APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.20-55882
20-55944

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

[Filed May 6, 2022]

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, a Canadian nonprofit corporation; HVFG, LLC, a New York limited liability company; SEAN CHANEY, an individual,	)
Plaintiffs-Appellees/ Cross-Appellants,	)
v.	)
ROB BONTA,[*] in his official capacity as Attorney General of California,	)
Defendant-Appellant/ Cross-Appellee.	)

[*] Rob Bonta has been substituted for his predecessor, Xavier Becerra, as California Attorney General under Fed. R. App. P. 43(c)(2).

App. 2

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

Argued and Submitted October 18, 2021
Pasadena, California

Filed May 6, 2022

OPINION

Before: Andrew J. Kleinfeld, Ryan D. Nelson, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge R. Nelson;
Partial Concurrence and Partial Dissent by Judge VanDyke

SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal of plaintiffs' preemption and dormant Commerce Clause claims and its summary judgment in favor of plaintiffs on a declaratory judgment claim in an action brought by various foie gras sellers challenging California's ban on the in-state sale of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25982.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the sales ban was neither preempted nor unconstitutional and that certain out-of-state sales were permitted by California law.

The panel assumed without deciding that California's sales ban prohibits all foie gras sales in California. The panel then rejected plaintiffs' impossibility preemption challenge asserting that the sales ban was preempted because it was impossible to comply with both California law and the federal Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451. The panel held that even assuming guidance from the United States Department of Agriculture requires foie gras to be produced by force feeding, the sellers could still force feed birds to make their products. They just could not sell those products in California. The sales ban was neither a command to market non-force-fed products as foie gras nor to call force-fed products something different.

The panel held that the district court did not abuse its discretion by denying plaintiffs leave to amend to add a new express ingredient preemption claim alleging that the sales ban operates as an "ingredient requirement" by prohibiting foie gras as an ingredient in other poultry products. The panel held that this court already rejected a critical premise of that claim in *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1145–53 (9th Cir. 2017) ("*Canards II*"), which was binding.

Rejecting plaintiffs' dormant Commerce Clause claim, the panel held that California's sales ban prohibits only in-state sales of foie gras, so it was not impermissibly extraterritorial even if it influenced out-

of-state producers' conduct. The panel further rejected plaintiffs' claim that the sales ban unduly burdened interstate commerce, determining that the sales ban was neither discriminatory nor was inherently unduly burdensome.

The panel next considered California Attorney General's cross-appeal from the declaratory judgment order which construed the sales ban to allow online, phone and fax sales to California buyers when title passes outside the state. The panel held that plaintiffs had standing to assert the claim; that the district court properly permitted out-of-state sales; and the district court did not err by rejecting the Attorney General's view that a sale occurs when a consumer takes possession of a product. The panel agreed with a California Court of Appeal's conclusion that the California Uniform Commercial Code provides a "reasonable" definition of "sale" for purposes of the sales ban.

Concurring in part and dissenting in part, Judge VanDyke agreed with the majority that the district court properly interpreted California Health & Safety Code § 25982 to permit sales from out-of-state vendors and that there was no standing issue preventing declaratory judgment. He therefore joined those sections of the majority opinion. But Judge VanDyke could not join the majority in rejecting plaintiffs' impossibility preemption claim and upholding the district court's denial of plaintiffs' motion to add an express preemption claim. Judge VanDyke wrote that ultimately, the PPIA and § 25982 require foie gras to be produced through mutually exclusive and

irreconcilable methods. When this conflict arises, the constitutional controversy is not solved simply by saying the regulated entity should stop selling. Rather, the Constitution demands that the state law yield to federal law, and that is what was required here. Judge VanDyke further wrote that this Court's decision in *Canards II* explicitly depended on multiple assumptions about facts or issues not proven in the record at that time—including whether foie gras could be produced without force-feeding—and plaintiffs had now presented undeniable evidence showing those assumptions were mistaken.

COUNSEL

Peter H. Chang (argued), Deputy Attorney General; Mark R. Beckington, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General; Office of the Attorney General, San Francisco, California; for Defendant-Appellant/Cross-Appellee.

Michael Tenenbaum (argued), Office of Michael Tenenbaum, Santa Monica, California, for Plaintiffs-Appellees/Cross-Appellants.

OPINION

R. NELSON, Circuit Judge:

California prohibits the in-state sale of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25982. After nine years of litigation and in their third set of appeals before this Court, the parties ask us to decide whether

California's sales ban is preempted by the Poultry Products Inspection Act ("PPIA") or violates the dormant Commerce Clause. If the ban is not preempted or unconstitutional, they ask us to clarify whether it permits certain internet, phone, and fax sales by out-of-state sellers. We hold that the sales ban is neither preempted nor unconstitutional and that the specified transactions are out-of-state sales permitted by California law.

I

In 2004, California passed a law targeting the practice of force feeding ducks or geese to produce foie gras. The law worked through two provisions. The first prohibited force feeding a bird "for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25981. The second banned the in-state sale of products that are "the result of" that practice. *Id.* § 25982. The law provided a seven-and-a-half-year grace period for producers to transition away from force feeding before it went into effect. *Id.* § 25984.

At the end of the grace period, various foie gras sellers sued to enjoin enforcement of the sales ban provision. Since then, we have considered their arguments that the sales ban violates the Due Process Clause or is preempted by federal law under express, field, or obstacle preemption theories. *See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 946–47 (9th Cir. 2013) ("*Canards I*"); *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1145–53 (9th Cir. 2017) ("*Canards II*") (rejecting prior express and implied preemption

arguments following summary judgment). Following those decisions, the sellers returned to district court to add an impossibility preemption claim, a claim under the dormant Commerce Clause, and a claim for declaratory relief (clarifying that out-of-state sellers could sell foie gras to California buyers over the internet, phone, or fax). After further development of the record, they also sought to add an express ingredient preemption claim.

The district court denied leave to add the new express ingredient preemption claim and dismissed the impossibility preemption and dormant Commerce Clause claims. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2020 WL 595440, at *6 (C.D. Cal. Jan. 14, 2020). But it granted summary judgment to the sellers on their declaratory judgment claim, construing the sales ban to allow online, phone, and fax sales to California buyers when title passes outside the state. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2020 WL 5049182, at *5 (C.D. Cal. July 14, 2020).

Both sides object to the district court's latest decisions. California's Attorney General appeals the declaratory judgment order, challenging the sellers' standing and arguing that the specified transactions are prohibited. For their part, the sellers cross-appeal the dismissal of their preemption and dormant Commerce Clause claims. They argue that it is impossible to comply with both California law and the PPIA and that the sales ban regulates extraterritorial conduct and unduly burdens interstate commerce. They

also contend that they should have been allowed to add their express ingredient preemption claim.

II

We review de novo the district court's order granting a motion to dismiss for failure to state a claim, taking as true all allegations of material fact and construing them in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). We review the district court's denial of leave to amend for abuse of discretion. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 573 (9th Cir. 2020).

We review de novo the district court's order granting summary judgment and "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 relevant substantive law." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008) (citation omitted). The scope of a statute is a question of law, which we also review de novo. *Canards I*, 729 F.3d at 945 (quoting *In re Lieberman*, 245 F.3d 1090, 1091 (9th Cir. 2001)).

"When interpreting state law, we are bound to follow the decisions of the state's highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises." *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015) (quotation marks and brackets omitted).

III

We first discuss the sellers' cross-appeal, which raises two preemption questions. The first is whether the sales ban is preempted because it is impossible to comply with both the PPIA and California law. The second is whether the district court should have granted leave to amend because the record now shows that the sales ban forbids the sale of all foie gras and therefore imposes an "ingredient requirement" that is "in addition to, or different than" those under federal law and regulations. *See* 21 U.S.C. § 467e. Both questions turn on the sellers' assertion that it is physically impossible to produce foie gras without force feeding. We assume without deciding they are correct that the sales ban prohibits all foie gras sales in California.

Preemption is rooted in the "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). It comes in three forms: express preemption, field preemption, and conflict preemption. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013). Express preemption arises "when the text of a federal statute explicitly manifests Congress's intent to displace state law." *Id.* (citation omitted). Field and conflict preemption, on the other hand, are types of implied preemption. Field preemption prohibits state regulation of "conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)). And even where Congress has

not occupied the field, conflict preemption arises when state law conflicts with a federal statute. *Id.* at 1023 (quoting *Crosby*, 530 U.S. at 372). Impossibility preemption—a form of conflict preemption—occurs when "it is impossible for a private party to comply with both state and federal law." *Id.* (quoting *Crosby*, 530 U.S. at 372).

A

The sellers first argue that the sales ban is preempted because it is impossible to comply with both California law and the PPIA. In their view, they cannot comply with the sales ban if federal law requires foie gras to be produced via force feeding. They contend that the sales ban is a mandate that foie gras not include force-fed products and therefore their only option is to withdraw from the market. They then point to the Supreme Court's decision in *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013), to argue that a state law is preempted if it requires producers to stop selling their products.

The PPIA is a federal law that protects consumers by ensuring that "poultry products . . . are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 451. It authorizes the Secretary of Agriculture to prescribe "definitions and standards of identity or composition [f]or articles" within its scope. *Id.* § 457(b).[1] According to the sellers, those

[1] USDA regulations authorize the Administrator of the Food Safety and Inspection Service

> to establish specifications or definitions and standards of

"definitions and standards" require foie gras to be produced by force feeding because the USDA defines foie gras as liver from poultry that has been "specially fed and fattened." They do not find that definition in the text of the PPIA or in a regulation, adopted by notice and comment, with the force of law. But at least one USDA Policy Book, expressly adopted as guidance, defines foie gras as "liver . . . obtained exclusively from specially fed and fattened geese and ducks," and other USDA documents support the proposition that a "specially fed and fattened" bird is one that has been force fed.

Unfortunately for the sellers, the definition of foie gras is beside the point: it is not impossible to produce foie gras in accordance with a USDA Policy Book just because force-fed products cannot be sold in California. Even assuming the USDA guidance requires force feeding, the sellers can still force feed birds to make their products. They just cannot sell those products in California. The sales ban is neither a command to market non-force-fed products as foie gras nor to call force-fed products something different.

---

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).

The dissent contends that our reasoning draws the "production versus sales" distinction that the Supreme Court rejected in *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012). To be sure, the Court has explained that states cannot enact preempted regulations under the guise of a sales ban. *Id.* at 463–64. But this case differs from *National Meat* in at least two important ways. First, *National Meat* was an express preemption case about the "operations" provision in another federal statute. *See id.* at 459–60. Second, the sales ban in this case works "at a remove" from the slaughterhouses implicated in *National Meat*. *See id.* at 467.

National Meat considered a California statute that (1) prohibited the sale of meat from "nonambulatory" animals and (2) required the animals' immediate euthanization. *Id.* at 458–59. Federal law explicitly preempted state regulation of slaughterhouse operations. After examining "how the prohibition on sales operates within [the California statute] as a whole," the Court held that "[t]he idea—and the inevitable effect—of the [sales ban] [wa]s to make sure that slaughterhouses remove nonambulatory pigs from the production process." *Id.* at 463–64. The California law was preempted not because it was a sales ban but because it operated as a "command to slaughterhouses to structure their operations." *Id.*

Here, the sellers invoke only the "ingredient requirements" provision of the PPIA's preemption clause. Of course, regulating how a food product is made could impact its physical composition. But California law is silent on what ingredients are needed to call a product foie gras. The sellers have not argued

that the sales ban affects slaughterhouse operations like the sales ban challenged in *National Meat*. In fact, the Supreme Court differentiated the *National Meat* sales ban from laws like the one in this case. *Id.* at 467. When a sales ban "works at a remove" from the sites and activities directly governed by federal law and does not "reach[] into the slaughterhouse's facilities and affect[] its daily activities," it is not preempted on *National Meat*'s reasoning. *See id.*

That leaves the sellers' argument that the sales ban forces them into the "stop-selling" solution rejected in another Supreme Court case. *See Bartlett*, 570 U.S. at 488. In *Bartlett*, the Supreme Court contemplated a New Hampshire law that allowed design-defect claims against drug manufacturers whose labels had been federally approved. The New Hampshire cause of action effectively required drug manufacturers to provide stronger safety warnings. *Id.* at 475. Meanwhile, federal law prohibited generic drug manufacturers from independently changing their labels. *Id.* New Hampshire law thus imposed a duty on manufacturers *not* to comply with federal law. *Id.* The Court rejected the idea that such impossibility could be resolved by forcing a seller to cease selling its products. *Id.* at 475–76.

Like their argument about *National Meat*, the sellers stretch the Supreme Court's reasoning too far. *Bartlett* does not prohibit states from imposing regulations that might require a manufacturer to withdraw from the market; it merely rejects the "stop-selling" rationale as an escape hatch when state and federal law impose conflicting obligations. If, for

example, federal law required foie gras to be from force-fed birds but California law required foie gras *not* to be from force-fed birds, producers could not comply with both state and federal law. There is no such impossibility here. Even if federal law requires foie gras to be the liver of force-fed birds, California says only that it may not be sold in the state.

In the dissent's view, any state law that prevented a manufacturer from selling its product would be preempted under *Bartlett*. But *Bartlett* has never been read so broadly, as evidenced by the bans upheld in this and at least two other circuits. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015); *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 334–35 (5th Cir. 2007). In fact, federal appellate courts generally apply *Bartlett* only in the products liability context. Confining *Bartlett* to those circumstances makes sense—conflict preemption first requires conflicting obligations under state and federal law. Virtually every instance of conflict preemption could be resolved if a court ordered the affected parties to simply cease their activities; such an order would render impossibility preemption "all but meaningless." *Bartlett*, 570 U.S. at 488.

It is another thing entirely to forbid a state from prohibiting sales just because a federal agency has issued some guidance that addresses some aspect of a product. If that were the case, several state sales bans would be preempted just because federal law touches the product in some way. *See, e.g.*, Mich. Comp. Laws

§ 287.746 (sales ban on battery cage eggs); Colo. Rev. Stat. § 35-21- 203(2)(a) (same); Mass. Gen. Laws ch. 148, § 39 (Massachusetts fireworks sales ban); 15 U.S.C. §§ 1261–1263 (requiring hazardous substances sold in interstate commerce and intended for household use to bear adequate cautionary labels). *Bartlett* says that, when faced with conflicting state tort law and federal law, the courts cannot simply tell manufacturers to withdraw from the market. That proposition does not erase states' authority to prohibit the sale of certain products within their borders.

B

The sellers' contention that it is physically impossible to produce foie gras without force feeding also underlies their express preemption claim. They assert that the sales ban operates as an "ingredient requirement" by prohibiting foie gras as an ingredient in other poultry products (*e.g.*, torchon).

The district court did not abuse its discretion when it denied leave to amend. Even if the sellers' arguments about force feeding are correct, we have already rejected a critical premise of their claim.

In *Canards II*, we concluded that the sales ban is not an "ingredient requirement" preempted by the PPIA. 870 F.3d at 1146–52. We held that force feeding was not an "ingredient requirement" because ingredient requirements refer to "the physical components of poultry products, not the way the animals are raised." *Id.* at 1147–48. We then addressed the argument that the sales ban is functionally a ban on all foie gras. *Id.* at 1149–50. We decided that it

"fail[ed] for two independent reasons." *Id.* at 1149. The first was that nothing in the record showed "that force-feeding is *required* to produce foie gras." *Id.* That reason no longer applies because the record now includes evidence to that effect. But *Canards II* also concluded that "even if section 25982 results in the total ban of foie gras regardless of its production method, it would still not run afoul of the PPIA's preemption clause." *Id.* at 1150.

The sellers urge us to reconsider because they have now established the impossibility of non-force-fed foie gras—an "essential factual premise" missing in the earlier appeal. But these facts are immaterial because our decision in *Canards II* did not depend on that premise and is binding. Even if the sales ban prohibits all foie gras sales, it is not a preempted "ingredient requirement" because federal law

> does not mandate that particular types of poultry be produced for people to eat . . . . Nothing in the federal law or its implementing regulations limits a state's ability to regulate the *types* of poultry that may be sold for human consumption. If foie gras is made, producers must, of course, comply with the PPIA. But if a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate.

Id. at 1150. The sellers do not advance any new argument that could prevail given that holding. *See Chappel v. Lab'y Corp. of Am.*, 232 F.3d 719, 725–26 (9th Cir. 2000) (no abuse of discretion when amendment would be futile).

The dissent calls our *Canards II* decision dicta that we can revisit because the sellers have produced new evidence. Dissent 36–40. But *Canards II* did not rely on the possibility of producing foie gras without force feeding, so the new evidence does not displace our prior decision. As for the dissent's characterization of that decision, *Canards II*'s alternative holding cannot be dismissed as dicta. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."). As a published decision of this court, it controls as law of the circuit. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).[2] The dissent believes "the panel in *Canards II* engaged in flawed analysis," Dissent 28, and new evidence might present a "more difficult question" than the one presented in the sellers' prior petition for certiorari, Dissent 38. Neither is a basis for us to ignore binding precedent. Because another panel has already answered the relevant question, that precedent must be followed unless overruled by a body competent to do so. *Gonzalez*, 677 F.3d at 389 n.4.[3]

---

[2] Moreover, *Canards II*'s decision is law of the circuit, "regardless of whether it was in some technical sense 'necessary' to our disposition of the case." *See Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc).

[3] The dissent also argues that we should go beyond the legislative text to assume California is trying to ban foie gras without explicitly doing so. Our assumption about the sales ban's effect does not assume California's purpose in passing the law. In any event, it is not our place to stray from the text and guess at

C

The sellers also cross-appeal the dismissal of their dormant Commerce Clause claim. They argue that the sales ban is unconstitutional because it (1) impermissibly regulates out-of-state commerce and conduct and (2) unduly burdens interstate commerce.

The dormant Commerce Clause stems from our understanding that the Commerce Clause "implicitly preempt[s] state laws that regulate commerce in a manner that is disruptive to economic activities in the nation as a whole." *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1026 (9th Cir. 2021), *cert. granted*, No. 21-438, 2022 WL 892100, at *1 (Mar. 28, 2022) (citing *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018)). "[T]wo primary principles . . . mark the boundaries of a State's authority." *Wayfair*, 138 S. Ct. at 2090. "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Id.* at 2091. A state law may also violate the dormant Commerce Clause when it (1) has extraterritorial effects, *Nat'l Pork Producers Council*, 6 F.4th at 1026 (citing *Wayfair*, 138 S. Ct. at 2091), or (2) regulates activities that are "inherently national or require a uniform system of regulation," *id.* at 1031 (quoting *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019)).

---

lawmakers' intent. "We are governed by laws, not by the intentions of legislators . . . . The law as it passed is the will of the majority . . . *and the only mode in which that will is spoken is in the act itself*." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (internal quotation marks omitted).

State laws that effectively burden only out-of-state businesses (because there are no comparable in-state businesses) are not necessarily discriminatory. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 119–26 (1978). The sellers do not argue against the sales ban on that basis. Instead, they argue that the sales ban is extraterritorial in its "practical effect" and burdens interstate commerce in a way that is "clearly excessive in relation to [its] putative local benefits." *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1149 (9th Cir. 2012) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).[4]

i

The sellers argue that the sales ban is impermissibly extraterritorial because force feeding is banned in California, *see* Cal. Health & Safety Code § 25981, and therefore the sales ban regulates only out-of-state conduct.

Although "[s]tates may not mandate compliance with their preferred policies in wholly out-of-state transactions, . . . they are free to regulate commerce

---

[4] The sellers also argue that California's sales ban regulates inherently national activities. To be sure, foie gras *labeling* is subject to an inherently national or uniform system of regulation; to qualify as foie gras, a product must satisfy USDA standards. But the sellers do not identify federal regulation of foie gras *sales*. Ultimately, federal regulation of one aspect of a good does not establish a uniform system of regulation of all aspects of that good. *See, e.g.*, *Chinatown Neighborhood*, 794 F.3d at 1147 (shark fin sales ban did not interfere with an activity that was inherently national or required a uniform system of regulation, despite federal regulation of fisheries).

and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. 2013). States are thus free to regulate in-state sales without such regulation being unconstitutional for its extraterritorial effect. *See Nat'l Pork Producers Council*, 6 F.4th at 1029 (citing *Rosenblatt*, 940 F.3d at 445). California's sales ban prohibits only in-state sales of foie gras, *Canards I*, 729 F.3d at 949, so it is not impermissibly extraterritorial even if it influences out-of-state producers' conduct.

This conclusion is supported by our reasoning in *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018). In that case, California attempted "to reach beyond [its] borders . . . and control transactions that occur wholly outside of the State after the material in question . . . ha[d] been removed from the State." *Id.* at 615. Although we enjoined enforcement of the law in *Daniels Sharpsmart*, we clarified that we were not concerned about "an attempt . . . to protect California and its residents by applying [state law] to products that are brought into or are otherwise within the borders of the State." *Id.* Unlike the law in that case, the sales ban does not affect transactions outside California.[5]

---

[5] The distinction between in-state and out-of-state regulations is also apparent in cases from other circuits. The Seventh Circuit enjoined enforcement of an Indiana law that directly regulated operations in out-of-state manufacturing plants. *See Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017). And the Fourth Circuit invalidated a law that directly controlled out-of-state transactions. *See Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018).

The sellers also contend that the sales ban unduly burdens interstate commerce. The district court disagreed, determining the sellers had shown no cognizable burden on interstate commerce and recognizing California's legitimate local interest in "public health," *Canards*, 2020 WL 5049182, at *2 n.1, and "[p]reventing animal cruelty," *Canards*, 2020 WL 595440, at *3.

State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Wayfair*, 138 S. Ct. at 2091 (quoting *Pike*, 397 U.S. at 142). Although we have not identified every way a burden can be "clearly excessive," our precedent "preclude[s] any judicial assessment of the benefits of a state law and the wisdom in adopting it unless the state statute either discriminates in favor of in-state commerce or imposes a significant burden on interstate commerce." *Chinatown Neighborhood*, 794 F.3d at 1146 (quotation marks, brackets, and ellipsis omitted).[6]

The sales ban is not discriminatory, so the statute does not impose an undue burden on that basis. *Canards I*, 729 F.3d at 948. And we have rejected the notion that sales bans are inherently unduly burdensome. In *Chinatown Neighborhood*, we held that a California law prohibiting instate shark fin sales did

[6] A state's interest in "prevent[ing] animal cruelty" is a "legitimate matter[] of local concern," even when that cruelty takes place outside the state. *See Chinatown Neighborhood*, 794 F.3d at 1147.

not unduly burden interstate commerce when weighed against California's interest in "prevent[ing] animal cruelty." 794 F.3d at 1147. We are not alone; the Fifth and Seventh Circuits similarly upheld laws banning the sale or importation of horse meat. *Empacadora*, 476 F.3d at 336–37; *Cavel Int'l*, 500 F.3d at 559.

In a final attempt to resurrect their dormant Commerce Clause claim, the sellers assert that California can "convey[] its distaste for foie gras" in less burdensome ways. But the dormant Commerce Clause does not impose a "least burdensome" requirement for state laws. *See Canards I*, 729 F.3d at 953 (quoting *Nat'l Ass'n of Optometrists*, 682 F.3d at 1157) ("'[F]or us to invalidate a statute based on the availability of less burdensome alternatives, the statute would have to impose a significant burden on interstate commerce,' which is not the case here."). We decline the invitation to wade into murky policy waters.

D

For his part, the Attorney General contests two sellers' standing and argues that the sales ban prohibits out-of-state vendors' sales to California buyers, even when order and payment is processed outside the state and the only in-state conduct is third-party delivery to (or transportation by) the consumer. We reject both arguments.

i

The Attorney General challenges the standing of two sellers—the Canadian Association ("Association") and restauranteur Sean "Hot" Chaney—because they have not alleged that they sell (or plan to sell) foie gras

to California buyers. According to the Attorney General, Association members do not directly sell foie gras to California buyers—instead, they sell to out-of-state third-party sellers who then sell to consumers. As for Chaney, the Attorney General argues that the restauranteur does not sell foie gras from outside California and Chaney's purported interest in purchasing foie gras is outside the scope of the declaratory claim.

In cases involving multiple plaintiffs, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1647 (2017). To establish standing, a plaintiff must show that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 816 (9th Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016)).

The Attorney General's challenge fails because the third seller, whose standing he does not contest, has standing to seek declaratory relief. Hudson Valley Foie Gras LLC ("Hudson Valley") is a limited liability corporation that produces foie gras in New York and sells foie gras online. Its website server is located outside California. Purchases are processed by a third-party processor outside California then received at Hudson Valley's bank in New York. Orders are fulfilled and products are delivered to third-party shipping companies in New York facilities. Only then do third-party shippers deliver Hudson Valley's foie gras to

buyers. As a result of the sales ban, Hudson Valley has been forced to stop accepting purchases from any buyer with a California address. In fact, California District Attorneys have threatened prosecution against Hudson Valley if they sell to California consumers. Hudson Valley has therefore alleged a sufficient injury in fact traceable to the Attorney General's enforcement of the sales ban and redressable by a declaratory order clarifying the scope of California law. The district court's declaratory relief describes a group of sales allowed under California law; it does not award damages or afford other relief unique to any plaintiff.

The record also establishes standing for at least one of the challenged sellers. As an organization, the Association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The Association's interest in protecting its members' foie gras sales is germane to its purpose and no claim asserted or relief requested requires member participation. Because Palmex, a member of the Association, has alleged that it sells foie gras in the United States, the Association has standing.[7]

---

[7] Given that two sellers have standing, we need not consider Chaney's.

The Attorney General also makes several arguments about the scope of the sales ban. He contends that the district court should not have used the definition provided in the California Uniform Commercial Code (UCC) to permit sales where:

> [1] The Seller is located outside of California[;]
>
> [2] The foie gras being purchased is not present within California at the time of sale[;]
>
> [3] The transaction is processed outside of California (via phone, fax, email, website, or otherwise)[;]
>
> [4] Payment is received and processed outside of California[;] and
>
> [5] The foie g[r]as is given to the purchaser or a third-party delivery service outside of California, and "[t]he shipping company [or purchaser] thereafter transports the product to the recipient designated by the purchaser," even if the recipient is in California.

Canards, 2020 WL 5049182, at *5. In the Attorney General's view, the sales ban prohibits sales to California consumers regardless of seller location. But because the ban prohibits certain products from being "sold in California," the question is not where a seller is located but where a sale occurs.

The California Supreme Court has not yet decided what constitutes a sale under the sales ban, so we must predict how it would answer the question. When

interpreting state law, California courts look "to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction." *Riverview Fire Prot. Dist. v. Workers' Comp. Appeals Bd.*, 28 Cal. Rptr. 2d 601, 605 (1994).

In a different case involving this sales ban, the California Court of Appeal looked to the UCC to define "sale." *Animal Legal Def. Fund v. LT Napa Partners LLC*, 184 Cal. Rptr. 3d 759, 771, 773 (2015) (citing Cal. Com. Code § 2106 (sale occurs where title passes)); *see also* Cal. Com. Code § 2401(2). It explained that the UCC provided "a reasonable general definition" for the term, *Animal Legal Def. Fund*, 184 Cal. Rptr. 3d at 771 (citing *Merriam-Webster's Collegiate Dictionary* 1028 (10th ed. 2001)), and noted that another California law also defined "sale" as a transaction "in which title . . . is passed," *id.* at 772.

The Attorney General contends that this definition does not apply because the UCC cannot "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." Cal. Com. Code § 2102. But the sales ban does not define "sale," and the UCC definition cannot "impair or repeal" language that does not exist.

In the Attorney General's view, other parts of the Health and Safety Code suggest a sale occurs when a consumer takes possession of the product. He first points to California's Shelled Egg Laws, which ban the in-state sale of shelled eggs from hens confined in a manner that violates specified animal care standards. Cal. Health & Safety Code § 25996. We have recognized

that California's Shelled Egg Laws apply to "all eggs sold in California"; the Attorney General contends that this language proves that out-of-state sellers are not excluded from the sales ban. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 650 (9th Cir. 2017). To be sure, both the sales ban and the Shelled Egg Laws apply to all sales in California. But this point confuses the issue: the district court's order does not exempt out-of-state sellers from California's sales ban. *Canards*, 2020 WL 5049182, at *5. Instead, it identifies out-of-state transactions that are not prohibited by California law. *Id.*

The Attorney General next argues that the district court erred by comparing the sales ban to other sections of California's Health and Safety Code. In particular, he argues that the district court improperly used those sections to infer that California did not reject the UCC definition.

After noting that the UCC does not override a provision of the sales ban, the district court recognized that California has defined sales in other sections of the Health and Safety Code. *Canards*, 2020 WL 5049182, at *3–4 (discussing Cal. Health & Safety Code § 25991(o)). To be sure, the *expressio unius* canon does not require us to reject definitions provided in parallel statutes just because they are absent from the sales ban. But neither does it require us to use those definitions. The sales ban does not define sales and, absent language to the contrary, we follow the California Court of Appeal, *see Animal Legal Def. Fund*, 184 Cal. Rptr. 3d at 773, and look to the reasonable definition provided by the UCC.

The Attorney General also contends that the district court's focus on payment processing imposes limitations not found in the sales ban's text or legislative history. In particular, he argues that "processing" does not determine the place of a sale and that, in the internet age, any sales ban permitting sales "processed" outside the state could be easily evaded. It is true that the sales ban does not mention "processing" of payments and transactions; it prohibits sales in California, regardless of seller location, payment processing, consumption, or possession. But the district court's language about "processing" merely limits its declaratory judgment to the facts presented and describes a category of transactions that occur outside California. It does not add conditions to what is prohibited by California law. And although the Attorney General correctly notes that the consummation of a sale provides "a sufficient nexus . . . to be treated as a local transaction taxable by th[e] State," that language discusses limitations on state and local taxation, not what constitutes a "sale" under state law. *See Wayfair*, 138 S. Ct. at 2092 (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995)).

The Attorney General finally argues that the declaratory judgment contradicts the legislature's intent in enacting the sales ban (*i.e.*, to "discourage the consumption of products produced by force feeding birds and prevent complicity in a practice . . . deemed cruel to animals," *Canards I*, 729 F.3d at 952), so any reasonable interpretation of the sales ban must prohibit direct sales to California buyers. But this argument is contradicted by the statutory text; there is

no indication that the legislature intended to further its goal by banning consumption and possession of foie gras. Policymakers' statements about force feeding and foie gras point to the legislature's general intent to prevent complicity in animal cruelty or California's position that a ban on force-fed products does not amount to a ban of foie gras. The sales ban presumably reflects the legislature's balancing of those goals with consumer costs. In any event, we agree with the California Court of Appeal's conclusion that the UCC provides a "reasonable" definition of "sale" for purposes of the sales ban. *Animal Legal Def. Fund*, 184 Cal. Rptr. 3d at 771.

IV

In conclusion, California's sales ban is neither preempted nor impermissible under the dormant Commerce Clause. The sellers have alleged standing to assert their declaratory judgment claim and the district court's order properly permits out-of-state sales.

AFFIRMED.

VANDYKE, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that the district court properly interpreted California Health & Safety Code § 25982 to permit sales from out-of-state vendors and that there is no standing issue preventing declaratory judgment, and therefore join those sections of the majority opinion. But I cannot join the majority in rejecting Plaintiffs' impossibility preemption claim and

upholding the district court's denial of Plaintiffs' motion to add an express preemption claim.[1]

California has prohibited the sale of any bird liver if that bird was force-fed, and the *only* way to make foie gras that complies with federal requirements is through force-feeding. This forces Plaintiffs into an impossible situation, and one in which the only solution is to stop selling any foie gras in California. Although the majority deems this solution sufficient, the Supreme Court has held that market participants cannot be forced to "stop selling" when it is impossible to comply with conflicting state and federal requirements, and the majority's attempt to free itself from this clear command is unavailing.

The majority also rejects Plaintiffs' argument that § 25982 operates as an impermissible "ingredient requirement" that conflicts with federal requirements governing how to produce foie gras. The majority does so by relying on this court's previous ruling in an earlier iteration of this litigation. *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017) (*Canards II*). But the *Canards II* decision explicitly depended on multiple assumptions about facts or issues not proven in the record at that time—including whether foie gras could be produced without force-feeding—and Plaintiffs have now presented undeniable evidence showing those assumptions were mistaken. Relying on those assumptions, the panel in *Canards II* engaged in

[1] Because I would hold that § 25982 is preempted by federal law, I would not reach Plaintiffs' dormant Commerce Clause challenge.

flawed analysis to deny Plaintiffs' claim by assuming that the process by which the birds are fed has no effect on the physical composition of the end product. That is simply not true on our record, as Plaintiffs have offered an abundance of evidence to prove that force-fed bird livers are chemically and physically different than non-force-fed bird livers in numerous respects. All that notwithstanding, the majority still chooses to bind itself to *Canards II*. Because that is not required by our caselaw and ignores essential developments in the litigation of this matter, I respectfully dissent.

I. Impossibility Preemption

The preemption doctrine is a natural outworking of our constitutional structure. As the Supremacy Clause makes clear, "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Therefore, "[w]here state and federal law directly conflict, state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (internal quotation marks and citation omitted). Relevant for our purposes, "state and federal law conflict where it is 'impossible for a private party to comply with both state and federal requirements.'" *Id.* at 618 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

Plaintiffs argue that it is impossible to sell foie gras in California in a way that is consistent with both the Federal Poultry Products Inspection Act (PPIA) and § 25982. The PPIA was enacted to ensure quality and uniformity among poultry products, and authorizes the Secretary of Agriculture to set forth "definitions and

standards" of articles governed by the PPIA. *See* 21 U.S.C. § 457(b). The USDA has defined foie gras as "liver . . . obtained exclusively from specially fed and fattened geese and ducks," *see* UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD STANDARDS AND LABELING POLICY BOOK (2005), and—as the majority acknowledges—has elsewhere explained that "specially fed and fattened" means force-fed. It is important to recognize that the federal government's definition of foie gras is inherently *process-based*. Compliance with the federal definition of foie gras inevitably turns on *how* the foie gras was made. If, for example, a company invented some method of modifying a bird liver posthumously so that it otherwise mirrored foie gras in every respect, that company would still *not* be able to label it as foie gras according to the federal requirements, because that bird was not "specially fed and fattened" as required by the federal definition of "foie gras."

This process-based definition is neither unique nor surprising. The most commonplace example of this is probably the USDA's guidelines around organic foods. As the USDA explains, "[t]he organic standards *are process-based*, meaning they establish the rules for an entire system of farming that follows a product from its beginnings on the farm all the way to retail." UNITED STATES DEPARTMENT OF AGRICULTURE, ORGANIC 101: WHAT ORGANIC FARMING (AND PROCESSING) DOESN'T ALLOW (2017) (emphasis added). As with foie gras, one cannot designate something as organic by examining

only the end product, but rather must also know the process by which that product was produced.[2]

Once foie gras' federal definition is properly understood, the tension with California's § 25982 becomes clear. Section 25982 is also a statute regulating the *process* of how foie gras must be made if it is to be sold in the state. Again, § 25982 forbids the sale of any product in California "if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." There is little dispute that this statute regulates process. *See Canards II*, 870 F.3d at 1144 ("California's legislature intended to ban not foie gras itself, but rather the practice of *producing foie gras by force-feeding*.") (emphasis added); *see also* Signing Message of Governor Arnold Schwarzenegger, Sen. Bill 1520, 2003–2004 Reg. Sess. (Sept. 29, 2004) ("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."). Looking at the statutory text, I see no reason to dispute this understanding of the statute as articulated by the *Canards II* panel or California's then-governor. California's statute is therefore best understood as limiting acceptable foie gras to non-force-fed foie gras.

In short, the federal government has defined foie gras to mean specially fed and fattened (i.e., force-fed) goose and duck liver, while California has banned the

---

[2] To be clear, the process by which foie gras is created *does also* in fact affect the end product—something that may or may not be true to the same extent with all organic foods. *See infra* Section II.

sale of any foie gras produced by force-feeding the bird. This means there is no universe in which Plaintiffs can comply with both the PPIA and § 25982, because there is no universe in which Plaintiffs could follow California's requirement for acceptable foie gras while also meeting the federal definition of what foie gras is. And therefore, "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law . . . which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal quotation marks and citation omitted).

Perhaps what is most puzzling about the majority opinion is that my colleagues seem to agree with much of what I just explained. They write: "If, for example, federal law required foie gras to be from force-fed birds but California law required foie gras *not* to be from force-fed birds, producers could not comply with both state and federal law." Unfortunately, "[w]hat the [majority] does not see is that *that is this case* . . . ." *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 490 (2013).

As explained above, both premises of the majority's not so hypothetical hypothetical are true. The federal definition does in fact require "foie gras to be from force-fed birds," and the California statute does in fact require "foie gras *not* to be from force-fed birds." But despite these two realities, the majority still claims "[t]here is no such impossibility here. Even if federal law requires foie gras to be the liver of force-fed birds, California says only that it may not be sold in the state." The majority seemingly relies on the idea that there is no preemption issue because the PPIA

regulates the process by which foie gras is made, while § 25982 is a sales ban.

But this line of reasoning has already been rejected by the Supreme Court. In *National Meat Association v. Harris*, the Supreme Court held that a California law banning the *sale* of nonambulatory pigs (pigs that cannot walk) was preempted by the Federal Meat Inspection Act (FMIA), which regulated the *process* by which slaughterhouses handle and slaughter animals for consumption. 565 U.S. 452, 455 (2012). The Supreme Court determined that the sales ban was preempted because it "imposes additional or different requirements on swine slaughterhouses" by forcing them to treat nonambulatory pigs differently than under federal law. *Id.* at 460. The same is true here, since § 25982 demands foie gras producers treat the birds differently than what the PPIA requires.

The majority distinguishes this case from *National Meat* by arguing in part that the "sales ban in this case works 'at a remove' from the slaughterhouses implicated in *National Meat*." But this argument has it backwards; § 25982 is in fact *more* intrusive on the foie gras sellers than the slaughterhouses in *National Meat*. The Supreme Court in *National Meat* examined the statute in question, which facially banned only the *sale* of nonambulatory pigs, and concluded that "[t]he idea—and the inevitable effect—of the provision is to make sure that slaughterhouses remove nonambulatory pigs from the production process . . . ." *Id.* at 464. The Supreme Court invalidated California's statute because the "sales ban" actually functioned "as a command to slaughterhouses to structure their

operations in the exact way the [statute] mandates." *Id.* There is no such subterfuge here. California's § 25982 *overtly* regulates the process by which saleable foie gras can be produced. But the majority today rewards California for doing explicitly what the Supreme Court faulted it for doing implicitly: imposing state requirements on a process regulated by the federal law.

The majority also argues that *National Meat* is inapplicable because the statute here does not directly govern any aspects of the process regulated by federal law and "does not 'reach[] into the slaughterhouse's facilities and affect[] its daily activities'" because it bans only the sale of non-force-feed birds. But this argument is no different than the one the Supreme Court considered and rejected in *National Meat*. Defenders of California's law in *National Meat* argued that there was no preemption because the "ban on sales does not regulate a slaughterhouse's 'operations' because it kicks in only after they have ended: Once meat from a slaughtered pig has passed a post-mortem inspection, the Act 'is not concerned with whether or how it is ever actually sold.'" *Id.* at 463 (citation omitted). The Supreme Court disagreed, reasoning that to accept this argument would mean that "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 464. The Supreme Court also referenced another preemption case to conclude "it 'would make no sense' to allow state regulations to escape preemption because they addressed the purchase, rather than manufacture, of a federally regulated product." *Id.* (citing *Engine Mfrs.*

Ass'n. v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 255 (2004)).

National Meat makes clear that a state cannot sidestep a preemption issue simply by banning the sale of a certain good produced a certain way instead of directly banning the process itself. *National Meat*'s practical rule would seem to apply a fortiori where the process by which the product is made is precisely how federal law *defines* the product that the state is attempting to partially ban. This is exactly what California has done with § 25982, and therefore § 25982 should be treated the same as California's statute in *National Meat*.

Building off this logic, the majority leaves the sellers with one unenviable path forward: "[t]hey just cannot sell those products in California." The problem with this supposed solution is that it too has already been flatly rejected by the Supreme Court. In *Mutual Pharmaceutical Company v. Bartlett*, the Supreme Court examined a New Hampshire law that effectively required Mutual Pharmaceutical to offer a stronger warning label for a certain drug. 570 U.S. 472, 475 (2013). Mutual argued that the New Hampshire law was preempted by the Federal Food, Drug, and Cosmetic Act, which prohibited Mutual from changing its drug label. *Id.* Given the impossibility of complying with both the federal and state law, the First Circuit offered the same solution the majority offers today: "Mutual should simply have pulled [the drug] from the market in order to comply with both state and federal law . . . ." *Id.* The Supreme Court emphatically rejected this idea. "We reject this 'stop-selling' rationale as

incompatible with our preemption jurisprudence." *Id.* at 488. Again, "if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless.'" *Id.* (citation omitted). And finally:

> The incoherence of the stop-selling theory becomes plain when viewed through the lens of our previous cases. In every instance in which the Court has found impossibility preemption, the 'direct conflict' between federal-and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.

Id.

The majority seeks to avoid this head-on collision with *Bartlett* by asserting that *Bartlett* "merely rejects the 'stop-selling' rationale as an escape hatch when state and federal law impose conflicting obligations." But even this narrow reading of *Bartlett* squarely governs the case before us, since the stop-selling rationale is in fact being used as the escape hatch to avoid the conflict between state and federal requirements governing the production of foie gras. And as our caselaw makes clear, the preemption doctrine is implicated *whenever* a state and federal law conflict. *Id.* at 490; *see also Maryland v. Louisiana*, 451 U.S. 725, 728 (1981) ("It is basic to [the Supremacy Clause] that *all* conflicting state provisions be without effect.") (emphasis added).[3]

---

[3] The majority also argues that under my reading of *Bartlett*, "any state law that prevented a manufacturer from selling its product would be preempted under *Bartlett*." My position is in fact far

Ultimately, the PPIA and § 25982 require foie gras to be produced through mutually exclusive and irreconcilable methods. When this conflict arises, the constitutional controversy is not solved simply by saying the regulated entity should stop selling. Rather, the Constitution demands that the state law yield to federal law, and that is what is required here.

II. Express Preemption

The harm in rejecting Plaintiffs' impossibility preemption claim is compounded by the fact that the majority also upholds the district court's denial of Plaintiffs' motion for leave to add a new express preemption claim. The PPIA's preemption clause ensures 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 . . . ." 21 U.S.C. § 467e. In *Canards II*, Plaintiffs argued that California's ban on the sale of force-fed birds operated as an "ingredient requirement" and was thus preempted by the PPIA. The *Canards II* panel disagreed, holding that "'ingredient requirements' pertain to the physical components that comprise a poultry product, not animal husbandry or feeding practices." *Canards II*, 870 F.3d at 1148.

---

narrower than the majority alleges. My argument is *not* that the states cannot ban the sale of a product if that product is regulated in any way imaginable by the federal government; rather, my argument is that the state cannot create an irresolvable conflict with federal law over how a product should be produced—a proposition firmly supported by *National Meat* and *Bartlett*.

Both the district court and the majority today base their decisions largely on the fact that, because *Canards II* "already rejected a critical premise of their claim," plaintiffs are bound by that decision under the "law of the case" doctrine. "[U]nder the 'law of the case' doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) (citation omitted). However, "[t]he doctrine is discretionary, not mandatory." *Id.* And our circuit has explained that one situation where the law of the case doctrine should not bind a later panel is when "substantially different evidence was adduced at a subsequent trial." *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995). An abundance of new evidence has been produced in this case since *Canards II*, and therefore this panel should not handcuff itself to a prior, and now outdated, ruling.

Most importantly, the *Canards II* panel found that "nothing in the record before us shows that force-feeding is *required* to produce foie gras." *Canards II*, 870 F.3d at 1149. Unlike in *Canards II*, Plaintiffs in the record before us now have demonstrated that force-feeding *is* required to produce foie gras. This is critical because, as the United States Solicitor General observed in his brief before the Supreme Court recommending that the Supreme Court *not* grant review in *Canards II*, "[i]f in fact Section 25982 did operate to make unavailable in the State any poultry products containing foie gras—or perhaps a particular type of foie gras that was a materially distinct substance, physically or chemically—it would present

a more difficult question."[4] Brief for the United States as Amicus Curiae at 14–15, *Canards II*. But the Solicitor General went on to recommend that because the Plaintiffs in *Canards II* have not "established that liver for foie gras cannot be produced by a method other than force-feeding the geese or ducks," there was no need to "resolve this difficult question" at that point. *Id.* at 15–16.

Ignoring that this "more difficult question" is now presented to this panel for the first time in this case, the majority still finds the holding in *Canards II* binding because the *Canards II* panel stated that "even if section 25982 results in the total ban of foie gras *regardless of its production method*, it would still not run afoul of the PPIA's preemption clause." *Canards II*, 870 F.3d at 1150 (emphasis added). But California's elected officials repeatedly emphasized what is also crystal clear from the text of § 25982—that it does not ban foie gras "*regardless of its production method*." Section 25982 is concerned *only* with the "production method" for foie gras, so *Canards II*'s passing

---

[4] The *Canards II* panel's conclusions appear to have been inextricably tied to its now-inapt factual understanding that foie gras could be produced without force-feeding. During oral argument, many of the questions centered around whether force-feeding was the exclusive means of producing foie gras. One of our colleagues asked Plaintiffs' counsel, "for us to agree with you, we have to agree that the only way that this product can be served in California is through force-feeding, there is no other way to do it?" Plaintiffs' counsel responded, "I think if you agree with that, then it's automatically preempted and there's not even a question." Oral Arg. at 32:00–32:11, *Canards II*, https://www.youtube.com/watch?v=WJerm_vEbE0&t=1785s.

statement about a hypothetical situation present in neither *Canards II* nor our case cannot somehow control our analysis here.[5]

The record in our case is unambiguous: California purports to ban only *some* foie gras, and that ban is entirely tied to the production method for that foie gras. As mentioned earlier, numerous California officials stressed this point at every stage of § 25982's deliberation and ratification. Even the Senator who authored the bill stated as much, declaring that § 25982 "has nothing to do . . . with banning foie gras," but rather only preventing the "inhumane force feeding [of] ducks and geese." *Id.* at 1144. California itself reinforces this interpretation in its briefing before the court, repeatedly asserting that § 25982 is not a total foie gras ban.

The problem is not that California has directly enacted a "total ban of foie gras"—no one argues that it has. The problem is that California has attempted to ban only one particular production method for foie gras (force-feeding), but that one production method is also precisely how federal law defines the ingredient foie gras, and there is no other way to make foie gras. That express preemption claim was never squarely

---

[5] The majority argues that my position requires the panel to "ignore binding precedent," but this misses the point. First, the majority transforms the law of the case doctrine from a discretionary doctrine to a categorical command in a way foreign to our own caselaw. *See, e.g.*, *Merritt*, 932 F.2d at 1320. But more importantly, my argument is *not* that we should disregard *Canard II* as non-binding dicta; my argument (as explained below) is that *Canards II*'s dicta is simply not applicable here.

addressed in *Canards II*, because *Canards II* expressly assumed that force feeding was not the only way to produce foie gras. Plaintiffs should not be barred from having it addressed in the first instance now.

The majority similarly errs by relying on the *Canards II* dicta about whether a state can enact a "total ban" on some food product. That dicta may very well be correct; perhaps California could directly ban all foie gras if it so chose. *See Canards II*, 870 F.3d at 1150 (citing *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007) (upholding a total ban on horse meat); *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007) (same)). But it is also completely irrelevant to this case. As explained, the record is unmistakable that California has not attempted to enact a total ban on foie gras like some states did with horse meat. And the fact that California might have the authority to *directly* ban all foie gras is factually and legally distinct from the question that Plaintiffs seek to present on remand in this case: whether California can attempt to ban *some* foie gras in a way that directly conflicts with the federal definition of what foie gras is, particularly when that is also the only way to make foie gras.

The majority seems to assume that if § 25982 would be constitutional if it was an *outright* foie gras ban, then it must also be constitutional if it is anything less stringent. But in constitutional law, the greater power often does not include the lesser power. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) ("[W]e think it equally clear that [Rhode Island's] power to ban the sale of liquor entirely does

not include a power to censor all [liquor] advertisements . . . . As the entire Court apparently now agrees, the [greater includes the lesser] statements . . . on which Rhode Island relies are no longer persuasive."). Here, the fact that California might be able to directly ban foie gras altogether does not control whether it can enact an attempted partial ban that runs headlong into the federal definition of how foie gras is defined.[6]

---

[6] The majority's rejection of Plaintiffs' preemption claims also has the unfortunate side effect of undermining political accountability. As California argued in its opening brief, the "Legislature enacted Section 25982 in part to discourage the consumption of force-fed foie gras." But the statute was obviously meant to discourage only the consumption of foie gras *produced a certain way*; it was not a ban on foie gras altogether. There could be numerous reasons why California's elected officials opted not to enact a total prohibition, including political compromise, lack of support for a direct total ban, countervailing considerations, etc. But the majority today ignores California's *limited* goal—clear from the face of § 25982 and reinforced by California's political branches at every turn. It instead analyzes the statute as if its conflict with federal law, and the effect of that conflict, was built directly into the state statute itself, so that the state statute *itself* is a total ban. In doing so, the majority disregards a key tenet of statutory interpretation: that "that the law's 'purpose,' properly understood, embodies not merely a statute's substantive ends (its 'ulterior purposes'), but also [the legislature's] specific choices about *the means* to carry those ends into effect (its 'implemental purposes')." John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 115 (2011) (footnote omitted). And in morphing this statute into something the legislature did not enact, the majority encourages future short-circuiting of the democratic process by the political branches (whether intentional or not). California's elected officials may be able to pass an outright foie gras ban if they desired, but they should be required to actually enact such a law and be held politically accountable for that decision. "When [the legislature]

Put simply, the panel in *Canards II* reached its conclusion by relying on two assumptions: (1) there were other methods for producing foie gras besides force-feeding; and (2) even if § 25982 was hypothetically a complete ban unrelated to production methods, it would still be constitutional. Neither of those assumption apply to the case before this panel, which presents a fact-pattern that the *Canards II* panel clearly *did not* consider—where force-feeding is

---

itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018). California's voters have been denied the opportunity to do that here. The voters were repeatedly told § 25982 was not a total ban on foie gras and have presumably made their political decisions accordingly. But the majority's conclusion today blesses an outcome that the political officials may not have had the political will to enact, and in doing so, denies the people of California the ability to "know who to credit or blame" for the fact that they not only cannot buy foie gras from force-fed ducks, but they cannot buy any foie gras at all. Is that because of California's attempted *partial* ban on foie gras, or because of the federal definition of foie gras? California voters should not have to speculate who is to blame for their deprived palate in this circumstance, because the direct conflict between the state and federal laws about how foie gras is produced should mean that the state law is preempted.

The majority's takeaway from this argument is that I am advocating we "should go beyond the legislative text to assume California is trying to ban foie gras without explicitly doing so." Again, the majority has it exactly backwards. The argument throughout my dissent is that the *legislative text* was clear: California enacted a law regulating the process by which foie gras was made, *not* an outright sales ban. A simple reading of that statute, not any divination of the lawmaker's intent, is the only foundation needed to sustain my view.

the only method of production *and* § 25982 is not a complete ban on foie gras. Because *Canards II* did not address this situation, it is yet another reason why the rule of the case doctrine does not apply. *See Hegler*, 50 F.3d at 1475 ("Although the doctrine applies to a court's explicit decisions as well as those issues decided by necessary implication, it clearly does not extend to issues an appellate court did not address.") (citation omitted).

Once it is recognized that *Canards II*'s express preemption ruling was based on a factual record very different than the one *before us*, we must examine if § 25982 does in fact impermissibly add an ingredient requirement that conflicts with federal law. On the record before it, the *Canards II* panel argued the "ordinary meaning" of "ingredient" and the "statutory scheme as a whole" proves that the "'ingredient requirements' pertain to the physical components that comprise a poultry product, not animal husbandry or feeding practices." 870 F.3d at 1148. But the expanded record in this case now shows that framing to be a false dichotomy. As Plaintiffs have now established, feeding practices *do in fact* affect the physical components of foie gras. The liver of a force-fed duck will be up to ten times larger, lighter in color, have a higher ratio of saturated fatty acids, as well as have a different texture, taste, and smell than the liver of a non-force-fed duck. One doesn't need to be a chemist to see the obvious differences between the two:

(non-force-fed liver) **(force-fed liver)**

So while *Canards II* may (or may not) have been correct to say that there is no physical difference "between regular chicken and cage-free chicken," *id.* at 1149, the same certainly cannot be said about "regular" duck liver and force-fed duck liver.

Given all the new evidence presented to this panel for this case, in addition to the outdated assumptions and erroneous reasoning offered in *Canards II*, I see no reason to bind ourselves to its conclusion on express preemption. I would therefore reverse the district court and allow Plaintiffs to add their express preemption claim.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:12-cv-05735-SVW-RZ

[Filed July 14, 2020]

Association des Eleveurs de Canards et d Oies du Quebec et al	)
	)
v.	)
	)
Kamala J Harris et al.	)

CIVIL MINUTES - GENERAL

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION [215],

DENYING DEFENDANTS' MOTION TO DISMISS [214], AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [216]

Plaintiffs have moved for reconsideration of this Court's previous Order, dkt. 212, and for summary judgment on their first cause of action for declaratory relief. Defendants have again moved to dismiss the complaint and opposed both the summary judgment and reconsideration motion. For the reasons provided below, the Court GRANTS Plaintiffs' motion for summary judgment but DENIES Plaintiffs' motion for reconsideration. Defendants' motion to dismiss is DENIED.

I. Background

The facts of this case have been outlined extensively in this Court's three previous Orders and in two appellate Opinions from the Ninth Circuit. *See Ass'n Des Éleveurs De Canards et D'Oies Du Québec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2012 WL 12842942, at *1 (C.D. Cal. Sept. 28, 2012) ("*Canards District I*"), *aff'd, Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) ("*Canards I*"); *Ass'n des Eleveurs de Canards et D'Oies du Quebec v. Harris*, 79 F. Supp. 3d 1136, 1138 (C.D. Cal. 2015) ("*Canards District II*"), *rev'd in part, vacated in part sub nom. Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017) ("*Canards II*"); *Ass'n des Eleveurs de Canards et d Oies du Quebec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2020 WL 595440 (C.D. Cal. Jan. 14, 2020) ("*Canards District III*").

In 2012, California enacted California Health and Safety Code § 25982 ("§ 25982"), which states in pertinent part: "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." Force feeding is defined as "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily. Force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird's esophagus." Cal. Health & Safety Code § 25980. Most recently, this Court denied Plaintiffs' motion for summary judgment and granted Defendants' motion to dismiss with prejudice. *Canards District III*, 2020 WL 595440, at *6. The Court also denied Plaintiffs' motion for declaratory relief without prejudice and gave Plaintiffs another opportunity to request declaratory relief based on more specific factual allegations. Plaintiffs have now moved for reconsideration of this Court's dormant Commerce Clause analysis, and moved for declaratory relief based on a specifically alleged factual scenario.

II. Motion for Reconsideration

In two of this Court's previous three Orders, the Court concluded that § 25982 did not violate the dormant Commerce Clause. *See Canards District I*, 2012 WL 12842942, *aff'd*, 729 F.3d 937; *Canards District III*, 2020 WL 595440, at *2–3. As previously noted, "the Ninth Circuit has observed that most regulations that run afoul of the dormant Commerce Clause 'do so because of discrimination'; that is, they 'impose disparate treatment on similarly situated

in-state and out-of-state interests.'" *Canards District I*, 2012 WL 12842942, at *7 (quoting *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1150 (9th Cir. 2012)). The Ninth Circuit affirmed this decision, holding that "Plaintiffs failed to raise serious questions that § 25982 imposes a substantial burden on interstate activity." *Canards I*, 729 F.3d at 952. In *Canards District III*, based on nearly identical arguments but a more-complete factual record, this Court again concluded that § 25982 did not discriminate against out-of-state commerce and did not present any plausible burden on interstate commerce. *Canards District III*, 2020 WL 595440, at *2–4.

Plaintiffs move for reconsideration based on a recent ruling in *North America Meat Institute v. Becerra*, No. 19-CV-08569-CAS-FFMX, 2020 WL 919153 (C.D. Cal. Feb. 24, 2020) ("*NAMI*"). As a threshold matter, Plaintiffs have not met the criteria for reconsideration under Local Rule 7-18:

> In the Central District of California, "a motion for reconsideration may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision."

Doe v. Regents of the Univ. of California, No. 15-CV-02478-SVW-JEM, 2016 WL 11504216, at *4 (C.D. Cal. Dec. 1, 2016) (quoting Local Rule 7-18). The Court did not fail to consider any material facts on the previous record, and, as a fellow district court, the *NAMI* decision does not constitute a change in law.

The decision in *NAMI* also does not present a holding contrary to this Court's previous orders. Considering the merits of Plaintiffs' motion, *NAMI* is readily distinguishable from the current case because *NAMI* explicitly found that discrimination against out of state commerce was plausible based on the complaint. *NAMI*, 2020 WL 919153, at *5 ("NAMI acknowledges that Proposition 12 is facially neutral, but alleges that Proposition 12 nevertheless unconstitutionally discriminates against out of state commerce."). There has never been such a finding in this case. As this Court stated in the previous Order, "Plaintiffs have raised no issue as to whether § 25982 discriminates against out-of-state interests. To the extent § 25982 imposes a burden on commerce (if any), it does so without discriminating against out-of-state commerce." *Canards District III*, 2020 WL 595440, at *2 ("As with the previous complaints, Plaintiffs have raised no issue as to whether § 25982 discriminates against out-of-state interests."). Because there is no plausible burden on interstate commerce, the Court does not need to reach the question of § 25982's in-state benefit.[1] *Canard I*, 729 F.3d at 951–52 ("[A] plaintiff

[1] If the Court were to reach the question of benefits versus burdens, Plaintiffs would still not prevail. Plaintiffs must clear the difficult hurdle of showing the "burden on interstate commerce

must first show that the statute imposes a substantial burden before the court will determined whether the benefits of the challenged law are illusory.") (internal quotation marks omitted). The motion for reconsideration is DENIED.[2]

III. Declaratory Judgment

Finally, Plaintiffs request a declaratory judgment defining the application and scope of § 25982. Dkt. 205 at 13. "A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III, section 2 of the United States Constitution." *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998) (citing *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 239–40 (1937)). Plaintiffs have presented sufficient evidence to demonstrate California intends to prosecute them for violations of § 25982 if Plaintiffs proceed with their proposed course of action. Dkt. 218 at 11–12. Plaintiffs

---

clearly exceed[s] its local benefits," *Canards District I*, 2012 WL 12842942, at *10 (emphasis added), and Plaintiffs have not shown *any* cognizable burden. Defendants have presented evidence that the California legislature intended to discourage consumption of force-fed products in the interest of public health. *Canards I*, 729 F.3d at 952. Because there is no burden, any benefit would not be "clearly exceed[ed]" by Plaintiffs' vacuous showing.

[2] This is the third time this Court has rejected Plaintiffs' dormant Commerce Clause argument (with an intervening affirmation from the Ninth Circuit), *see Canards I, Canards District I, Canards District III*, and Plaintiffs have not substantially altered their argument in each iteration. Accordingly, future argument on this issue without a significant change in the facts or controlling law will subject Plaintiffs to sanctions.

have presented a factual scenario wherein an out-of-state seller[3] ("Seller") fulfills an order "through a website operated by an out-of-state seller who receives and fulfills an order outside California, delivering it to a shipper such as FedEx or UPS to be sent to an address" in California. Dkt. 218 at 2.

Neither § 25982 nor § 25980 define "sale" in their text. Rather than broadly determining how sale is defined in reference to § 25982, the Court's focus is on whether the specific factual scenario presented by Plaintiffs falls within the grasp of the regulation.[4] Of course, the ultimate goal of a declaratory judgment is to provide a clear interpretation of a statute in accordance with the legislature's purpose. *See People v. Prunty*, 355 P.3d 480, 486 (Cal. 2015) (The court's "task in construing the Act, of course, is to ascertain and effectuate the intended legislative purpose."). The Court must determine whether the legislature intended to capture the limited circumstances Plaintiffs present by forbidding birds products that are "the result of force feeding" from being "sold in California." § 25982.

---

[3] The Sellers include the named Plaintiffs: Association Des Éleveurs De Canards et D'oies Du Québec ("Canards"), Hudson Valley Foie Gras ("HVFG"), and Sean "Hot" Chaney. This judgment only pertains to the factual allegations the Sellers have represented to the Court. Dkt. 218.

[4] As Plaintiffs note: "The only question for the Court to answer in order to resolve the parties' dispute is whether § 25982's ban on foie gras products being 'sold in California' somehow also prohibits products sold outside California from even being sent here." Dkt. 218 at 2.

The text of § 25982 is silent as to the possession, importation, or receipt of foie gras within California. Courts in California have looked to the California Uniform Commercial Code (UCC)[5] for the default rule when the statute was silent as to the definition of "sale." *See City of S. San Francisco v. Bd. of Equalization*, 181 Cal. Rptr. 3d 656, 672 (Ct. App. 2014) ("Courts have consistently used section 2401 of the California Uniform Commercial Code to determine when title passes between sellers and buyers."). In that case, the California Court of Appeals determined that "[s]ince the sales at issue in this appeal were negotiated at retailers in a California city but had to be shipped to the California consumer from an out-of-state location, title passed out of state under section 2401[(2)]." *Id.* Although the UCC undisputedly does not override any provision of § 25982, the contested statute does not provide any clear indication that it is intended to prevent sales occurring outside of California from being received in-state if that transaction occurs entirely outside of California.

Contrarily, some sections of California's Health and Safety Code (where § 25982 is located) that do not relate to foie gras specifically define "sale" to more expansively encompass the receipt of goods in California. For example, California Health & Safety

---

[5] The UCC provision states: "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the *seller completes his performance* with reference to the physical delivery of the goods . . . ." Cal. Com. Code § 2401(2) (emphasis added). In the factual scenario presented by Plaintiffs, Sellers complete their performance upon delivery of the goods to the third-party shipper.

Code § 25991(o), which relates to pig products, specifically states that "[f]or purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item." *See also* Cal. Health & Safety Code § 14950(10) ("'Sale' or 'sell' means any transfer, exchange, or barter, in any manner or by any means whatever, or any agreement for these purposes.").[6] There is no such language in § 25982, leading the Court to infer California did not intend § 25982 to be expansively read beyond the traditional understanding of "sold in California." § 25982; *see N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (explaining how the expressio unius canon applies in the context of statutory interpretation).

Both the text and legislative history of § 25982 also support the idea that California did not intend to create a total ban on foie gras. Again, consumption and possession are not mentioned in the statute at all, and all accompanying legislative discussions leading up to the passage of § 25982 suggest that a "total ban" on foie gras was disfavored. Both then-State Senator John Burton, who authored the bill, and then-Governor Schwarzenegger, who signed the bill, stated that § 25982 was not intended as a total ban on foie gras in California. Dkt, 218 at 10.[7] Rather, both the legislative

---

[6] In regard to the sale of smartphones, California's Business and Professional Code also specifically defines "sale" to include importation of products purchased out of state. *See* Cal. Bus. & Prof. Code § 22761(a)(4) ("[O]r the smartphone is sold and shipped to an end-use consumer at an address within the state.").

[7] Plaintiffs present a sworn declaration attesting to these statements based on a review of the video recording of the signing

and executive branches indicated that the focus of the bill was to prevent the cruel practice of force-feeding within California. *Id.*

California's published legislative analysis also supports the contention that the intent of § 25982 is to prevent force-feeding in California, not to create a total ban. "The author's office states that no other livestock product is produced via force feeding, and that it is a cruel and inhumane process that should be banned." California Bill Analysis, S.B. 1520 Sen., 5/06/2004. This appears to reference the banning of the practice of force-feeding in California, but does not suggest a total ban on the receipt of the product. When a product is sold in California, it could be difficult for the regulator to determine whether the force-feeding and slaughter occurred in California or out-of-state. Thus, § 25982 also prevents products that are the result of the force-feeding, wherever it may occur, from being sold in California. As this Court has repeatedly held, § 25982 does not have any extraterritorial effect—the statute cannot prevent animal cruelty from occurring in another state. *Canards District III*, 2020 WL 595440, at *2. Therefore, even though California can regulate what is produced and sold within its own borders, it has no interest in sales occurring outside of California, even if those sales are to a California resident or visitor.

---

of the bill on April 26, 2004. Dkt. 118-5 ¶ 2. Defendant has not contested these facts, and the Court accepts them to be true for the purposes of this motion.

Plaintiffs' primary contention is that, under Defendants' proposed interpretation, § 25982 would constitute a total ban on foie gras against the wishes of the state of California. Although Defendants' reading would not result in a total ban, the Court concludes that Defendants' interpretation substantially overreaches the intent of the regulation. After extensively examining the text and legislative history of the statute, the Court concludes that the legislature did not intend to prevent the factual scenario presented by Plaintiffs. There is no evidence that California intended to completely ban the receipt or possession of foie gras in California, and there is ample evidence that this was not California's intent. Of course, once the foie gras reaches California, it cannot be resold within the state, even if the transaction processes "out of state" via an explicit agreement or otherwise.[8]

This situation does not produce absurd results, as Defendants contest, because there is a logical distinction between conducting a transaction entirely outside of California, while still allowing the fruits of that transaction to be delivered into California (via the purchaser or a third-party), and selling a product *in California*, where the seller or product are present in California at the time of sale. It is more difficult to create a principled distinction between a purchaser who buys foie gras outside of California and personally drives it back into the state (which is undisputedly not

---

[8] No relief is offered, for instance, "to sellers of Hudson Valley's and Palmex's foie gras products who are located *within* California (e.g., restaurants) [who] have been forced to stop selling them to purchasers in California . . . ." Dkt. 218 at 4.

encompassed by § 25982), and a purchaser who buys foie gras outside of California and has it delivered into the state (which Defendants now contest). There is no principled way to distinguish between foie gras purchased out of state and transported into California by the purchaser and that which is delivered by a third party. Whether the purchaser receives the foie gras in California is not closely related to whether the force-feeding or sale occurred in California, which (as discussed above) is what § 25982 intended to ban. Further, the distinction cannot turn on whether the recipient is a California citizen, resident, or visitor without implying broader constitutional principles not briefed or suggested by either party.

Accordingly, the Court concludes the most reasonable interpretation of § 25982, in accordance with the intent of California and the plain language of the statute, does not encompass the factual scenario presented by Plaintiffs. The Court holds that a sale of foie gras does not violate § 25982 when:

- The Seller is located outside of California.
- The foie gras being purchased is not present within California at the time of sale.
- The transaction is processed outside of California (via phone, fax, email, website, or otherwise).
- Payment is received and processed outside of California, and
- The foie gas is given to the purchaser or a third-party delivery service outside of California,

> and "[t]he shipping company [or purchaser] thereafter transports the product to the recipient designated by the purchaser,"even if the recipient is in California.

Dkt. 218 at 5. This judgement is limited to the circumstances described above, and does not encompass situations wherein the Seller is present in California during the sale, or the foie gras is already present in California when the sale is made.

IV. Conclusion

Plaintiffs' motion for reconsideration is DENIED. Plaintiff's motion for declaratory judgment is GRANTED as described above. Defendants' motion to dismiss is accordingly DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. 2:12-cv-05735-SVW-RZ

[Filed July 23, 2020]

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, a Canadian nonprofit corporation; HVFG, LLC, a New York limited liability company; SEAN "HOT" CHANEY, an individual;	)
Plaintiffs,	)
– against –	)
XAVIER BECERRA, in his official capacity as Attorney General of California;	)
Defendant.	)

JUDGMENT

For the reasons stated in the Court's order of July 14, 2020 (Dkt. 227), and in light of the disposition of Plaintiffs' other claims dismissed without leave to

amend pursuant to the Court's order of January 14, 2020 (Dkt. 212), the Court hereby enters JUDGMENT in favor of Plaintiffs on the first cause of action for declaratory relief in accordance with the Court's order of July 14, 2020.

Dated: July 23, 2020 s/_____
Stephen V. Wilson
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:12-cv-05735-SVW-RZ

[Filed January 14, 2020]

Association des Eleveurs de Canards et d Oies du Quebec et al	)
	)
v.	)
	)
Kamala J Harris et al.	)

CIVIL MINUTES - GENERAL

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [202] AND

GRANTING DEFENDANT' MOTION TO DISMISS [190]

Plaintiffs have moved for partial summary judgment on their second cause of action, impossibility preemption, and in the alternative, on their first cause of action for declaratory relief. Defendant has moved to dismiss the complaint.

I. FACTS

The facts of this case have been outlined extensively in this Court's two previous Orders and in two subsequent appellate Opinions from the Ninth Circuit. *See Ass'n Des Éleveurs De Canards et D'Oies Du Québec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2012 WL 12842942, at *1 (C.D. Cal. Sept. 28, 2012) ("*Canards District I*"), *aff'd sub nom. Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) ("*Canards I*"); *Ass'n des Eleveurs de Canards et D'Oies du Quebec v. Harris*, 79 F. Supp. 3d 1136, 1138 (C.D. Cal. 2015) ("*Canards District II*"), *rev'd in part, vacated in part sub nom. Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017) ("*Canards II*").

To briefly recap, in 2012, California enacted California Health and Safety Code § 25982 ("§ 25982"), which states in pertinent part: "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." Force feeding is defined as "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily. Force feeding methods include, but are not limited to,

delivering feed through a tube or other device inserted into the bird's esophagus." § 25980. Since its inception, Plaintiffs have challenged the law as unconstitutional under various theories. Plaintiffs now move the Court to grant partial summary judgment finding the law unconstitutional as preempted by the Poultry Products Inspection Act (PPIA), or in the alternative, a declaratory judgment finding § 25982 does not apply to sales of foie gras with delivery into California when the title passes outside the state. Defendant has moved to dismiss the complaint in its entirety.

II. PROCEDURAL HISTORY

In *Canards I*, 729 F.3d 937 (9th Cir. 2013), the Ninth Circuit affirmed this Court's denial of a preliminary injunction of § 25982. The Ninth Circuit agreed, among other issues, that § 25982 was not unconstitutionally vague and did not violate the dormant Commerce Clause. *Id.* In the subsequent decision on the second amended complaint, this Court concluded § 25982 was an "ingredient requirement" as used in PPIA and therefore expressly preempted by PPIA. *Canards District II*, 79 F. Supp. 3d at 1138. The Ninth Circuit reversed, concluding § 25982 was not an ingredient requirement and was also not impliedly preempted under the doctrines of field or obstacle preemption. *Canards II*, 870 F.3d 1140 (9th Cir. 2017). Plaintiffs now bring their Third Amended Complaint ("TAC") on the novel theory § 25982 is preempted under the doctrine of impossibility preemption and the not-as-novel theory that § 25982 violates the dormant Commerce Clause. Plaintiffs have moved for partial summary judgment and declaratory relief defining the

applicable scope of § 25982. Defendant has opposed the motion and has moved to dismiss the entire complaint. For the reasons stated below, the Court GRANTS Defendant' motion to dismiss. Plaintiffs' motion for partial summary judgment is consequently DENIED. Finally, the Court DENIES Plaintiffs' request for declaratory relief. As explained below, Plaintiffs are given leave to amend their motion for declaratory relief but not their constitutional challenge.

III. Legal Standard

a. Motion for Summary Judgment

A motion for summary judgment under Federal Rule of Civil Procedure 56(a) is appropriate "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). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of . . . [the record that] demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the plaintiff meets this initial burden, the burden shifts to the non-movant to demonstrate with admissible evidence that genuine issues of material fact remain and preclude summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Any inferences drawn from the underlying facts

must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

b. Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" without more. *Id.* (internal quotation marks omitted). "Allegations in the complaint, together with reasonable inferences therefrom, are assumed to be true for purposes of the motion." *Odom v. Microsoft Corp.,* 486 F.3d 541, 545 (9th Cir. 2007).

IV. Dormant Commerce Clause Challenge

This Court previously concluded that § 25982 did not violate the dormant Commerce Clause, *Canards District I*, 2012 WL 12842942, and the decision was affirmed by the Ninth Circuit. *Canards I*, 729 F.3d 937. As we previously noted, "The Ninth Circuit has observed that most regulations that run afoul of the dormant Commerce Clause 'do so because of

discrimination'; that is, they 'impose disparate treatment on similarly situated in-state and out-of-state interests.'" *Canards District I*, 2012 WL 12842942 at *7 (quoting *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1150 (9th Cir. 2012)). As with the previous complaints, Plaintiffs have raised no issue as to whether § 25982 discriminates against out-of-state interests. To the extent § 25982 imposes a burden on commerce (if any), it does so without discriminating against out-of-state commerce. Plaintiffs ask for reconsideration under the dormant Commerce Clause in light of the more-developed factual record available on summary judgment. However, Plaintiffs now bring substantially the same challenges they brought in the first case, *see id.*, and the developed record does little to change our previous analysis.

A. Extraterritorial Regulation

Plaintiffs now claim that § 25982 violates the dormant commerce clause because of its extraterritorial effect. To support this theory, Plaintiffs assert the Court must accept three new allegations as true: "(1) that § 25982 constitutes a total ban, i.e., a complete import and sales ban, on foie gras; (2) that foie gras may be produced only by force feeding; and (3) that Congress intended to ordain the sole standards for foie gras products to ensure 'national uniformity'" Dkt. 205 at 17. It is correct that the Court must accept factual allegations as true, but, as alleged, these points are legal conclusions based on the same operative facts that produced both *Canards I* and *Canards II*.

Neither this Court nor the Ninth Circuit has ever concluded that § 25982 constitutes a total ban on foie gras—that is a legal conclusion not ascertainable from a conclusory allegation. Next, even if we accept Plaintiffs' declarations that foie gras is impossible produce without force feeding as a new factual allegation, that allegation does not significantly change our previous dormant Commerce Clause analysis. Assuming foie gras cannot be produced without force-feeding, § 25982 still only bans foie gras *sales in California*. It does not prevent *any* conduct outside of California; it prevents products that are a result of certain conduct (even out-of-state) from being sold *within* California. § 25982 says nothing of how other states must regulate force-feeding. Further, Congress' intent in setting foie gras labeling standards is a legal conclusion as applied to this case, and the Court is not bound by Plaintiffs' interpretation in the complaint. Again, even accepting Plaintiffs' interpretation, the dormant Commerce Clause analysis remains fundamentally unchanged—there is still no conflict between PPIA and § 25982. In light of the lack of new, non-conclusory *factual* allegations in the Third Amended Complaint and summary judgment record, this Court remains bound by the previous Ninth Circuit decisions, which determined that § 25982 does not constitute extraterritorial regulation and does not violate the dormant Commerce Clause. *Canards I*, 729 F.3d at 949.

B. *Pike* Balancing

This Court previously determined that Plaintiffs had "not raised a serious question" that § 25982

substantially burdened interstate commerce under *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). *Canards District I*, 2012 WL 12842942, at *9. We noted that "[m]ost laws that impose a substantial burden on interstate commerce do so because they are discriminatory." *Id.* The Ninth Circuit agreed. *Canards I*, 729 F.3d at 951. Again, there is nothing in the Third Amended Complaint to significantly change our analysis. Even if we accept Plaintiffs' contention that § 25982 constitutes a total ban on foie gras, collectively costing Plaintiffs millions over the past seven years, Plaintiffs' have not met their burden in showing the "burden on interstate commerce *clearly exceed[s]* its local benefits . . . ." *Canards District I* 2012 WL 12842942, at *10 (emphasis added). Again, we note that "[p]reventing animal cruelty in California is clearly a legitimate state interest. *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993)). Like in the earlier decision, Plaintiffs "have presented no evidence that Section 25982 is an ineffective means of advancing that goal." *Id.*

Even accepting Plaintiffs' new allegations as factual and true, the Court cannot conclude our previous dormant Commerce Clause analysis is altered in any significant way. Plaintiffs have therefore failed to state a dormant Commerce Clause claim as a matter of law, and Defendant' motion to dismiss is GRANTED.

V. IMPOSSIBILITY PREEMPTION

This Court previously concluded that § 25982 was an ingredient requirement expressly preempted by PPIA. *Canards District II*, 79 F.Supp. 3d at 1147. But

the Ninth Circuit reversed, finding "[t]he fact that Congress established 'ingredient requirements' for poultry products that are produced does not preclude a state from banning products—here, for example, on the basis of animal cruelty—well before the birds are slaughtered." *Canards II*, 870 F.3d at 1150. Significantly, the Ninth Circuit noted that "even if section 25982 results in the total ban of foie gras regardless of its production method, it would still not run afoul of the PPIA's preemption clause. The PPIA targets the slaughtering, processing, and distribution of poultry products, 21 U.S.C. §§ 451–452, but it does not mandate that particular types of poultry be produced for people to eat." *Id.* Further, the Ninth Circuit concluded PPIA did not impliedly preempt § 25982 under the doctrines of field or obstacles preemption. *Id.* at 1153. We are bound by the Ninth Circuit's holding that § 25982 is neither expressly or impliedly preempted by PPIA on these grounds. Plaintiffs now contend, however, that § 25982 is preempted by PPIA under the doctrine of "impossibility preemption."

Impossibility preemption exists when "state and federal law conflict" and "it is 'impossible for a private party to comply with both state and federal requirements.'" *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (citing *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995)). If the two requirements are in conflict, the federal mandate must prevail, as "[t]he Supremacy Clause establishes that federal law 'shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Id.* (citing U.S. Const. Art. IV, cl. 2.).

Impossibility preemption applies whenever the private party would have to ask the federal government for permission or relief to comply with state law. *See Mensing*, 564 U.S. at 623–24 ("when a party cannot satisfy its state duties without the Federal Government's special permission and assistance . . . that party cannot independently satisfy those state duties for pre-emption purposes."). "Impossibility pre-emption is a demanding defense." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). The movant must "demonstrate that it was impossible for it to comply with both federal and state requirements." *Id.*

a. **Applying Impossibility Preemption**

The Supreme Court has recently acknowledged impossibility preemption in context of drug labelling. *See Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019); *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013); *Mensing*, 564 U.S. at 617. In each of these cases, the Supreme Court concluded that the federal drug-labelling law preempted a conflicting state decision. But courts have been reluctant to extend *Mensing*'s holding beyond "generic manufacturers of pharmaceuticals," even to the similar issue of "*brand* name medication whose manufacturer was permitted to make modifications to the warning label through the CBE ("changes being effected") process . . . ."*J.F. ex rel. Moore v. McKesson Corp.*, No. 1:13-CV-01699-LJO, 2014 WL 202737, at *9 (E.D. Cal. Jan. 17, 2014). Similarly, another district court declined to extend *Mensing*'s holding to the related issue of "designers of medical products." *Harmon v. DePuy Orthopaedics, Inc.*, No. CV 12-7905 PA PJWX, 2012 WL 4107710, at

*3 (C.D. Cal. Sept. 18, 2012) ("Defendants have cited no case law making such a leap, and the Court has found none."). Courts have found that *Mensing* applies to distributors of generic drugs, *Marroquin v. Pfizer, Inc.*, 367 F. Supp. 3d 1152, 1169 (E.D. Cal. 2019), but there has been no authority to suggest *Mensing*'s narrow holding should be extended to food producers and distributors. Drug labeling is particularly susceptible to impossibility preemption because "only the holder of a New Drug Application (NDA) or the FDA itself can make any change to an FDA approved prescription drug label." *Id.* Therefore any conflicting labelling requirement imposed by a state leaves interested parties (such as generic manufacturers or distributors) powerless to comply. "'Impossibility' is determined by asking 'whether the private party could independently do under federal law what state law requires it to do.'" *Marroquin v. Pfizer, Inc.*, 367 F. Supp. 3d 1152, 1169 (E.D. Cal. 2019) (quoting *Mensing*, 564 U.S. at 620).

In this case, Plaintiffs do not need permission from California to comply with PPIA, nor do they need permission from the federal government to not sell force-fed foie gras in California. Impossibility preemption is only found when state law requires the movant *do* something that potentially conflicts with a corresponding federal mandate to *do something else*. Here, Defendant is requiring Plaintiffs *not* to sell foi gras within California, and the federal government is requiring Plaintiffs to properly label foi gras whenever and wherever it is sold. Plaintiffs can satisfy both requirements without assistance from the federal government by correctly labeling their products under PPIA and refraining from selling those products in

California. Unlike in *Mensing*, the Plaintiffs here do not need to seek the federal government's permission to *not* sell foi gras in California. Of course, as the Ninth Circuit previously held, PPIA "does not mandate that particular types of poultry be produced for people to eat." *Canards II*, 870 F.3d at 1150. The negative mandate from California does not require *any* interaction with the affirmative labelling mandate under PPIA. In layman' terms, PPIA says "if you are going to do it, do it right," while § 25982 says "to not do it in California."

Plaintiffs' reliance on the Supreme Court' decision in *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) ("*Florida Lime*") is also misplaced. Although *Florida Lime* was instrumental in establishing the doctrine of impossibility preemption, its holding is inapposite to Plaintiffs' claim. In *Florida Lime*, the Supreme Court wrote in dicta that "no State may completely exclude federally licensed commerce," but immediately noted that the "principle has no application to this case." *Florida Lime*, 373 U.S. at 142. The Court in *Florida Lime* held "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." *Id.* Impossibility preemption was not established because the "record demonstrate[d] no inevitable collision between the two schemes of regulation . . . ." *Id.* at 143. Through PPIA, Congress has neither unmistakably required the sale of foie gras within every state nor has it regulated which animal cruelty laws a state is

permitted to pass. There is no conflict between PPIA's labeling requirement and California' force-feeding ban—so there is no impossibility preemption.

b. **Stop Selling**

Plaintiffs argue that forcing them to "top selling" is incompatible with Supreme Court impossibility preemption precedent. *Bartlett*, 570 U.S. at 488. As explained above, *Bartlett* involved a set of directly conflicting state and federal mandates on drug labels. *Id.* In that case, the Supreme Court rejected the argument that the plaintiff could simply "stop selling" to avoid running afoul of either regulation. There is no such conflict when the *purpose* of the state statute is to prevent sales within the state's borders. Plaintiffs do not need to "stop selling" to prevent a conflict or escape federal liability; they need to stop selling in California to directly comply with a negative mandate of California law. "Stop selling" is simply a rejected defense to a claim of impossibility preemption. The argument has no application where there is no conflict between the statutes.

VI. Declaratory Relief

Finally, Plaintiffs request a declaratory judgment defining the application and scope of § 25982. Dkt. 205 at 13. Plaintiffs assert that the law should be read not to capture circumstances where an offending product is "shipped to the California consumer from an out-of-state location, [but] title passed out of state . . . ."*Id.* Through its responsive pleadings, California has demonstrated that it would seek to

enforce § 25982 against such a sale. Dkt. 205 at 4–6; Dkt. 206 at 14–16.

"A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III, section 2 of the United States Constitution." *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998) (citing *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 239–40 (1937)). Even so, "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act (Act), even when the suit otherwise satisfies subject matter jurisdiction." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). This Court previously concluded that Plaintiffs' claims were justiciable because there was a genuine showing Plaintiffs' might suffer legal injury by not adhering to § 25982—Plaintiffs needed "certainty that Defendant won't prosecute them for selling their foie gras products." *Canards District II*, 79 F. Supp. 3d at 1143. Determining if the law could be constitutionally enforced against Plaintiffs was "purely a question of statutory interpretation; its resolution would not vary based on the specific facts surrounding enforcement." *Id.* Rather than determine if § 25982 is constitutional as a whole, Plaintiffs now asks the Court to determine if their hypothetical sale can avoid the grasp of § 25982 by delivering foie gras to Californians after passing title to the goods outside of California.

Under the discretion granted to the Court under the Declaratory Judgment Act, we decline to provide declaratory relief to Plaintiffs' hypothetical distribution method. Plaintiffs' motion asks the Court to decide an

issue that in not properly before us. The exact circumstances of the sale (including how, when, and where title is passed or the goods are delivered) are not properly before us because they have not been presented with sufficient specificity. In their summary judgment reply, to demonstrate their need for declaratory relief, Plaintiffs invite the Court to imagine a hypothetical seller named "Cal" who *might attempt* to effectuate a sale a foie gras where title passes out-of-state but is delivered within California. Dkt. 209 at 17. However, this is not a factual allegation upon which this Court may grant relief. At this point, how the Plaintiffs may or may not attempt to circumvent § 25982 is entirely the subject of imagination.

Plaintiffs' hypothetical is just one of many circumstances the Court can envision wherein title to the foie gras would pass outside of California, but the offending product would be delivered within the state. The facts of the transfer might require drastically different analysis. For example, one spouse may buy foie gras for the other spouse in a state that permits the sale of foie gras and then return to California with the product. Would that constitute delivery under Plaintiffs' theory? Or a different buyer may drive to a permitting state and buy a quantity of foie gras in the store (with the contract signing and exchange of payment taking place in the store), but have the entire shipment delivered to California. Would that constitute a sale in California under Defendant's view? Even more nebulous, what if a seller in California delivers foie gras to a buyer in California, but the entire sale is effectuated via an online transaction occurring out-of-state? The variance between these circumstances

demonstrates that Plaintiffs' request represents the exact "hypothetical state of facts" courts are admonished to avoid when granting declaratory relief. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 239–0 (1937)) (the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.) (emphasis added).

For this Court to properly grant declaratory relief, Plaintiffs must present declarations or other evidence which establish sufficient facts for the Court to determine Plaintiffs' proposed course of action. The Court cannot address the potential future conduct of Plaintiffs without concrete factual allegations to adjudicate. It would be inappropriate to offer declaratory relief on the hypothetical controversy presented by Plaintiffs, and the request for a declaratory judgment is therefore DENIED. Plaintiffs are given twenty-one days amend their motion for declaratory relief.

VII. **Conclusion**

Plaintiffs' motion for partial summary judgment and motion for declaratory relief are DENIED. Defendant's motion to dismiss is GRANTED. Plaintiffs' claims are DISMISSED without prejudice, but Plaintiffs' are DENIED leave to amend their constitutional challenge. However, Plaintiffs are

GRANTED leave to amend their motion for declaratory relief within twenty-one days.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:12-cv-05735-SVW-RZ

[Filed February 27, 2019]

Association des Eleveurs de Canards et d Oies du Quebec et al	)
	)
v.	)
	)
Kamala J Harris et al.	)

CIVIL MINUTES - GENERAL

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING IN PART MOTION TO AMEND COMPLAINT [178]

Plaintiffs' motion for leave to file an amended complaint, Dkt. 178, is GRANTED in part and DENIED in part. Plaintiffs impermissibly seek to relitigate their claims that Section 28952 of the California Health and Safety Code is expressly preempted and impliedly preempted—through the theories of field preemption and obstacle preemption—by the Poultry Products Inspection Act, 21 U.S.C. §§ 451 *et seq.* (the "PPIA"). The Ninth Circuit has squarely addressed the issues of express preemption and implied preemption and concluded unequivocally that "The PPIA does not expressly preempt" Section 25982, that "Congress clearly did not intend to occupy the field of poultry products," and that Section 25982 "does not stand as an obstacle to accomplishing the PPIA's purposes." *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1152-53 (9th Cir. 2017) (*Canards II*). The Court must follow the Ninth Circuit's decision, which considered and decided the matters of express and implied preemption under the PPIA, in all subsequent proceedings in this case. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 2000). Therefore, any renewed arguments Plaintiffs could bring regarding express or implied preemption that the Ninth Circuit rejected would plainly be futile and cannot be included in an amended complaint. *See Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); *Leadsinger, Inc. v. BMG Music Publ'g* 512 F.3d 522, 532 (9th Cir. 2008).

Nevertheless, Plaintiffs have indicated that they intend to assert a new legal theory not presented to the Court or the Ninth Circuit in the prior proceedings in this case—namely, the claim that Section 25982 is

preempted due to the impossibility of compliance with both Section 25982 and federal law, in light of the fact that the United States Department of Agriculture has allegedly approved the inclusion of foie gras from force-fed ducks in poultry products since the date the Second Amended Complaint was filed. Plaintiffs should be "freely given" leave to add this new claim to their complaint under Federal Rule of Civil Procedure 15, which dictates that amendments should be granted liberally. *See* Fed. R. Civ. P. 15(a)(2); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Moreover, Plaintiffs have indicated that, in light of the substantial time that has passed since the filing of the Second Amended Complaint, Plaintiffs intend to present new factual allegations to support their causes of action regarding whether Section 25982 violates the Commerce Clause, which remains active and pending in this litigation as part of the operative Second Amended Complaint. The Ninth Circuit's earlier decision in 2013 affirming the Court's denial of a motion for preliminary injunction on the Commerce Clause claims did not foreclose Plaintiffs from continuing to litigate those claims, contrasted to how the Ninth Circuit's decision in *Canards II* precludes Plaintiffs from relitigating express or implied preemption under the PPIA. *See Association des Éleveurs de Canards et d'Oies du Québec v. Harris* 729 F.3d 937 (9th Cir. 2013) (*Canards I*). In resolving Plaintiffs' Commerce Clause claims, the parties of course will be required to assess the Ninth Circuit's decision in *Canards I* to determine whether Plaintiffs' amended claims under the Commerce Clause have merit.

Accordingly, the Court GRANTS in part Plaintiffs leave to file an amended complaint, for the limited purpose of amending Plaintiffs' Commerce Clause claims and adding a new claim premised upon the theory of "impossibility preemption." Plaintiffs are not granted leave to include in the amended complaint any claims of express or implied preemption under the PPIA, as any such claims would be futile in light of *Canards II*. Plaintiffs also may non-substantive changes to substitute parties as necessary and to remove any claims that the parties stipulated to dismiss without prejudice.

Plaintiffs are ordered to file an amended complaint consistent with this Order within 10 days of the date of this Order; the failure to do so will result in the dismissal of Plaintiffs' case.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.20-55882

D.C. No. 2:12-cv-05735-SVW-RZ
Central District of California, Los Angeles

[Filed July 1, 2022]

ASSOCIATION DES ELEVEURS DE CANARDS ET D OIES DU QUEBEC, a Canadian nonprofit corporation; et al., Plaintiffs-Appellees	)
v.	)
ROB BONTA, in his official capacity as Attorney General of California, Defendant-Appellant.	)

No.20-55944

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

ASSOCIATION DES ELEVEURS DE CANARDS ET D OIES DU QUÉBEC, a Canadian nonprofit corporation; et al., Plaintiffs-Appellants	)

v.	)
	)
ROB BONTA, in his official capacity as Attorney General of California,	)
Defendant-Appellee.	)
	)

ORDER

Before: KLEINFELD, R. NELSON, and VANDYKE, Circuit Judges.

A majority of the panel has voted to deny the petition for panel rehearing. Judge VanDyke has voted to grant the petition for panel rehearing. Judge R. Nelson has voted to deny the petition for rehearing en banc and Judge Kleinfeld so recommended. Judge VanDyke has voted to grant the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.