15-55192

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATION DES ELEVEURS DE CANARDS ET D'OIES DU QUEBEC, a Canadian nonprofit corporation; et al.,

Plaintiffs-Appellees,

v.

KAMALA D. HARRIS, Attorney General,

Defendant-Appellant.

On Appeal from the United States District Court for the Central District of California

Case No. 2:12-cv-05735-SVW-RZ
Hon. Stephen V. Wilson, Judge

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INTRODUCTION

Section 25982 of the California Health and Safety Code prohibits the sale, in California, of products made from force-feeding a bird to enlarge its liver beyond normal size. In adopting this law, the Legislature determined that the practice was inhumane. Among other things, the evidence before the Legislature was that force-feeding a bird—a process that involves inserting a long tube into the bird's mouth and forcing it to consume more food than it would voluntarily—causes the bird's liver to swell to ten times its normal size and results in severe suffering and physical harm. The State accordingly decided to prohibit the practice anywhere within the State's own regulatory authority, and to prohibit the sale in the California market of any product resulting from the use of force-feeding in other places where it may be lawful.

The day after the law took effect, plaintiffs in this case—a trade organization of Canadian farmers and foie gras exporters, a New York duck farmer and foie gras producer, and a California restaurant—filed suit alleging that section 25982 violated the Due Process Clause and the dormant Commerce Clause of the U.S. Constitution. In the first phase of the litigation, the district court denied plaintiffs' request for a preliminary injunction, and this Court affirmed, holding that plaintiffs were not likely to

succeed on their claim that California's ban on the in-state sale of products resulting from bird force-feeding improperly regulated out-of-state conduct. On remand, plaintiffs amended their complaint to allege that section 25982 was preempted by the federal Poultry Products Inspection Act (PPIA) and moved for summary judgment on that claim. The district court granted their motion, holding that the PPIA expressly preempted California's law, and enjoined the Attorney General from enforcing section 25982 against plaintiffs.

The district court's ruling was in error. Presumably Congress could, if it wished, authorize the force-feeding of ducks and geese, and provide that all markets in the Nation must remain open to products resulting from that practice. That is not, however, what it did in the PPIA. Congress enacted the PPIA to ensure that poultry products offered for sale in the United States are wholesome, unadulterated, and properly marked, packaged, and labeled. To that end, it provided for federal inspection of slaughterhouses and packing plants, set standards for adulterated and mislabeled products, and vested the United States Department of Agriculture with authority to promulgate regulations to give effect to these standards. Under the PPIA's statutory framework and implementing USDA regulations, poultry slaughterhouses and processors are subject to a series of rules regarding the

slaughtering of birds, the processing of bird carcasses, the contents of finished poultry products, and the labels attached to those products. But the PPIA says nothing about animal-husbandry practices, including the care and feeding of birds while they are being raised and before they reach the slaughterhouse. The district court erred in concluding that California's ban on in-state sales of poultry products resulting from a particular bird-feeding method falls within the PPIA's preemptive scope.

The district court ruled section 25982 was preempted by the PPIA as an "ingredient requirement." Under the PPIA, States may not adopt "marking, labeling, packaging, or ingredient requirements" in addition to or different from those prescribed under the PPIA. But an "ingredient" is a physical component of a poultry product, and the PPIA addresses what physical substances can go into, or be used to prepare, poultry products and in what quantities. Nothing in the federal statute addresses how birds are raised or fed while they are alive.

The district court's judgment should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over plaintiffs' claims under 28 U.S.C. § 1331. On January 7, 2015, the district court granted plaintiffs' motion for partial summary judgment, entered judgment in favor of plaintiffs

on their preemption claim, and permanently enjoined the Attorney General from enforcing section 25982 against plaintiffs. Excerpts of Record 3, 18. On January 9, 2015, the district court entered an order closing the case as of the date of its judgment. ER 2. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). The Attorney General filed a timely notice of appeal on February 4, 2015. ER 1; *see* Fed. R. App. Proc. 4(a)(1)(A).

STATEMENT OF THE ISSUE

Whether California's prohibition on sales, in California, of products resulting from force-feeding a bird to enlarge its liver beyond normal size is an "ingredient requirement" preempted by the federal Poultry Products Inspection Act.

STATEMENT OF THE CASE

I. CALIFORNIA'S PROHIBITION ON THE IN-STATE SALE OF PRODUCTS MADE FROM FORCE-FEEDING BIRDS

The California Legislature enacted California Health and Safety Code section 25982 in 2004 as part of a statutory framework aimed at the practice of force-feeding birds. California Health and Safety Code section 25981 prohibits force-feeding a bird, in California, "for the purpose of enlarging the bird's liver beyond normal size, or hir[ing] another person to do so." Section 25982, the only provision of the law at issue in this case, prohibits

the sale, in California, of any product "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. The 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. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 945 (9th Cir. 2013). "Force feeding a bird," as defined in the statute, is "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). Prohibited force-feeding methods include "delivering feed through a tube or other device inserted into the bird's esophagus." *Id.*

In enacting the law, the California Legislature considered evidence that the process of force-feeding ducks and geese causes extreme suffering. The bill's author reported that the force-feeding process, which begins when ducks are 12 to 15 weeks old, involves a worker holding the bird "between his or her knees," "grasp[ing] the head," and inserting a 10- to 12-inch tube into the bird's esophagus to pump large amounts of concentrated meal and compressed air into the bird, "creating a golf ball-sized bulge as it goes down." Assemb. Comm. on Bus. & Prof., Bill Analysis, S.B. 1520, at 3-4 (Cal. June 22, 2004). The process is repeated up to three times a day for

several weeks. *Id.* at 3. This method of feeding results in the bird's liver swelling to about ten times its normal size and "is so hard on the birds that they would die from the pathological damage it inflicts if they weren't slaughtered first." *Id.*

When the Legislature adopted the law, only three entities in the United States produced foie gras, and a growing number of countries had outlawed force-feeding birds for foie gras production. Assemb. Comm. on Bus. & Prof., Bill Analysis, S.B. 1520, at 4. By 2004, at least fourteen nations had prohibited the practice, including Italy, the United Kingdom, and Israel, which was once the world's fourth largest producer of foie gras. *Id.*

II. THE FEDERAL POULTRY PRODUCTS INSPECTION ACT

Originally enacted in 1957, the PPIA establishes a national inspection scheme for the slaughtering of poultry and the processing of poultry products in the United States, including products made from geese and ducks. 21 U.S.C. §§ 451-472. In adopting the law, Congress declared it "essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." *Id.* § 451. To accomplish that objective, the PPIA provides for federal inspection of slaughterhouses and poultry-processing plants (§ 455); requires

that slaughterhouses and poultry-processing plants follow proper sanitation practices (§ 456(a)); prohibits the sale or transport of adulterated, misbranded, or uninspected poultry products (§ 458(a)(2)); proscribes false and misleading labeling of poultry products (§ 457(c)); and authorizes the promulgation of regulations for the storage and handling of poultry products (§ 463(a)).

The PPIA does not address animal-husbandry practices. It says nothing about standards for animal welfare on farms, including feeding methods. As the House report accompanying the 1957 enactment noted, the "bill does not regulate in any manner the handling, shipment, or sale of live poultry." H.R. Rep. No. 85-465, at 1 (1987), *reprinted in* 1957 U.S.C.C.A.N. 1630, 1630.

In 1968, Congress amended the PPIA to ensure adequate inspection of poultry sold only in intra-state commerce, which generally had not been regulated under the 1957 law. Among other things, the 1968 amendment, entitled the Wholesome Poultry Products Act, created a system of federal-state cooperation through which the federal government would assist States in developing and implementing rigorous inspection programs for poultry products sold within their borders. *See* 21 U.S.C. § 454. Under the PPIA as amended, the USDA may provide financial and technical support to any State that "has enacted a mandatory State poultry product inspection law that

imposes ante mortem and post mortem inspection, reinspection and sanitation requirements that are at least equal to those" under federal law. *Id.* § 454(a)(1), (a)(3). At the same time, PPIA, as amended, permits federal inspections for intra-state poultry slaughtering and processing in cases in which a State fails to enact adequate inspection standards. *Id.* § 454(c)(1); *see generally* H.R. Rep. No. 90-1333, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3426, 3427 (discussing purpose of 1968 enactment).

As part of this amendment, Congress adopted the preemption provision at issue in this case, 21 U.S.C. § 467e, which precludes States from regulating federally inspected slaughterhouses or imposing different labeling, packaging, or ingredient requirements. The first sentence of section 467e generally forbids States from imposing "[r]equirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter." *Id.*; *see also id.* § 453(p) (defining "official establishment[s]" as establishments where federal inspection of slaughtering or poultry-processing occurs). In its second sentence, section 467e provides that "[m]arking, labeling, packaging, or ingredient 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 this chapter," except that States may, "consistent with the requirements under this chapter exercise concurrent jurisdiction with the Secretary [of Agriculture] over articles required to be inspected under this chapter, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States." *Id.* § 467e. Finally, section 467e preserves state authority to "mak[e] requirement[s] or tak[e] other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.*

III. PROCEDURAL HISTORY

A. Plaintiffs File Suit, and This Court Rejects Their Request to Preliminarily Enjoin the Enforcement of Section 25982 Based on Alleged Violations of the Due Process Clause and Commerce Clause

On July 2, 2012, the day after section 25982 took effect, plaintiffs sued the California Attorney General claiming that the law violated the Due Process Clause and the dormant Commerce Clause of the federal Constitution. Dkt. 1. A few days later, plaintiffs filed an ex parte application for a temporary restraining order, which the district court denied,

and then sought a preliminary injunction against the statute's enforcement. Dkts. 3, 35, 51. The district court denied plaintiffs' motion for a preliminary injunction (Dkt. 87), and this Court affirmed, holding that plaintiffs were not likely to succeed on their claim that section 25982 impermissibly regulated conduct occurring outside the State's borders. *Ass'n des Éleveurs*, 729 F.3d at 948-951.

B. The District Court Grants Summary Judgment on Plaintiffs' Preemption Claim

In April 2014, plaintiffs filed their Second Amended Complaint alleging, among other things, that section 25982 is preempted by the PPIA and violates the dormant Commerce Clause. Dkt. 112. The Attorney General moved to dismiss the complaint (Dkt. 116), and plaintiffs moved for summary judgment on their preemption claim, arguing that the PPIA both expressly and impliedly preempts section 25982 (Dkts. 117, 118).

After holding that plaintiffs' claims were justiciable, the district court concluded that the PPIA expressly preempted section 25982. ER 11-12, 18. The court assumed without deciding that foie gras can be made without force-feeding a bird to enlarge its liver. ER 14, n. 8. But the court reasoned that "it does not matter whether foie gras obtained from force-fed birds is a different product from non-force-fed bird foie gras." ER 14. Because the

PPIA does not require that foie gras be made with the liver of non-force-fed birds, the court observed, plaintiffs' 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).

The court further concluded that the Supreme Court's decision in *National Meat Association v. Harris*, 132 S. Ct. 965 (2012), required a ruling in plaintiffs' favor. In *National Meat*, the Supreme Court held that the Federal Meat Inspection Act (FMIA), which established a meat-inspection scheme similar to that under the PPIA and includes a preemption provision like that in the PPIA, displaced a California law regulating the slaughter of nonambulatory swine and prohibiting the in-state sale of meat from such animals. *Id.* at 966. At the outset of its analysis, the district court observed that "*National Meat*'s application to this case is far from clear." ER 16. The court noted, among other things, that *National Meat* did not involve a claim that a state statute imposed a preempted "ingredient requirement." ER 16-17. Nevertheless, in light of the ambiguity as to "whether or how *National Meat* applies to Plaintiffs' case," the 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." ER 18. Consequently, the court reasoned that *National Meat* must be read "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." ER 18. Thus, the court held, "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.

Based on these conclusions, the district court granted plaintiffs' motion for partial summary judgment, entered judgment in their favor on their preemption claim, and permanently enjoined the Attorney General from enforcing section 25982 "against Plaintiffs' USDA-approved poultry products containing foie gras." ER 3, 18. The district court did not address plaintiffs' alternative arguments based on theories of field and obstacle preemption or any of plaintiffs' other legal claims.

SUMMARY OF THE ARGUMENT

The PPIA does not expressly preempt section 25982. The PPIA regulates the slaughtering, processing, and labeling of poultry products. It precludes States from imposing, among other things, "ingredient requirements" that are in addition to, or different from, those prescribed by federal law. California law, on the other hand, prohibits California poultry

farmers from using a force-feeding practice that the State deems inhumane, and bans the in-state sale of products resulting from the use of that technique outside the State. The two laws are directed at different subjects. A law prohibiting in-state sales of poultry products based on the way that source birds were treated while they were being raised is not an "ingredient requirement" preempted by the PPIA.

According to its plain meaning, an "ingredient" is a physical component of a product. Throughout the PPIA and its implementing regulations, the term "ingredient" is used in this same ordinary sense. For example, the PPIA describes "ingredients" as things that can be "contained in" a product. Likewise, the USDA's implementing regulations enumerate the approved food ingredients that can be used in poultry products. The PPIA and USDA rules regulate these ingredients by dictating which substances are permitted in which poultry products in what amounts. They do not address the techniques used to feed a bird when it is still alive. As applicable here, duck liver is an "ingredient," but the method by which the ducks were fed while alive is not an "ingredient."

The purpose and scope of the PPIA confirm that "ingredient requirements" do not encompass bird-feeding practices. The PPIA establishes standards for slaughtering birds and processing their carcasses

into finished poultry products. The law does not purport to address particular techniques for feeding live animals away from the slaughterhouse.

The district court erred in holding that the PPIA expressly preempted section 25982 based on the Supreme Court's decision in *National Meat*. Contrary to the district court's reasoning, *National Meat* has little application here. That decision did not address the meaning of "ingredient requirements" and involved a state statute that regulated slaughterhouse operations, the domain expressly reserved to federal law.

Finally, the district court's judgment cannot be affirmed based on alternative theories of field or obstacle preemption, which the district court did not consider but which plaintiffs briefed below. Congress preempts a field when it establishes a scheme of federal regulation so pervasive that federal law impliedly ousts any state action in the area. In the PPIA, Congress did not address—much less occupy the field of—the methods used to care for and feed poultry. In enacting the PPIA, Congress did not purport to authorize bird force-feeding and require all States in the Nation to open their markets to products resulting from such a feeding technique.

Section 25982 likewise poses no obstacle to the achievement of Congress's goals in adopting the PPIA. The PPIA seeks to ensure the safety of processed poultry products through inspection, sanitation, processing, and

labeling standards. Section 25982 imposes no requirements on slaughterhouses or processing plants; establishes no marking, labeling, or ingredient requirements; and has no effect on Congress's goal of preventing the sale of adulterated or misbranded poultry products.

The district court's judgment should be reversed.

STANDARD OF REVIEW

A district court's decision to grant a motion for partial summary judgment is reviewed de novo. *Amdahl Corp. v. Profit Freight Sys., Inc.*, 65 F.3d 144, 146 (9th Cir. 1995). This Court's review "is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c)." *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999). The Court "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id*.

ARGUMENT

When addressing a preemption claim, courts "assum[e] that the historic police powers of the States are not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (alterations omitted). This presumption

against preemption applies with particular force where, as here, a State legislates in an area within its traditional police powers. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The "ultimate touchstone" in "assessing the preemptive force of a federal statute . . . [is] the purpose of Congress, as discerned from the language of the pre-emption statute and the statutory framework surrounding it." *Chinatown Neighborhood Ass'n v. Harris*, No. 14-15781, 2015 WL 4509284, at *2 (9th Cir. July 27, 2015) (internal quotation marks omitted). When a federal law is susceptible of more than one plausible interpretation, courts "have a duty to accept the reading that disfavors preemption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *see also Altria*, 555 U.S. at 77 (courts ordinarily accept interpretation of ambiguous statute that preserves state law). In this case, the PPIA neither expressly nor impliedly preempts section 25982.

I. THE PPIA DOES NOT EXPRESSLY PREEMPT SECTION 25982

Section 467e of the PPIA precludes States from imposing "[m]arking, labeling, packaging, or ingredient requirements" that are "in addition to, or different than," those prescribed under the PPIA. 21 U.S.C. § 467e. Contrary to the district court's conclusion, section 25982 does not impose an "ingredient requirement" preempted by the PPIA.

A. An "Ingredient Requirement" Regulates the Physical Composition of a Processed Poultry Product

Neither section 467e nor any other provision of the PPIA defines the term "ingredient." In such circumstances, the word is given its "ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). The ordinary meaning of "ingredient" is a physical component of a product. For example, one dictionary defines the term to mean "something that enters into a compound or is a component part of any combination or mixture: constituent." Webster's Third New International Dictionary of the English Language 162 (2002) (capitalization omitted). Another defines the term as "[s]omething added or required to form a mixture or compound" or "[a] component or constituent." The American Heritage Dictionary of the English Language 675 (1980); *see also* The American Heritage College Dictionary 713 (4th ed. 2007) ("[a]n element in a mixture or compound; a constituent").

Throughout the PPIA, Congress used the word "ingredient" in that same ordinary sense. For example, the PPIA defines the term "poultry product" to exclude "products which contain poultry ingredients only in a relatively small proportion." 21 U.S.C. § 453(f); *see also id.* § 466(a) (permitting import of foreign poultry products only if, among other things,

they "contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food"). Only a physical component can be "contain[ed]" in a product or be present in a "small proportion." *Id.* § 453(f). As a further example, the PPIA requires that labels on certain poultry products include "the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food." *Id.* § 453(h)(7); *see also id.* § 453(h)(9) (when certain products are "fabricated from two or more ingredients," label must include "the common or usual name of each such ingredient"). Again, only physical components can be "present in" food and be listed as a component of a poultry product.

Numerous regulations implementing the PPIA describe "ingredients" in similar terms. For example, USDA regulations require labels on poultry products to show "a statement of the ingredients in the poultry product if the product is fabricated from two or more ingredients" and provide that "[s]uch ingredients shall be listed by their common or usual names in the order of their descending proportions." 9 C.F.R. § 381.118(a)(1). Likewise, if a slaughterhouse or processing plant is flooded with water, "all poultry products and ingredients for use in the preparation of such products that have been rendered adulterated by the water" must be condemned. 9 C.F.R.

§ 381.151(a); *see also* 9 C.F.R. § 381.129 ("The terms 'All,' 'Pure,' '100%,' and terms of similar connotation shall not be used on labels for products to identify *ingredient content*, unless the product is prepared solely from a single ingredient.") (emphasis added); 9 C.F.R. § 381.444 ("The major cuts of *single-ingredient, raw poultry products* are: Whole chicken (without neck and giblets), chicken breast, chicken wing, chicken drumstick, chicken thigh, whole turkey (without necks and giblets; separate nutrient panels for white and dark meat permitted as an option), turkey breast, turkey wing, turkey drumstick, and turkey thigh.") (emphasis added); *cf.* 7 C.F.R. § 205.2 (defining "ingredient" in regulations implementing the National Organic Program as "[a]ny substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed"). And the USDA's cooperative agreement with the Food and Drug Administration regarding the regulation of poultry, meat, and egg products specifically defines "[f]ood [i]ngredient" to include substances that are "[f]ood [a]dditive[s]," "[f]ood [c]ontact substance[s]," "generally recognized as safe" substances, "[p]rior-sanctioned [s]ubstance[s]," and "[c]olor [a]dditive[s]."[1]

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[1] Memorandum of Understanding between the Food Safety &

(continued…)

The requirements that the PPIA and its implementing regulations establish with respect to these "ingredients" relate to the type and amount of ingredients that a processed poultry product may contain. For example, to implement the PPIA's prohibition against the distribution of adulterated or misbranded poultry products, USDA regulations forbid any poultry product from "bear[ing] or contain[ing] any food ingredient that would render it adulterated or misbranded" or that the agency has not explicitly approved. 9 C.F.R. § 424.21(a)(1). Agency regulations, in turn, list the "food ingredients" that are approved for use in poultry products, for specified purposes and "within the limits of the amounts stated." *Id.* § 424.21(c); *see also* Food Safety & Inspection Service Directive 7120.1 ("Safe and Suitable Ingredients Used in the Production of Meat, Poultry, and Egg Products") (July 6, 2015) (summarizing substances approved for use in the production of poultry products). For example, under the applicable regulations, poultry producers may add the substances gelatin, methyl cellulose, or a "mixture of sodium alginate, calcium carbonate, lactic acid, and calcium lactate" to bind

(…continued)
Inspection Serv. U.S. Dep't of Agriculture & the Food & Drug Admin. U.S. Dep't of Health & Human Servs., MOU No. 225-00-2000 (Mar. 24, 2015), *available at* http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/Ingredients-Guidance/.

or extend poultry products. 9 C.F.R. § 424.21(c) (chart). Poultry products may contain prescribed amounts of other substances such as sodium acetate or corn syrup solids for flavor. *Id.* And "[c]oal tar dyes" may be added to color various poultry products. *Id.*; *see also id.* (permitting certain substances to be used in the processing of poultry carcasses such as a trisodium phosphate solution to reduce microbial contamination). As these examples illustrate, federal "ingredient requirements" involve the specification of what physical substances can be used to prepare a processed poultry product, and in what quantities.

The USDA's regulations implementing the PPIA's prohibition against the distribution of misbranded poultry products also confirm that federal law addresses itself to the physical composition of processed poultry products. Under the PPIA, a "misbranded" poultry product includes, among other things, a product that "purports to be or is represented as a food for which a definition and standard of identity or composition has been prescribed" by the USDA, when the product does not conform to such definition or standard. 21 U.S.C. § 453(h)(7). The USDA's standards of identity or composition, in turn, prescribe what may be included in various poultry products marketed under particular labels. *See* 9 C.F.R. § 381.155(a)(1). For example, poultry products labeled as "[m]ostly white meat" must

contain at least 66% light meat and no more than 34% dark meat. *Id.* § 381.156 (table). A product sold as "[l]ight and dark meat" must contain between 51% to 65% light meat. *Id.* And products labeled "[c]anned boned poultry" must generally "be prepared from cooked deboned poultry meat and may contain skin and fat not in excess of natural whole carcass proportions." *Id.* § 381.157(a). These standards of identity and composition further underscore that "ingredient requirements" under federal law involve the type and amount of ingredients that may be contained in a poultry product.

In *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), the Sixth Circuit concluded that a Michigan law that prescribed standards for the contents of sausage that could be sold in that State imposed "ingredient requirements" under the FMIA. *Id.* at 83-84. Under Michigan's law, Grade 1 sausage could be made only with certain skeletal meats from cattle, swine, or sheep. *Id.* at 81. The Michigan statute forbade the use of heart, tongue, lungs, lips, and other organs; limited the permissible moisture content; required a minimum protein content; and restricted the percentage of "trimmable fat" in certain sausage products, among other things. *Id.* at 86-87. By contrast, federal law permitted sausages to be prepared from any part of cattle, swine, sheep, or goats capable of use as human food, including the organs

prohibited under Michigan law; specified different moisture and protein limitations; and allowed higher levels of fat to be included in sausage. *Id.* at 81, 86; *see also id.* at 82 ("nearly all provisions in the Michigan Law conflict with the corresponding provisions in the Secretary's regulations"). In the face of Michigan's law prescribing the content for Grade 1 sausage, the court concluded that Michigan's "ingredient requirements" were preempted. *Id.* at 83-84.

These authorities show that the PPIA's "ingredient requirements" regulate the physical components or composition of poultry products.

B. Section 25982 Does Not Impose an "Ingredient Requirement"

Section 25982 is not an "ingredient requirement" within the meaning of the PPIA. Unlike the "ingredient" standards found in federal statutes and regulations and the ingredient requirements at issue in *Armour & Co. v. Ball*, which all relate to the physical composition of a poultry product, section 25982 regulates California's market by proscribing the in-state sale of products resulting from the use of force-feeding. Section 25982, for example, does not mandate or prohibit any substance from being added to any foie gras product. It 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. Section 25982 provides only that a product cannot be sold in California if it is the result of feeding a bird in a particularly cruel manner when it was still alive. Section 25982 is thus unlike the "ingredient" standards described in the PPIA and its implementing regulations.

The purpose and scope of the PPIA confirm that "ingredient requirements" do not encompass rules regarding the sale of products produced by use of certain animal-feeding practices, such as section 25982. As explained above, Congress enacted the PPIA "to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution" of those products to prevent the distribution of adulterated or misbranded poultry products. 21 U.S.C. § 452. To that end, the PPIA establishes national inspection, sanitation, and labeling standards that regulate the slaughtering and processing of poultry products. *See supra* pp. 6-8; *see also Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 333 (5th Cir. 2007) (FMIA's parallel preemption clause is "more naturally read as being concerned with the methods, standard of quality, and packaging that slaughterhouses use"); *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007) (Posner, J.) (FMIA "is concerned with inspecting premises at which meat is produced for human

consumption"). The PPIA does not purport to address the sale of products derived from birds fed in a particular way while they are being raised. While the PPIA covers slaughterhouses, processors, buyers, sellers, renderers, and others involved in the processing, selling, and transportation of poultry products, it does not extend to address farming practices. *See* 21 U.S. C. §§ 455 (slaughterhouse inspections), 456 (sanitary practices at slaughterhouses and processing plants), 457 (labeling and container standards), 458 (sale and transport of adulterated or misbranded poultry products); *see also id.* § 460(b)(1)-(3) (record-keeping requirements apply to those who slaughter poultry; process, freeze, package, label, buy, sell, transport, or store poultry carcasses; renderers; and those dealing in dead, dying, diseased, or disabled poultry). As a legislative history report noted concerning the enactment of the original 1957 law, the "bill does not regulate in any manner the handling, shipment, or sale of live poultry." H.R. Rep. No. 85-465 at 1, *reprinted in* 1957 U.S.C.C.A.N. 1630, 1630.[2]

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[2] The PPIA defines as "adulterated" a product that, among other things, "bears or contains (by reason of administration of any substance to the live poultry or otherwise) any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive) which may, in the judgment of the Secretary [of Agriculture], make such article unfit for human food." 21 U.S.C. § 453(g)(2)(A). Although this provision

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Plaintiffs argued below that the USDA's Food Standards and Labeling Policy Book provides detailed definitions and standards for foie gras products that require birds to be force-fed. *See* ER 19-22 (excerpt of USDA Food Safety & Inspection Service, Office of Policy, Program and Employee Development, Food Standards and Labeling Policy Book (Aug. 2005)).[3] Plaintiffs made the same argument in their appeal from the denial of their request for a preliminary injunction. *See Ass'n des Éleveurs*, 729 F.3d at 950. This Court rejected plaintiffs' argument, reasoning that the "standards to which Plaintiffs refer . . . merely state that 'Goose liver and duck liver foie gras (fat liver) are obtained exclusively from specially fed and fattened geese and ducks.' It says nothing about the force feeding of geese and ducks." *Id.*

In any event, the USDA's Policy Book cannot itself preempt a state statute because it lacks the force of law. *See* Policy Book, Preface; *Reid v. Johnson & Johnson*, 780 F.3d 952, 964 (9th Cir. 2015) (agency actions

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references activity occurring while a bird is still alive, it does not address animal-treatment or animal-feeding practices; its sole focus is on substances that could remain in, and contaminate, a finished poultry product. It avoids a loophole in the scheme for protecting against an adulterated final product.

[3] The complete Policy Book is available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf.

without force of law lack preemptive effect). And taken on its own terms, the publication only underscores that federal ingredient regulation concerns itself with the physical composition of processed poultry products and how they are labeled, not the means by which birds are fed when they are alive. The brief section of the Policy Book discussing foie gras products describes three types of foie gras products based on the minimum content of duck liver or goose liver foie gras contained in the product. For example, the Policy Book states that products labeled "Whole Duck Foie Gras" or "Whole Goose Foie Gras" are those in which goose liver or duck liver foie gras are the only animal tissues present. ER 21. Products labeled "Goose Foie Gras" or "Duck Foie Gras" (among others) contain at least 85% goose liver or duck liver foie gras and "may also contain a wrapping or stuffing consisting of the lean or fat of pork, veal, or poultry, pork liver, and/or aspic jelly." *Id.*; *see also id.* (products labeled "pate," "puree," or "galantine" of goose or duck liver must contain a minimum of 50% duck or goose liver foie gras and may contain "a wrapping or stuffing of the lean or fat of pork, veal, or poultry, pork liver, aspic jelly, extenders, and/or binders"). Nothing in this labeling

guidance suggests that federal law treats foie gras products any differently based on how the goose or duck was fed when it was still alive.[4]

Finally, any doubt whether the PPIA preempts States from prohibiting the in-state sale of poultry products derived from birds raised by a cruel animal-feeding method must be resolved to avoid such a conclusion. As noted above, federal law should not be read to supplant a state enactment unless Congress clearly intended for it to do so. *Altria Group*, 555 U.S. at 76-77. And in the face of ambiguity, courts should interpret federal statutes to avoid preemption when such an interpretation is plausible. *Bates*, 544 U.S. at 449.

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[4] In the district court, plaintiffs cited a number of cases, including this Court's decision in *National Broiler Council v. Voss*, 44 F.3d 740 (9th Cir. 1994) (per curiam), in which the PPIA was held to preempt a state law. None of these decisions bears on the preemption question in this case. They all involved claims that a state law imposed "labeling," "marking," or "packaging" requirements, not an "ingredient" requirement. *See, e.g.*, *Voss*, 44 F.3d at 745-747 (state law forbidding use of term "fresh" on certain poultry labels was preempted "labeling" requirement); *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047 (E.D. Cal. 2013), appeal pending (9th Cir. No. 13-16893) (California law regarding "slack fill" in poultry packaging preempted as "packaging" requirement in addition to or different from federal law); *Northwestern Selecta, Inc. v. Munoz*, 106 F. Supp. 2d 223 (D. Puerto Rico 2000) (Puerto Rico regulation requiring inspection date to appear on certificate of inspection was preempted "marking" requirement).

C. The District Court Misinterpreted and Misapplied *National Meat*

Although the district court acknowledged that it is not clear whether *National Meat* applies to this case, it nonetheless held section 25982 preempted based on what it believed to be the reasoning of *National Meat*. ER 17-18. *National Meat* does not support the district court's conclusion. As an initial matter, and as the district court recognized (ER 16-17), *National Meat* addressed only the first sentence of the FMIA's preemption provision—which, like the PPIA's, forecloses States from adopting additional or different "[r]equirements within the scope of [the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided." *See* 21 U.S.C. § 678; *National Meat*, 132 S. Ct. at 969. *National Meat* did not address the second sentence, at issue in this case, involving "ingredient requirements." 132 S. Ct. at 969. Accordingly, *National Meat*'s discussion of the meaning of the FMIA's parallel preemption provision has little application to this case.

Moreover, the Supreme Court's conclusion that the FMIA preempted California's ban on sales of meat from nonambulatory pigs does not suggest that the PPIA preempts the State's proscription of in-state sales of products resulting from bird force-feeding. As noted above, in *National Meat*, the

Supreme Court held that the FMIA preempted a California law that dictated how *slaughterhouses* had to handle nonambulatory pigs and forbade the sale of meat from such animals. 132 S. Ct. at 972-973. In reaching that conclusion, the Court recognized that the FMIA usually does not foreclose state regulation of the commercial sales activities of slaughterhouses. *Id.* at 972. The Court nonetheless held that California's prohibition on the sale of meat from nonambulatory swine impermissibly functioned "as a command to slaughterhouses [how] to structure their operations." *Id.* at 973 ("[l]ike the rest of [the state statute], the sales ban regulates how slaughterhouses must deal with nonambulatory pigs on their premises"). To permit the sales ban to avoid FMIA preemption, the Court concluded, would allow any State to regulate slaughterhouses "just by framing [the law] as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* And it was precisely the regulation of slaughterhouse activities that the FMIA reserved to federal law. *Id.* at 968-969.

Here, the PPIA regulates the operations of "official establishments," which are places where inspections of slaughtering and processing occur. *See* 21 U.S.C. § 453(p); 9 C.F.R. § 381.1 (defining "official establishment" as "any establishment as determined by the Administrator at which inspection of the slaughter of poultry, or the processing of poultry products,

is maintained pursuant to the regulations"). The law does not concern itself with animal-husbandry practices that take place on farms where animals are raised. *Cf. National Meat*, 132 S. Ct. at 974 (observing that state bans on slaughtering horses for human consumption "work[] at a remove from" slaughterhouses, "the sites and activities that the FMIA most directly governs"); *see also Empacadora*, 476 F.3d at 333 (rejecting claim that FMIA preempted Texas law banning the sale of horsemeat for human consumption and explaining that the FMIA "expressly limits states in their ability to govern meat inspection and labeling requirements" but "in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place") (footnote omitted). And it is the treatment of live animals with which section 25982 is concerned.

The district court thought the fact that animal-husbandry practices occur away from official establishments was irrelevant because the part of the PPIA's preemption clause addressing "ingredient requirements" applies "beyond the activities actually conducted by or at an official establishment." ER 17. But, as discussed above, Congress did not intend for the PPIA to regulate *all* activities relating to poultry, and such a reading of the law would expand the law beyond its intended purpose. *See supra* pp. 6-9.

Section 25982 also does not impermissibly seek to circumvent the PPIA by indirectly regulating foie gras products' ingredients, as the district court thought. ER 18. As explained above, ingredients as understood in the PPIA are not the same as animal-feeding practices. The district court erred in reading *National Meat* to require preemption of section 25982.

II. The PPIA Does Not Preempt Section 25982 Under Theories of Either Field or Obstacle Preemption

In granting plaintiffs' motion for summary judgment, the district court held that the PPIA expressly preempts section 25982 and did not address plaintiffs' alternative arguments that the PPIA impliedly displaces state law under theories of field or obstacle preemption. Neither of these theories provides a basis to sustain the district court's judgment.

A. The PPIA Does Not Preempt the Field of Animal Care and Feeding

Under the doctrine of field preemption, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). In such circumstances, Congress's "intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no

room for the States to supplement it." *Id.* (internal quotation marks and ellipses omitted).

No such inference is possible with the PPIA. Congress did not establish a pervasive framework of regulation addressing animal-husbandry practices. Presumably, Congress could have decided to authorize force-feeding and provide that all markets in the Nation must remain open to products resulting from that practice. But Congress did not make that decision. Rather, Congress enacted the PPIA to establish national inspection, sanitation, and labeling standards that regulate the slaughtering and processing of poultry products. *Supra* pp. 6-9. In enacting that law, Congress did not address—much less regulate exclusively in—the field of animal feeding.

In addition, even in the field of poultry processing and production, which the PPIA does address, the statute expressly leaves intact certain state regulatory authority. As noted above, the PPIA relies on cooperative federal-state efforts to ensure that the Nation's supply of poultry products is safe and wholesome. For example, the law contemplates that States will develop and implement sanitation and inspection schemes for poultry products sold intra-state. 21 U.S.C. § 454(a). In addition, the PPIA's preemption provision specifically preserves States' ability to act, consistent

with the requirements of federal law, to prevent the distribution of adulterated or misbranded poultry products outside of official establishments. *Id.* § 467e; *see also id.* (PPIA "shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter"). These features of the PPIA demonstrate that Congress did not intend to displace all state activity in this area. *See Arizona*, 132 S. Ct. at 2502 ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."); *Empacadora*, 476 F.3d at 334 ("[t]he FMIA specifically indicates that it did not intend to preempt the field of meat commerce entirely" by way of a savings clause like that in the PPIA). And even if federal law occupies the field of poultry processing, that would not mean that it forecloses States' ability to regulate their own markets by prohibiting the in-state sale of products resulting from a particular method of bird feeding. "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulations at the other end." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145 (1963) (federal regulations providing minimum standards of picking, processing, and transporting agricultural commodities, however

comprehensive, do not displace state control over distribution and retail sale of those commodities).

The PPIA does not displace section 25982 under a field preemption theory.

B. Obstacle Preemption Does Not Apply Because Section 25982 Does Not Frustrate the Objectives of the PPIA

Obstacle preemption is a form of conflict preemption and applies when the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chinatown Neighborhood Ass'n*, 2015 WL 4509284, at *9 (internal quotation marks omitted). Here, section 25982 poses no impediment to Congress's objectives in enacting the PPIA, which were "to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles" to prevent the movement or sale of adulterated or misbranded poultry products. 21 U.S.C. § 452 (congressional declaration of policy).

As discussed above, section 25982 regulates California's market by prohibiting the in-state sale of foie gras products produced by force-feeding a bird to enlarge its liver beyond normal size. The statute does not regulate official establishments, where the PPIA most directly governs, and it

imposes no marking, labeling, or ingredient requirements. Section 25982 also does not affect Congress's goal of preventing the movement or sale of adulterated or misbranded poultry products. Rather, it proscribes in-state sales of poultry products that are made by using a cruel animal-feeding practice on which the PPIA is silent. Section 25982 does not interfere with Congress's objectives in adopting the PPIA.

Contrary to plaintiffs' view, moreover, it is irrelevant that the PPIA does not prohibit the production of foie gras made from force-fed bird liver. As the Seventh Circuit explained in rejecting a claim that the FMIA preempted an Illinois ban on slaughtering horses for human consumption, Congress's decision to regulate the slaughter and processing of horsemeat "was not a decision that states must allow horses to be slaughtered for human consumption." *Cavel*, 500 F.3d at 554 ("The government taxes income from gambling that violates state law; that doesn't mean the state must permit the gambling to continue."); *see also Fla. Lime & Avocado Growers*, 373 U.S. at 141-145 (federal standards permitting the picking, processing, and transportation of certain avocados did not preempt state law barring sale of those avocados in the State). Likewise, here, just because federal law does not prohibit the production of foie gras products made from

force-fed birds does not mean that California is required to allow the sale of such products within its borders.

CONCLUSION

The district court's judgment should be reversed.

Dated: August 24, 2015

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15-55192

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATION DES ELEVEURS DE CANARDS ET D'OIES DU QUEBEC, a Canadian nonprofit corporation; et al.,

Plaintiffs-Appellees,

v.

KAMALA D. HARRIS, Attorney General,

Defendant-Appellant.

STATEMENT OF RELATED CASE

Pursuant to Ninth Circuit Rule 28-2.6, Appellant states that *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 12-5688 (9th Cir.) is related to the present appeal. That case involved plaintiffs' appeal from the district court's denial of a preliminary injunction in the present matter.

Dated: August 24, 2015

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 15-55192

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 7,401 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: August 24, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 24, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 24, 2015

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