, such an interpretation as they ask this Court to adopt would do what the Supreme Court said it may not: make a mockery of the PPIA.

III. Section 25982 is Also Impliedly Preempted by the PPIA Because Federal Regulation Pervasively Occupies the Field of Poultry Product Ingredients and Because § 25982 Stands as an Obstacle to Ensuring the Uniform Availability of Poultry Products in the Nation's Food Supply.

It should be manifest from the foregoing that § 25982 is expressly preempted by the PPIA as applied to Plaintiffs' USDA-

approved poultry products. In addition, § 25982 is also impliedly preempted under the doctrines of field preemption and conflict preemption. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Field preemption occurs "where the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Conflict preemption occurs "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). There is ample evidence of both forms of implied preemption to support the judgment in favor of Plaintiffs here.

A. Section 25982 is preempted under the doctrine of field preemption.

Indeed, as to the pervasiveness of the PPIA and its regulatory framework in the field of poultry product standards and ingredients, the Sixth Circuit has long recognized that, "by prohibiting a state's imposition of … [']ingredient requirements' which are 'in addition to, or different than [those made by the Secretary],' Congress has 'unmistakably … ordained' that the Federal Act fixes the ***sole***

standards." *Armour & Co.,* 468 F.2d at 84 (emphasis added). As that Court of Appeals summed it up: "['I]ngredient requirements' prescribed by the Secretary ***completely preempt this field*** of commerce." *Id*. (emphasis added). More recently in this circuit, the district court in *Del Real* duly observed that the "FMIA and PPIA comprehensively regulate meat and poultry products." *Del Real*, 966 F. Supp. 2d at 1052 (emphasis added).

Defendant therefore argues against a strawman when she asserts as a major point in her brief: "The PPIA Does Not Preempt the Field of Animal Care and Feeding." (AOB 32.) No one is so much as suggesting that. It is true that the PPIA does not directly legislate how farmers must feed the animals that they raise for slaughter. But the PPIA unmistakably expresses its intent to occupy the field as to the sale of all edible products that result from raising poultry birds for food, specifically including the "***ingredients***" for all such poultry products.

In *Campbell v. Hussey*, 368 U.S. 297, 298 (1961), the Supreme Court considered a Georgia law that required "type 14 flue-cured leaf tobacco" for sale to be marked with a "white sheet ticket." Like the PPIA here, the federal Tobacco Inspection Act — which had as its

purpose the elimination of the "burden upon commerce" that a lack of uniform standards would create — established "standards" for tobacco, and the Secretary of Agriculture had prescribed such standards. *Id*. at 299. The federal standards required that type 14 flue-cured tobacco be identified with a *blue* tag, and the question for the high court was not one of conflict preemption but "whether the federal scheme of regulation has left room for Georgia" to so legislate. *Id*. at 299-300.

> We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption. Under the federal law there can be but one 'official' standard — one that is 'uniform' and that eliminates all confusion by classifying tobacco not by geographical origin but by its characteristics. In other words, our view is that Congress, in legislating concerning the types of tobacco sold at auction, preempted the field and left no room for any supplementary state regulation concerning those same types.

Id. at 300-01 (footnote omitted). As the Supreme Court concluded: "We have then a case where the federal law excludes local regulation, *even though the latter does no more than supplement the former*. Under the definition of types or grades of tobacco and the labeling which the Federal Government has adopted, complementary state regulation is as fatal as state regulations which conflict with the federal scheme." *Id*. at 302 (emphasis added).

The same is true in light of the USDA's ingredient standards for products containing foie gras here. As the Fifth Circuit has observed

in reviewing the history of the PPIA, "Congress thus subjected all domestic poultry production sold in *inter*state commerce to a single, federal program ***with uniform standards***." *Miss. Poultry Ass'n,* 31 F.3d at 295-96 (second emphasis added) ("The PPIA created one uniform regulatory scheme for the national market[.]").

Indeed, "the PPIA maintain[s] uniformity regarding the *inter*state sale of domestic poultry products. Such sales still could occur only if the poultry had been inspected under THE federal program — not under some state program, whether identical or equivalent — and then only according to THE uniform federal standards." *Id*. at 296 (capitals in original). If any State could enact its own requirements as to the sale of a USDA-approved poultry product based on the process for producing its principal ingredient, the resulting patchwork would destroy the very national uniformity that the PPIA seeks to achieve.

B. Section 25982 is preempted under the doctrine of obstacle preemption.

Section 25982's attempt to ban the sale of USDA-approved poultry products in California also stands as an obstacle to Congress's objectives in the PPIA of ensuring that all poultry products remain "an important source of the Nation's total supply of food" and legislating

"to prevent and eliminate burdens upon such commerce." 21 U.S.C. § 451. Last year, in *Zogenix, Inc. v. Patrick*, Civil Action No. 14-11689-RWZ, 2014 WL 1454696, at *1 (D. Mass. Apr. 15, 2014), a federal court enjoined Massachusetts's ban on the sale of an Food and Drug Administration ("FDA")-approved analgesic called Zohydro ER. The court recognized such a ban as preempted by federal law because it stood in the way of Congress's charge to the FDA to "protect the public health" by making sure that "drugs are safe and effective." *Id.* at *1 (quoting 21 U.S.C. § 393(b)(2)(B)).

Not unlike Plaintiffs' foie gras products are approved as "wholesome and unadulterated" by the USDA to "protect the health and welfare of consumers" here, Zohydro ER had been approved by the FDA. *Id.* But Massachusetts was concerned that the drug was not "abuse-resistant" because it could be crushed and inhaled or injected, which would make the full dose of its active ingredient available immediately and could lead to addiction or overdose fatalities. *Id.* Massachusetts was experiencing a recent spike in opioid-related deaths, and its governor had even declared a public health emergency. *Id.*

Zogenix asserted that the Massachusetts law was preempted because it conflicted with the federal Food, Drug, and Cosmetic Act (the "FDCA"). *Id.* at *1-*2. Although the FDCA nowhere required that States permit federally-approved products to be sold, the district court found that the FDA had approved the drug for sale to the public as one of a range of safe and effective prescription drugs and that, "[i]f the Commonwealth were able to countermand the FDA's determinations and substitute its own requirements, it would undermine the FDA's ability to make drugs available to promote and protect the public health." *Id.* at *2.

The same is true here. The USDA has approved Plaintiffs' foie gras products for sale to the public among the range of wholesome and unadulterated poultry products that Congress has made a part of national commerce through the PPIA. If California were able to countermand the USDA's determinations and substitute its own requirements, it would undermine the USDA's ability to make these poultry products available as "an important source of the Nation's total supply of food" and to "to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 451. As the district

court concluded in *Zogenix*, and as this Court should conclude here, such a state law "stands in the way of 'the accomplishment and execution of' an important federal objective." *Zogenix*, 2014 WL 1454696, at #2 (citing *Hines*, 312 U.S. at 67).[16]

Indeed, were the law otherwise, any State could undermine the very objectives of the PPIA by removing vast quantities of food from the food supply. For example, if § 25982 were not recognized to be preempted, then neither would a state law prohibiting the sale of all USDA-approved poultry products from a turkey that is the result of artificial insemination (as virtually all are) or from a chicken that is the result of confinement in a cage (as few are). To allow such state laws to escape preemption would completely undermine the express language and overriding objective of the PPIA. While California may be free to force its own producers out of business based on the way they raise their animals, it may not impose additional or different requirements on the ingredients in poultry products approved by the USDA as in accordance with federal standards.

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[16] Whether a law like § 25982 is preempted should not depend on anyone's view of the necessity or luxury of the subject product. Foie gras may not provide the same kind of pain relief as Zohydro ER, but that drug was certainly not the only one available to consumers. The ruling in this case should be no different whether the product be Zohydro ER or foie gras, or whether it be Viagra or chicken soup.

CONCLUSION

Federal preemption of state law under the Supremacy Clause "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). "Pre-emption fundamentally is a question of congressional intent …, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citation omitted). Here, there is no question that Congress intended to prohibit any additional or different State requirement as to the uniform ingredients for poultry products — whether country fried chicken or pâté de foie gras. The PPIA thus expressly and impliedly preempts § 25982.

The judgment should be affirmed.

Dated: November 2, 2015 s/ Michael Tenenbaum

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ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC; HVFG LLC; AND HOT'S RESTAURANT GROUP, INC.

STATEMENT OF RELATED CASE
(Ninth Circuit Rule 28-2.6)

No other cases in this Court are deemed related. (Plaintiffs note that *Ass'n des Éleveurs de Canards et d'Oie du Québec v. Harris*, No. 12-56822, resolved Plaintiffs' preliminary injunction appeal, but that case is no longer "pending in this Court" for purposes of Ninth Circuit Rule 28-2.6.)

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