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UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

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.

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

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’ stomachs 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”)<sup>1</sup> 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

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

1 ban on products containing a constituent that was produced in a particular manner is an  
2 “ingredient requirement” under the PPIA.

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

## 7 **II. FACTS AND PROCEDURAL HISTORY**

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

13 California Health and Safety Code § 25982 was enacted as part of a statutory scheme  
14 aimed at the practice of force feeding birds. Section 25981, which is not at issue in this case,  
15 prohibits force feeding a bird for the purpose of enlarging its liver. Cal. Health & Safety Code §  
16 25981. Section 25982 reinforces this ban by prohibiting the sale in California of products that  
17 are “the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal  
18 size.”<sup>2</sup> Cal. Health & Safety Code § 25982. Section 25980(b) defines “force feeding” as “a  
19 process that causes the bird to consume more food than a typical bird of the same species would  
20 consume voluntarily.” Cal. Health & Safety Code § 25980. It states that “[f]orce feeding  
21 methods include, but are not limited to, delivering feed through a tube or other device inserted  
22 into the bird's esophagus.” (*Id.*)

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

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27  
28 <sup>2</sup> 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.

1 selling foie gras products from outside California to California consumers. (SAC ¶ 89.)

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

8 On appeal, the Ninth Circuit affirmed this Court’s determination that Harris is not  
9 entitled to Eleventh Amendment immunity. *Association des Éleveurs de Canards et D’Oies du*  
10 *Québec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013). The Ninth Circuit stated in dicta that  
11 instead of asserting Eleventh Amendment immunity, “a state official who contends that he or she  
12 will not enforce the law may challenge plaintiff’s Article III standing based on an ‘unripe  
13 controversy’”—an argument not then before that Court. *Id.* at 944. The Ninth Circuit also held  
14 that § 25982’s scope was limited to liver products produced as a result of force feeding a bird for  
15 the purpose of enlarging its liver. *Id.* at 945–46. Finally, the Ninth Circuit affirmed this Court’s  
16 holding that Plaintiffs failed to show a likelihood of success on the merits of their due process  
17 and commerce clause claims. *Id.* at 946–53.

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

### 25 **III. DISCUSSION**

#### 26 **A. JUSTICIABILITY**

27 \_\_\_\_\_  
28 <sup>3</sup> 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.)

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

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

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the  
7 Court's subject matter jurisdiction to hear the claims alleged. Fed. R. Civ. P. 12(b)(1). A Rule  
8 12(b)(1) motion may be asserted either as a facial challenge to the complaint or a factual  
9 challenge. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial  
10 challenge, the moving party asserts that the allegations contained in the complaint are  
11 insufficient on their face to invoke federal jurisdiction. *Id.*; *Warren v. Fox Family Worldwide,*  
12 *Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). When reviewing a facial challenge, the court is  
13 limited to the allegations in the complaint, the documents attached thereto, and judicially  
14 noticeable facts. *Gould Electronics, Inc. v. United States*, 220 F.3d 169, 176 (3rd Cir. 2000).  
15 The court must accept the factual allegations as true and construe them in the light most  
16 favorable to the plaintiff. *Id.*

17 Regardless of the type of motion asserted under Rule 12(b)(1), the plaintiff always bears  
18 the burden of showing that federal jurisdiction is proper. *See Kokkonen v. Guardian Life Ins.*  
19 *Co. of America*, 511 U.S. 375, 376-78 (1994); *Valdez v. United States*, 837 F. Supp. 1065, 1067  
20 (E.D. Cal. 1993), *aff'd* 56 F.3d 1177 (9th Cir. 1995). "In effect, the court presumes *lack* of  
21 jurisdiction until plaintiff proves otherwise." Schwarzer, Tashima & Wagstaffe, California  
22 Practice Guide: Federal Civil Procedure Before Trial § 9:77.10 (Rutter Group 2011) (citing,  
23 *inter alia*, *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989))  
24 (emphasis in original). "The proponents of subject-matter jurisdiction bear the burden of  
25 establishing its existence by a preponderance of the evidence." *Remington Lodging &*  
26 *Hospitality, LLC v. Ahearn*, 749 F. Supp. 2d 951, 955-956 (D. Alaska 2010) (citing *United States*

27  
28 <sup>4</sup> 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.

1 *ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999)).

2 **2. Legal Standard Under Article III**

3 **a. Standing**

4 “[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the  
5 threshold requirement imposed by Article III of the Constitution by alleging an actual case or  
6 controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). In order to have standing  
7 to seek injunctive relief, the plaintiff must show “the reality of the threat of repeated injury,” *id.*  
8 at 107 n.8, and a “real or immediate threat . . . that he will again be wronged,” *id.* at 111. The  
9 plaintiff cannot rely on mere “conjecture” or “speculation” regarding a threat of injury. *Id.* at  
10 108.

11 To establish Article III standing:

12 First, the plaintiff must have suffered an injury in fact, the violation of a  
13 protected interest that is (a) concrete and particularized, and (b) actual or  
14 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.

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

17 **b. Ripeness**

18 The standing inquiry also overlaps with the constitutional and prudential doctrine of  
19 ripeness. “[I]njunctive and declaratory judgment remedies are discretionary, and courts  
20 traditionally have been reluctant to apply them . . . [except] in the context of a controversy ‘ripe’  
21 for judicial resolution.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). “A claim is  
22 not ripe for adjudication if it rests upon contingent future events that may not occur as  
23 anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998)  
24 (internal quotations omitted). In particular, the doctrine “requires us to evaluate both the fitness  
25 of the issues for judicial decision and the hardship to the parties of withholding court  
26 consideration.” *Abbott Laboratories*, 387 U.S. at 149.

27 **3. Legal Standard Under the Declaratory Judgment Act**

28 The Declaratory Judgment Act provides that a federal court may issue a declaratory

1 judgment in “a case of actual controversy . . . whether or not further relief is sought.” 28 U.S.C.  
2 § 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). “[T]he phrase ‘case  
3 of actual controversy’ in the Act refers to the type of ‘Cases’ and ‘controversies’ that are  
4 justiciable under Article III.” *MedImmune*, 549 U.S. at 126 (quoting *Aetna Life Ins. Co. v.*  
5 *Haworth*, 300 U.S. 227, 240) (1937)). The test is “whether the facts alleged, under all the  
6 circumstances, show that there is a substantial controversy, between parties having adverse legal  
7 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”  
8 *Id.* at 127. An actual controversy must exist at all stages of review. *Preiser v. Newkirk*, 422 U.S.  
9 395, 401 (1975).

#### 10 4. Application

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

16 The California Constitution obligates Defendant “to see that the laws of the State are  
17 uniformly and adequately enforced.” Cal. Const. art. V, § 13. Nevertheless, Defendant’s  
18 supervisory authority over local district attorneys is somewhat limited. *See id.*; Cal. Gov. Code §  
19 12550. If the Attorney General believes that a district attorney is not adequately enforcing the  
20 law, she may step in and institute enforcement proceedings herself. Cal. Const. Art. V, § 13.  
21 She may also require district attorneys to make written reports and may take charge of an  
22 investigation or prosecution where necessary. Cal. Gov. Code § 12550. However, she does not  
23 have the ability to force a district attorney to act or to adopt a particular policy. *Goldstein v. City*  
24 *of Long Beach*, 715 F.3d 750, 756 (9th Cir. 2013) *cert. denied sub nom. Cnty. of Los Angeles,*  
25 *Cal. v. Goldstein*, 134 S. Ct. 906, 187 L. Ed. 2d 778 (2014).

26 Nevertheless, the parties do not dispute that under certain circumstances Defendant has  
27 the ability to institute enforcement proceedings under § 25982. Moreover, aside from any  
28 enforcement authority conferred by the California Constitution, Defendant is at least empowered

1 to enforce § 25982 by virtue of being a peace officer. (Dkt. 87: Order at 9.)

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

8 As this Court previously found, Plaintiffs are in the same position as the trappers who  
9 challenged California’s ban on certain animal traps and poisons in *National Audubon Society,*  
10 *Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002). In *Davis*, the Ninth Circuit reversed the district  
11 court’s holding that the trappers lacked standing because there was no “genuine threat of  
12 imminent prosecution.” *Id.* at 855. The Ninth Circuit first found that the trappers did not need to  
13 show a genuine threat of imminent prosecution because their asserted injury was financial loss  
14 caused by ceasing certain animal trapping practices to avoid violating the challenged ban. *Id.* at  
15 855–56. The Court next found that several factors indicated that this economic injury was  
16 caused by the enactment of the challenged proposition:

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

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

25 Plaintiffs assert that they have lost millions of dollars because they were forced to either  
26 cease sales of their foie gras products in California or face prosecution. As in *Davis*, “the  
27 gravamen of [Plaintiffs’] suit is economic injury rather than threatened prosecution.” *Id.* at 856.

28 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

1 producers under § 25982. Even assuming *arguendo* that these threats are not attributable to  
2 Defendant, they illustrate the causal relationship between § 25982 becoming operative and  
3 Plaintiffs’ economic injury from ceasing sales in California. Moreover, Defendant is both  
4 obligated to ensure that § 25982 is adequately enforced and authorized to enforce it herself.  
5 Defendant’s recent refusal to stipulate that she won’t enforce § 25982 reinforces the conclusion  
6 that a causal relationship exists.

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

15 Additionally, this is not a case where more facts surrounding enforcement will assist the  
16 Court. Plaintiffs “injury is established, and the legal arguments are as clear as they are likely to  
17 become.” *Davis*, 307 F.3d at 857. In relevant part, Plaintiffs assert that the PPIA preempts §  
18 25982. This is purely a question of statutory interpretation; its resolution would not vary based  
19 on the specific facts surrounding enforcement. The potential hardship to Plaintiffs also favors  
20 adjudication. They will continue to lose revenue by ceasing sales of their foie gras products in  
21 California unless and until the sales ban is declared invalid. Plaintiffs’ claim against Defendant  
22 is thus ripe. *Id.*

23 For the same reasons, Plaintiffs satisfy the Declaratory Judgment Act’s “case of actual  
24 controversy” requirement. *See Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d  
25 1016, 1042 (E.D. Cal. 2014) (finding declaratory relief appropriate where a state enforcement  
26 agency and private entities disputed whether a state law was preempted).

27 For the aforementioned reasons, the Court finds that Plaintiffs’ claims are justiciable.  
28 The Court therefore DENIES Defendant’s motion to dismiss Plaintiffs’ complaint under Rule



1 12(b)(1).<sup>5</sup>

2 **B. PREEMPTION**

3 Plaintiffs move for partial summary judgment on their claim that the PPIA preempts §  
4 25982.

5 **1. Legal Standard for a Motion for Summary Judgment**

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

11 The moving party bears the initial burden of establishing the absence of a genuine issue  
12 of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). On an issue for  
13 which the moving party does not have the burden of proof at trial, the moving party may satisfy  
14 this burden by “‘showing’—that is, pointing out to the district court—that there is an absence of  
15 evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. Once the moving  
16 party has met its initial burden, the nonmoving party must affirmatively present admissible  
17 evidence and identify specific facts sufficient to show a genuine issue for trial. *See id.* at 323-24;  
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A scintilla of evidence or evidence  
19 that is not significantly probative does not present a genuine issue of material fact. *Addisu v.*  
20 *Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

21 **2. Express Preemption**

22 Under the Supremacy Clause of the Constitution, Congress has the power to preempt  
23 state law. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) *cert. denied sub*  
24 *nom. Arizona v. Valle Del Sol, Inc.*, 134 S. Ct. 1876, 188 L. Ed. 2d 911 (2014). Preemption may  
25 be express or implied. *See id.* Express preemption “arises when the text of a federal statute  
26 explicitly manifests Congress's intent to displace state law.” *Id.* (quoting *United States v.*  
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28 <sup>5</sup> As discussed below, the Court also denies Defendant’s motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).

1 *Alabama*, 691 F.3d 1269, 1281 (11th Cir.2012)).

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

6 The PPIA expressly preempts states from imposing:

7 [m]arking, labeling, packaging, or ingredient requirements (or storage or  
8 handling requirements . . . [that] unduly interfere with the free flow of  
9 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[.]<sup>6</sup>

10 21 U.S.C. § 467e. This clause sweeps broadly. *See Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965,  
11 970 (2012) (finding that the nearly identical preemption provision set forth in the Federal Meat  
12 Inspection Act (“FMIA”) sweeps broadly). An “official establishment” is “any establishment as  
13 determined by the Secretary at which inspection of the slaughter of poultry, or the processing of  
14 poultry products, is maintained under the authority of this chapter.” 21 U.S.C. § 453(p). Thus,  
15 the PPIA preempts § 25982 if a sales ban on poultry products resulting from force feeding a bird  
16 imposes an ingredient requirement that is in addition to or different than those imposed by the  
17 PPIA.

18 Plaintiffs’ foie gras products are prepared at official establishments.<sup>7</sup> (Henley Decl. ¶¶  
19 3–4; Henley Decl., Exs. A & B; Cuchet Decl. ¶¶ 3–5; Cuchet Decl., Ex. A.) Defendant argues  
20 that § 25982 regulates a feeding process occurring before Plaintiffs’ birds enter an official  
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22 <sup>6</sup> Another portion of that clause which is not at issue in this case preempts additional or different  
23 requirements “with respect to premises, facilities and operations of any official establishment[.]”  
24 21 U.S.C. § 467e There is also a savings clause permitting states to impose recordkeeping  
25 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.*

26 <sup>7</sup> The Court rejects Defendant’s assertion that Plaintiffs failed to submit sufficient evidence  
27 showing that their foie gras products are prepared at official establishments. Plaintiffs submitted  
28 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.

1 establishment. Defendant thus asserts that § 25982 does not apply with respect to an article  
2 produced at an official establishment. Defendant further argues that § 25982 regulates a process  
3 rather than an “ingredient” because it regulates the manner of producing the fattened bird livers  
4 rather than the use of a particular ingredient. .

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

12 Additionally, it does not matter whether foie gras obtained from force-fed birds is a  
13 different product from non-force-fed bird foie gras. It is undisputed that the PPIA and its  
14 implementing regulations do not impose any requirement that foie gras be made with liver from  
15 non-force-fed birds. Thus, Plaintiffs’ foie gras products may comply with all federal  
16 requirements but still violate § 25982 because their products contain a particular  
17 constituent—force-fed bird’s liver. Accordingly, § 25982 imposes an ingredient requirement in  
18 addition to or different than the federal laws and regulations.<sup>9</sup> *See Nat’l Broiler Council*, 44 F.3d  
19 at 745 (finding that a California law imposed a labeling requirement in addition to the PPIA  
20 where “plaintiffs’ members can label [certain specified] poultry products . . . as ‘fresh’ and  
21 comply with all federal labeling requirements but not comply with the California Act”); *Armour*  
22 *& Company v. Ball*, 468 F.2d 76, 83–85 (6th Cir. 1972) (holding that the FMIA’s analogous  
23 preemption provision preempted Michigan’s sales ban on Grade 1 sausage containing non-

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24  
25 <sup>8</sup> The Court assumes, but does not decide, that foie gras may be produced without force feeding  
26 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.

27 <sup>9</sup> For similar reasons the Court need not address whether the USDA’s definitions and standards  
28 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.

1 striated muscle meat because it imposed requirements in addition to or different than the federal  
2 requirements).

3 a. National Meat Association v. Harris

4 Defendant asserts that Plaintiffs' preemption argument is foreclosed by the Supreme  
5 Court's reasoning in *National Meat Association v. Harris*. In *National Meat* the Court  
6 considered whether the FMIA preempts California's statute regulating the treatment and sale of  
7 nonambulatory swine. In addressing that issue the Court applied only the first sentence of the  
8 preemption clause, which preempts requirements within the FMIA's scope "with respect to  
9 premises, facilities and operations of any establishment . . . in addition to, or different than those  
10 made under this [Act]." *Nat'l Meat Ass'n*, 132 S. Ct. at 969 (quoting 21 U.S.C. § 678)  
11 (alterations in original). The California statute at issue barred: (1) selling or buying  
12 nonambulatory animals for human consumption; (2) producing meat for human consumption  
13 from nonambulatory animals; and (3) selling meat for human consumption from nonambulatory  
14 animals. *Id.* at 970. It also imposed a host of other requirements regarding the treatment of  
15 nonambulatory animals. *Id.* The plaintiff was a trade association representing meatpackers and  
16 processors, including operators of swine slaughterhouses. *Id.*

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

25 Additionally, the Court considered whether the sales ban on meat from nonambulatory  
26 animals avoided preemption because it applied only after the slaughterhouse's activities  
27 concluded. The Court rejected this argument, relying on a functional interpretation of the sales  
28 ban as it functioned within the statute as a whole. *Id.* at 972–73. The Court found that the sales

1 ban helped to implement and enforce the statute’s other requirements directly regulating  
2 activities on Slaughterhouse’s premises by ensuring that slaughterhouses remove nonambulatory  
3 swine from their production process. *Id.* at 972. The Court thus stated that the sales  
4 ban “functions as a command to slaughterhouses to structure their operations in the exact way the  
5 remainder of [the California statute] mandates.” *Id.* at 973. Based on this functional  
6 interpretation, the Court found that the sales ban was preempted as an additional or different  
7 requirement with respect to the premises, facilities, or operation of an FMIA-covered  
8 establishment. *Id.* According to the Court, if the sales ban weren’t preempted “then any State  
9 could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat  
10 produced in whatever way the State disapproved. That would make a mockery of the FMIA’s  
11 preemption provision.”

12 *National Meat’s* application to this case is far from clear. On its face, the California ban  
13 on sales of meat from nonambulatory pigs appears analogous to California’s ban on sales of foie  
14 gras from force-fed birds. Additionally, the need to prevent states from avoiding preemption via  
15 strategic legislative drafting applies with equal force to § 25982. Thus, if the nonambulatory pig  
16 sales ban is preempted by the FMIA then § 25982 should also be preempted by the analogous  
17 PPIA.

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

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

27 As this discussion illustrates, there is a critical distinction between *National Meat* and the  
28 case at bar: *National Meat* considered a different portion of the preemption clause than the one

1 here at issue.<sup>10</sup> Much of the Court’s analysis relied on the fact that the statute expressly preempts  
2 regulations with respect to “premises, facilities and operations” of covered establishments. It did  
3 not consider the portion of the FMIA’s preemption clause applicable to ingredient and labeling  
4 requirements. Thus, much of the Court’s analysis does not apply to the case at bar.

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

15 Additionally, unlike in *National Meat*, § 25982’s sales ban appears in a separate statute  
16 from the ban on the act of force feeding birds. While this division would be unimportant if it  
17 were purely formalistic, Plaintiffs’ case illustrates that the divide is functional. Plaintiffs only  
18 assert that the sales ban applies to their foie gras products. They do not challenge the conduct  
19 ban, nor do they argue that the conduct ban applies to their force-feeding of birds outside of  
20 California. In contrast, the plaintiff in *National Meat* challenged both the conduct and sales  
21 bans, and was apparently impacted by both.<sup>11</sup> Thus, unlike in *National Meat*, it makes little  
22 sense here to consider § 25982 alongside § 25981 and thus to interpret § 25982 as the functional  
23 equivalent of § 25981’s conduct ban.

24 Given this ambiguity regarding whether or how *National Meat* applies to Plaintiffs’ case,  
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26 <sup>10</sup> Both the FMIA and PPIA contain preemption clauses with a section applicable to operations  
27 and another applicable to ingredients and labeling. See 21 U.S.C. § 467e; 21 U.S.C. § 678.

28 <sup>11</sup> 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*, 132 S. Ct. 965 (2012) (stating that some of the plaintiff organization’s  
members claimed the statute “would prevent the slaughter of approximately 2.5% of their pigs”).

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

8 For the aforementioned reasons, the Court finds that the PPIA expressly preempts §  
9 25982. The Court therefore GRANTS Plaintiffs' motion for partial summary judgment.<sup>12</sup>

10 **IV. ORDER**

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

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

18  
19 **IT IS SO ORDERED.**

20  
21 Dated: January 7, 2015



22  
23 \_\_\_\_\_  
STEPHEN V. WILSON  
United States District Judge

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28 \_\_\_\_\_  
<sup>12</sup> In light of this holding, the Court need not reach any of the other arguments raised in the parties' motions.